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on civil and political
rights**

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Ninety-first session
15 October – 2 November 2007

VIEWS

Communication No. 1306/2004

<u>Submitted by:</u>	Erlingur Sveinn Haraldsson and Örn Snævar Sveinsson (represented by Mr. Ludvik Emil Kaaber)
<u>Alleged victim:</u>	The authors
<u>State party:</u>	Iceland
<u>Date of communication:</u>	15 September 2003 (initial submission)
<u>Document references:</u>	- Special Rapporteur's rule 97 decision, transmitted to the State party on 1 September 2004 (not issued in document form) - CCPR/C/87/D/1306/2004 – decision on admissibility dated 5 July 2006
<u>Date of adoption of Views:</u>	24 October 2007

* Made public by decision of the Human Rights Committee.

Subject matter: Compatibility of fisheries management system with non-discrimination principle

Procedural issues: notion of *victim*, exhaustion of domestic remedies, compatibility with the provisions of the Covenant

Substantive issues: discrimination

Article of the Covenant: Article 26

Articles of the Optional Protocol: 1 and 5, paragraph 2(b)

On 24 October 2007, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No.1306/2004.

[Annex]

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of
the Optional Protocol to the International Covenant on Civil and Political rights

Ninety-first session

concerning

Communication No. 1306/2004*

<u>Submitted by:</u>	Erlingur Sveinn Haraldsson and Örn Snævar Sveinsson (represented by Mr. Ludvik Emil Kaaber)
<u>Alleged victim:</u>	The authors
<u>State party:</u>	Iceland
<u>Date of communication:</u>	15 September 2003 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 October 2007

Having concluded its consideration of communication No. 1306/2004, submitted to the Human Rights Committee on behalf of Erlingur Sveinn Haraldsson and Örn Snævar Sveinsson, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Four dissenting opinions signed by Committee members, Ms. Elisabeth Palm, Mr. Ivan Shearer, Ms. **Iulia Antoanella Motoc**, Sir Nigel Rodley, Mr. Yuji Iwasawa and Ms. Ruth Wedgwood are appended to the present document.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication are Mr. Erlingur Sveinn Haraldsson and Mr. Örn Snævar Sveinsson, both Icelandic citizens. They claim to be victims of a violation of article 26 of the International Covenant on Civil and Political Rights by Iceland¹. The authors are represented by Mr. Ludvik Emil Kaaber.

1.2 The authors have been professional fishers since boyhood. Their complaints relate to the Icelandic fisheries management system and its consequences for them. The fisheries management system, which was created by legislation, applies to all fishers in Iceland.

The relevant legislation

2.1 Counsel and the State party refer to the *Kristjánsson case*² and their explanations provided in relation to that case, on the fisheries management system in Iceland. During the 1970s the capacity of Iceland's fishing fleet was surpassing the yield of its fishing banks and measures became necessary to safeguard Iceland's main natural resource. After several unsuccessful attempts to restrict the pursuit of particular species and to make fishing by certain types of gear or by type of vessel subject to licence, a fisheries management system was adopted by Act 82/1983, initially enacted for one year. It was based on the allocation of catch quotas to individual vessels on the basis of their catch performance, generally referred to as "the quota system". The allocation of quotas had been employed to a considerable extent since the 1960s with regard to catches of lobster, shrimp, shellfish, capelin and herring, for which a quota system was established already in 1975.

2.2 In application of the Act, regulation No. 44/1984 (on the management of demersal fishing) provided that operators of ships engaged in fishing of demersal species during the period from 1 November 1980 to 31 October 1983 would be eligible for fishing licences. The ships were entitled to fishing quotas based on their catch performance during the reference period. Further regulations continued to build on the principles so established and these principles were transferred into statute legislation with Act No. 97/1985, which stated that no one could catch the following species without a permit: demersal fish, shrimp, lobster, shellfish, herring and capelin. The main rule was that fishing permits were to be restricted to those vessels that had received permits the previous fishing year. Accordingly, the decommissioning of a vessel already in the fleet was a prerequisite for the granting of a fishing permit to a new vessel. With the enactment of the Fisheries Management Act No. 38/1990 (hereafter referred to as the Act), with subsequent amendments, the catch quota system was established on a permanent basis.

2.3 The first article of the Act states that the fishing banks around Iceland are common property of the Icelandic nation and that the issue of quotas does not give rise to rights of private ownership or irrevocable domination of the fishing banks by individuals. Under article 3 of the Act, the Minister of Fisheries shall issue a regulation determining the total allowable catch (TAC) to be caught for a

¹ The International Covenant on Civil and Political Rights and the Optional Protocol entered into force for Iceland on 22 November 1979.

² See Communication 951/2000, *Kristjánsson v. Iceland*, declared inadmissible on 16 July 2003.

designated period or season from the individual exploitable marine stocks in Icelandic waters for which it is deemed necessary to limit the catch. Harvest rights provided for by the Act are calculated on the basis of this amount and each vessel is allocated a specific share of the TAC for the species, the so-called quota share. Under article 4(1) of the Act, no one may pursue commercial fishing in Icelandic waters without having a general fishing permit. Article 4(2) allows the Minister to issue regulations requiring special fishing permits for catches of certain species or made with certain type of gear or from certain types of vessels, or in particular areas. Article 7(1) provides that fishing of those species of living marine resources which are not subject to limits of TAC as provided for in article 3 is open to all vessels with a commercial fishing permit. Article 7(2) establishes that harvest rights for the species of which the total catch is limited shall be allocated to individual vessels. When quota shares are determined for species that have not been previously subject to TAC, they are based on the catch performance for the last three fishing periods. When quota shares are set for species that have been subject to restricted fishing, they are based on the allocation in previous years. Under article 11 (6) of the Act, the quota share of a vessel may be transferred wholly or in part and merged with the quota share of another vessel, provided that the transfer does not result in the harvest rights of the receiving vessel becoming obviously in excess of its fishing capacity. If those parties who are permanently entitled to a quota share do not exercise their right in a satisfactory manner, this may result in their forfeiting the right permanently. The Fisheries Management Act also imposes restrictions on the size of the quota share that individuals and legal persons may own. The Act finally sets penalties for violations of the Act, ranging from fines of ISK 400 000 to imprisonment of up to six years.

2.4 The State party provides some statistics to illustrate that the fisheries sector constitutes a major component of the Icelandic economy. It points out that all changes in the management system may have immense effects on the economic well-being of the country. In the past few years, there has been intense public discussion and political argument about the right manner to build the fisheries management system in the most efficient way for the interests of both the nation as a whole, and those who are employed in the fisheries industry. Icelandic courts have examined the fisheries management system in the light of the constitutional principles of equality before the law (article 65 of the Constitution) and of freedom of occupation (article 75 of the Constitution), in particular in two cases.

2.5 In December 1998, the Supreme Court of Iceland delivered its judgement in the case of *Valdimar Jóhannesson v. the Icelandic State (the Valdimar case)*, stating that the restrictions on freedom of employment involved in article 5 of the Fisheries Management Act were not compatible with the principle of equality under article 65 of the Constitution. It considered that article 5 of the Act imposed excluding restrictions in advance against individual persons' ability to make fishing their employment. It reasoned that under the restrictions in force at that time, fishing permits were granted only to certain vessels that had been in the fishing fleet during a particular period, or new vessels that replaced them, and that these restrictions were unconstitutional. However it did not adopt a position on article 7 (2), regarding the restrictions on access by the holders of fishing permits to the fish stocks. Parliament then adopted Act No. 1/1999 which substantially relaxed the conditions for obtaining commercial fishing permits. With the adoption of this act, the decommissioning of a vessel already in the fleet was no longer a prerequisite for the granting of a fishing permit to a new vessel. Instead, general conditions were set for the issuance of fishing permits to all vessels.

2.6 The other relevant judgment of the Supreme Court, dated 6 April 2000, relates to the case of the Directorate of Public Prosecutions v. Björn Kristjánsson, Svavar Gudnason and Hymnó Ltd (the *Vatneyri case*). With regard to article 7 of the Act, the Supreme Court found that restrictions on individuals' freedom to engage in commercial fishing were compatible with articles 65 and 75 of the Constitution, because they were based on objective considerations. In particular, the Court noted that the arrangement of making catch entitlements permanent and assignable is supported by the consideration that this makes it possible for operators to plan their activities in the long term, and to increase or decrease their catch entitlements in individual species as may suit them.

2.7 After the *Valdimar case*, a committee was appointed to revise the fisheries management legislation. Amendments corresponding to its recommendations were introduced by Act No.85/2002. According to this Act, a fee, known as a "catch fee", should be charged for the use of the fishing grounds. The fee is based on the economic performance of the fishing industry. It consists of a fixed part based on the State's costs for managing fisheries, and a variable part reflecting the economic performance of the industry. In the State party's opinion, this legislative amendment shows that the Icelandic legislature is constantly examining what are the best means to achieve the goal of managing fishing in the most efficient way in view of the interests of the nation as a whole.

2.8 The authors state that in practice, and notwithstanding section 1 of the Act, (providing that the fishing banks around Iceland are a common property of the Icelandic nation and that allocation of catch entitlements does not endow individual parties with a right of ownership of such entitlements,) fishing quotas are treated as a personal property of those to whom they were distributed free of charge during the reference period. Other persons, such as the authors, must therefore purchase or lease a right to fish from the beneficiaries of the arrangement, or from others who have, in turn, purchased such a right from them. The authors consider that Iceland's most important economic resource has therefore been donated to a privileged group. The money paid for access to the fishing banks does not revert to the owner of the resource – the Icelandic nation – but to the private parties personally.

Factual background

3.1 During the reference period, the authors worked as captain and boatswain. In 1998, they established a private company, Fagrimúli ehf, together with a third man, and purchased the fishing vessel *Sveinn Sveinsson*, which had a general fishing permit. The company was the registered owner of the ship. During the fishing year 1997-1998, when the ship was purchased, various harvest rights (catch entitlements) were transferred, but no specific quota share was associated with the ship. At the beginning of the fishing year 2001-2002, the *Sveinn Sveinsson* was allocated harvest rights for the first time for the species ling, tusk and monkfish, which amounted to very small harvest rights. The authors claim to have repeatedly applied for catch entitlements on various grounds, but unsuccessfully. In particular, the Fisheries Agency stated that there was no legal authorisation for providing them with a quota. As a result, they had to lease all catch entitlements from others, at exorbitant prices, and eventually faced bankruptcy.

3.2 They decided to denounce the system, and on 9 September 2001, they wrote to the Ministry of Fisheries, declaring that they intended to catch fish without catch entitlements, in order to obtain a

judicial decision on the issue and to determine whether they would be able to continue their occupation without paying exorbitant amounts of money to others. In its reply of 14 September 2001, the Ministry of Fisheries drew the authors' attention to the fact that under the penalty provisions of the Fisheries Management Act, No.38/1990, and the Treatment of Exploitable Marine Stocks Act, No. 57/1996, catches made in excess of fishing permits were punishable by fines or up to six years' imprisonment, as well as the deprivation of fishing permits.

3.3 On 10, 11, 13, 19, 20 and 21 September 2001, the first author, as managing director, board member of Fagrimúli ehf, owner of the company operating the *Sveinn Sveinsson* and captain of that ship, and the second author, as chairman of the board of that company, sent the ship to fish, and landed, without the necessary catch entitlements, a catch of a total of 5,292 kg of gutted cod, 289 kg of gutted haddock, 4 kg of gutted catfish and 606 kg of gutted plaice. Their only purpose in doing this was to be reported, so that their case could be heard in court. On 20 September, the Fisheries Agency received a report that the *Sveinn Sveinsson* had landed a catch at Patreksfjörður on that day.

3.4 As a consequence, the Fisheries Agency filed charges against the authors with the commissioner of police at Patreksfjörður for violations of the Treatment of Exploitable Marine Stocks Act, No. 57/1996, the Fisheries Management Act, No. 38/1990, and the Fishing in Iceland Fisheries Jurisdiction Act, No. 79/1997. On 4 March 2002, the National Commissioner of Police brought a criminal action against the authors before the West Fjords District Court. The authors confessed the acts they were accused of, but challenged the constitutional validity of the penal provisions that the indictment relied on. On 2 August 2002, with reference to the precedent of the Supreme Court judgment of 6 April 2000 in the *Vatneyri case*, the District Court convicted the authors and sentenced them to a fine of ISK 1 000 000³ each or three months imprisonment, and to payment of costs. On appeal, the Supreme Court, on 20 March 2003, upheld the judgment of the District Court.

3.5 On 14 May 2003, the authors' company was declared bankrupt. Their ship was sold on auction for a fraction of the price the authors had paid for it four years earlier. Their bank then requested the forced sale of the company's shore facilities and of their homes. One of the authors was able to conclude an instalment agreement with the bank and started working as an officer on board a vessel used for industrial purposes. The other author lost his home, moved from his home community and started working as a mason. At the time of submission of the communication, he was unable to pay his debts.

The complaint

4. 1 The authors claim to be victims of a violation of article 26 of the Covenant, because they are lawfully obliged to pay money to a privileged group of fellow citizens, in order to be allowed to pursue the occupation of their choice. The authors request, in accordance with the principles of freedom of employment and equality, an opportunity to pursue the occupation of their choice without having to surmount barriers placed in advance, which constitute privileges for others.

³ Approximately US\$ 13,600

4.2 The authors claim compensation for the losses endured as a result of the fisheries management system.

The State party's observations

5.1 On 29 October 2004, the State party challenged the admissibility of the communication on three grounds: non-substantiation of the authors' claim that they are *victims* of a violation of article 26, non-exhaustion of domestic remedies, and the communication's incompatibility with the provisions of the Covenant.

5.2 The State party argues that the authors have not shown how article 26 of the Covenant is applicable to their case, or how the principle of equality has been violated against them as individuals. They have not demonstrated that they were treated worse, or were discriminated against, as compared with other persons in a comparable position; or that any distinction made between them and other persons was based on irrelevant considerations. They merely make a general assertion that the Icelandic fisheries management system violates the principle of equality in article 26.

5.3 The State party notes that the authors have worked many years at sea, one of them as captain and the other as marine engineer. They worked as employees on ships whose catch performance was not of direct benefit to them, but to their employers, who, unlike the authors, had invested in ships and equipment in order to run fishing operations. One of the main reasons for the introduction of the Fisheries Management Act, No.38/1990, was that it would create acceptable operating conditions for those who had invested in fisheries operations, instead of their being subject to same catch restrictions as other persons who had not made such investments. The authors have not demonstrated how they were discriminated against when they were refused a quota, or whether other vessel captains or seamen in the same position received quota allocations. In addition they did not make any attempt to have these refusals reversed by the courts on the ground that they constituted discrimination in violation of article 65 of the Constitution or article 26 of the Covenant.

5.4 When they invested in the purchase of the *Sveinn Sveinsson* in 1998, the authors were aware of the system. They bought the ship without a quota, with the intention to rent it on the quota exchange, as a basis for their fishing operations. As a result of the increased demand of quotas on the market, the prices of quotas rose, which changed the economic basis for the authors' fishing operations. After they fished without a quota, they were tried and sentenced, as would have happened to any other person under the same circumstances. The State party concludes that the communication should be declared inadmissible *ratione personae* under article 1 of the Optional Protocol, as the authors have not sufficiently substantiated their claims that they are victims of a violation of the Covenant.

5.5 The State party argues that the authors failed to exhaust all available domestic remedies, because they did not make any attempts to have their refusal of a quota reversed by the courts. They could have referred these administrative decisions to the courts with a demand that they be set aside. The State party indicates that this was done in the *Valdimar* case, where an individual who had been refused a fishing permit demanded the annulment of an administrative decision. His demand was accepted by the courts, which demonstrates that this is an effective remedy. The State party concludes that the communication should be declared inadmissible under article 5, paragraph 2(b), of

the Optional Protocol.

5.6 Finally, the State party argues that the case hinges on whether the restriction in the authors' freedom of employment is excessive, as they consider that the prices of certain commercial catch quotas are unacceptable and constitute an obstacle to their right to choose freely their occupation. The State party points out that freedom of employment is not protected *per se* by the International Covenant on Civil and Political Rights and that in the absence of specific arguments showing that the restrictions of his freedom of employment were discriminatory the communication would be inadmissible as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

5.7 The State party also provides observations on the merits of the communication. It argues that no unlawful discrimination was made between the author and those to whom harvest rights were allocated. What was involved was a justifiable differentiation: the aim of the differentiation was lawful and based on reasonable and objective grounds, prescribed in law and showing proportionality between the means employed and the aim. The State party explains that public interest demands that restrictions be imposed on the freedom of individuals to engage in commercial fishing in order to prevent over-fishing. Restrictions aimed at this goal are prescribed by the detailed fisheries legislation. The State party further argues that the allocation of a limited resource cannot take place without some sort of discrimination and states that the legislature employed a pragmatic method in allocating the permits. The State party rejects the authors' view that the principle of equality protected by article 26 of the Covenant is to be interpreted in such a way as to entail a duty to allocate a share of limited resources to all citizens who are or have been employed as seamen or captains. Such an arrangement would violate the principle of equality with regards to the group of individuals who have, through extensive investment in vessel operations and the development of commercial enterprises, tied their fishing competence, assets and livelihood to the fisheries sector.

5.8 The State party emphasizes that the arrangement by which harvest rights are permanent and transferable is based mainly on the consideration that this enables individuals to plan their activities in the long term and to increase or reduce their harvest rights to particular species as best suits them, which leads to the profitable utilisation of the fish stocks for the national economy. The State party maintains that the permanent and transferable nature of the harvest rights leads to economic efficiency and is the best method of achieving the economic and biological goals that are the aims of the fisheries management. Finally, the State party points out that the third sentence of article 1 of the Fisheries Management Act states clearly that the allocation of harvest rights endows the parties neither with the right to ownership nor with irrevocable jurisdiction over harvest rights. Harvest rights are therefore permanent only in the sense that they can only be abolished or amended by an act of law.

5.9 The State party concludes that the differentiation that results from the fisheries management system is based on objective and relevant criteria and is aimed at achieving lawful goals that are set forth in law. In imposing restrictions on the freedom of employment, the principle of equality has been observed and the authors have not sufficiently substantiated their claim that they are victims of unlawful discrimination in violation of article 26 of the Covenant.

Authors' comments

6.1 On 28 December 2004, the authors commented on the State party's admissibility observations. On the State party's first argument, that the authors are not *victims* of a violation of the Covenant, the authors point out that they do not claim to have been treated unlawfully under domestic law, but under the Covenant. The authors maintain that the State party's action to close the fishing banks to persons not engaged in fishing during the "reference period" involved, in reality, a donation of the use of the fishing banks to the persons who were so engaged, and, as matters subsequently evolved, a donation of a personal right to demand payments from other citizens for fishing in the ocean around Iceland. These rights have the nature of property in practice. The authors' complaint relate to this action of donation, and the situation the authors have been placed in, as a result of it. They reiterate that they are brought up and trained as fishermen, have the cultural background of fishermen, and want to be fishermen. They must, if they are to pursue the occupation of their choice, surmount barriers that are not placed in the way of their fellow privileged citizens. They therefore maintain that they are victims of a violation of article 26 of the Covenant. That all Icelanders, except a particular group of citizens, share their situation, and that they would also be criminally indicted if not accepting this arrangement, is irrelevant. The authors acknowledge that most other Icelanders would be faced with the same obstacles as them. But they consider that their situation should not be compared to other persons in their position, but to the group the members of which have been donated a privilege, and are entitled to monetary payments from any outsiders, like the authors, who want to work in the same field as the group members.

6.2 The authors recall that unlike Mr. Kristjánsson, whose case was declared inadmissible by the Committee, the authors were the owners of the enterprise operating the vessel they used. They had a direct, personal and immediate interest in being allowed to pursue the occupation of their choice, and they repeatedly applied for a quota.

6.3 The authors point out that at the time they decided to fish in violation of the enforced rules, the Icelandic society was divided in disputes and debates on the nature of the fisheries management system. The opinion held by the public and many politicians was that the Icelandic fisheries management system could not be upheld much longer, and that the use of the fishing banks should as soon as possible be admitted to every citizen fulfilling general requirements.

6.4 On the State party's argument that the authors have not exhausted domestic remedies, the authors note that constitutional provisions are superior to other sources of law. The incompatibility of a criminal provision with the Constitution is therefore a valid defence under Icelandic criminal law, and a finding of guilt affirms the constitutional validity of a criminal provision. It was for this reason that two out of seven Supreme Court judges wanted to acquit Mr. Kristjánsson in the *Vatneyri case*. The authors were sentenced with reference to that case. They emphasise that the matter they complain of to the Committee is the law of Iceland.

6.5 The authors refer to the State party's argument that they did not challenge their denials of a fishing quota in domestic courts, as Mr. Jóhanesson did in the *Valdimar case*, and therefore failed to exhaust domestic remedies. They note that it is for the legislature to lay down rules governing fisheries management, for the administrative authorities to administer those rules in practice, and for

the courts to resolve disputes relating to the interpretation or implementation of those rules. They further note that, as was pointed out by the State party, the *Valdimar* judgment did not relate to the question of the donation of quotas to a privileged group and the subsequent requirement that others should pay them for a share of their gift. In the *Vatneyri* case, the Supreme Court declared the fisheries management system constitutionally valid. Under those rules, the authors could not be allocated quotas, as they did not fulfil the requirements.

6.6 As to the State party's contention that the complaint is incompatible with the provisions of the Covenant, the authors concede that measures to prevent over-fishing by means of catch-limits are a necessary element in the protection and rational utilisation of fish stocks, and that public interest demands that restrictions be imposed on the freedom of individuals to engage in commercial fishing. They can accept the assertion that the right of employment can only be conferred to a limited group. They maintain however, that such restrictions must be of general nature, and that all citizens fulfilling the relevant general requirements must have equal chances to enter the limited group. In their opinion, the requirement of having been donated a permanent personal quota, or having purchased or leased such a quota, is not a valid requirement.

Committee's admissibility decision

7.1 During its 87th session, on 5 July 2006, the Committee examined the admissibility of the communication. It noted that the State party had challenged the admissibility of the communication on the ground that the authors were not *victims* of a violation of the Covenant. The authors claimed to be victims of a violation of article 26 of the Covenant, because they were lawfully obliged to pay money to a privileged group of fellow citizens, in order to be allowed to pursue the occupation of their choice. The Committee noted the State party's argument that the authors were treated in the same manner as anyone in their position, i.e. fishermen having not acquired a quota during the reference period. However, the authors did in fact claim to have been treated differently in comparison with those who acquired a quota during the reference period. The Committee noted that the only difference between the authors, who owned the company which owned and operated the vessel *Sveinn Sveinsson* and who were denied a quota, and the fishermen who were actually granted a quota, was the period in which they were engaged in fishing. The Committee observed that the reference period requirement had since become a permanent one. This was confirmed by the fact that the authors had repeatedly applied for a quota, and that all requests had been denied. In these circumstances, the Committee considered that the authors were directly affected by the fisheries management system in the State party, and that they had a personal interest in the consideration of the case.

7.2 The Committee noted the State party's contention that the authors had not exhausted domestic remedies because they did not attempt to have their refusal of a quota reversed by the Icelandic courts. It considered the State party's reference to the *Valdimar case*, aimed at illustrating that the authors had an available and effective remedy. In that judgment, the Supreme Court found that:

“Although temporary measures of this kind to avert the collapse of fish stocks may have been justifiable, providing permanently by law for the discrimination ensuing from the rule contained in Section 5 of Act No.38/1990 on the issue of fishing entitlements

cannot be regarded as logically necessary. The respondent [the State party] has not demonstrated that other means cannot be employed for attaining the lawful objective of protecting the fish stocks around Iceland.”

The Court considered that Section 5 of Act No.38/1990 was in conflict with the principle of equality. However, it concluded that:

“The Ministry of fisheries cannot be regarded as having lawfully denied the appellant’s application for a general and special fishing licence on the grounds on which that denial was based. The Ministry’s denial will therefore be invalidated. On the other hand a stand will not be taken in this case with respect to the question whether the Ministry was in this situation obliged to grant the appellant his petition, as the action is only brought for invalidation of the Ministry’s decision, and not for a recognition of a right of the appellant to receive any particular catch entitlements.”

The Committee had not been informed whether the appellant in that case had later been allocated a quota, as a result of the Supreme Court annulling the administrative decision that denied him a quota. It considered that this example alone could not be used to demonstrate that the authors had an effective remedy.

7.3 The Committee further observed that the constitutional validity of the fisheries management system was subsequently affirmed by the Supreme Court, in the *Vatneyri case*, which was referred to as a precedent in the examination of the authors’ case by the District Court and the Supreme Court. In these circumstances, and keeping in mind that the authors did not fulfil the legal and administrative requirements to be allocated a quota, the Committee found it difficult to conceive that the Supreme Court would have ruled in favour of the authors had they tried to appeal the administrative denials of a quota. The Committee therefore considered that the remedy referred to by the State party was not an effective one, for the purposes of article 5, paragraph 2(b) of the Optional Protocol.

7.4 Finally, the Committee observed that the authors had repeatedly applied for a quota, and that all requests had been denied, because they did not fulfil the requirement for being allocated one, namely to have been active in the fishing industry between 1 November 1980 and 31 October 1983. In the Committee’s opinion, the authors had no possibility of obtaining a quota from the State party, because, having attributed all available quotas in the beginning of the 1980’s, and having made the then beneficiaries of the quotas permanent quota owners, the State party had in fact no more quotas to allocate. The Committee concluded that the authors had therefore no effective remedy to contest their denial of a quota, and that it was not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

7.5 As regards the State party’s argument that the authors’ complaint fell outside the scope of the Covenant, the Committee considered that the facts raised issues closely connected with the merits, and that these matters were more appropriately examined at the same time as the substance of the authors’ complaint under article 26 of the Covenant. On 5 July 2006, the Committee declared the communication admissible.

State Party's merits observations:

8.1 On 19 January 2007, the State party submitted its observations on the merits of the communication. It recalls the wording of articles 65⁴, and 75, paragraph 1⁵, of the Constitution, respectively relating to equality before the law and freedom of employment. With respect to the fisheries legislation, the State party points out that a uniform Individual Transferable Quotas (ITQ) system was introduced in 1991 by the Fisheries Management Act, No. 38/1990. Prior to this, many different fisheries management systems other than the ITQs were tried out, including: overall catch quotas, fishery access licenses, fishing effort restrictions, and investment controls and vessel buy-back programmes. However, the experience with these various systems led to the adoption of the ITQ system in all fisheries.

8.2 The State party provides an update of the amendments in the fisheries management legislation. In 2006, the Fisheries Management Act was reissued *in toto* as Act No. 116/2006, replacing the earlier Act No. 38/1990. The main provisions applying to the authors' case remain unchanged in substance.

8.3 On the merits, the State party claims that the authors have not provided substantiated arguments related to their claim under article 26 of the Covenant; rather, they have only claimed in general terms that an unlawful discrimination took place as they were not granted a quota share by the authorities in the same way as those fishing operators who received such harvesting rights according to Act No. 38/1990 based on their previous catch experience.

8.4 The State party considers that the restriction of the authors' employment did not constitute a violation of article 26. No unlawful discrimination was made between the authors and those to whom quota shares were allocated under article 7 of Act No. 38/1990. The differentiation between the authors who belonged to a large group of Icelandic seamen and the operators of fishing vessels was justifiable. The State party refers to the standards set by Icelandic courts and the European Court of Human Rights to assess whether a differentiation is justifiable. Firstly, the aim of the differentiation was lawful and based on objective and reasonable grounds. Secondly, it was prescribed by law. Thirdly, no excessive discrimination was practised against the authors when weighed against the overall objective of the fisheries legislation. The State party refers to the Committee's jurisprudence⁶ that not every distinction amounts to discrimination and that objective and reasonable differentiations are permitted. It argues that in the case of the authors, all conditions were fulfilled for the differentiation not to amount to a violation of article 26.

8.5 With reference to the aim of the differentiation, the State party observes that important evident public interests are tied to the protection and economical utilisation of fish stocks. The State party

⁴ "All persons shall be equal before the law and shall enjoy human rights irrespective of their sex, religion, opinion, national origin, race, colour, property, birth or other status. (...)"

⁵ "All persons shall be free to engage in the employment of their choice. This freedom may nevertheless be restricted by law, providing that the public interest so demands."

⁶ The State party refers to Communication No. 182/1984, *Zwaan de Vries v. the Netherlands*, Views adopted on 9 April 1987

has underwritten international legal obligations to ensure the rational utilisation of these resources, in particular under the United Nations Convention on the Law of the Sea. The danger of over-fishing in Iceland is real and imminent, due to advancement in fishing technology, higher catch yields and a growing fishing fleet. A collapse of fish stocks would have disastrous consequences on the Icelandic nation, for which fishing has been a fundamental occupation since the earliest times. Measures to prevent over-fishing by means of catch limits are a necessary element in the protection and rational utilisation of fish-stocks. Therefore, public interest demands that restrictions be imposed on the freedom of individuals to engage in commercial fishing. Such restrictions are prescribed in law in detailed fisheries legislation. The State party raises the question of how the limited resources of the nation's fish-stock were to be divided and considers that it was impossible to allocate equal shares to all citizens.

8.6 The State party argues that there are reasonable and objective grounds for the decision of the Icelandic legislature to restrict and control fish catches by means of a quota system in which harvesting rights are allocated on the basis of the previous catch experience of the fishing vessels rather than by other fisheries management methods. Reference is made to the Supreme Court judgement in the *Valdimar case*:

“The arrangement of making catch entitlements permanent and assignable is also supported by the consideration that this makes it possible for operators to plan their activities in the long term, and to increase or decrease their catch entitlements in individual species as may suit them at any particular time. In this respect, the Act is based on the assessment that the economic benefits leading from the permanent nature of catch entitlements and the possibilities for assignment of catch entitlements and quotas will lead to gainful utilisation of the fish stocks for the benefit of the national economy.”

8.7 The State party refers to Act No. 85/2002, by which a special catch fee was imposed on vessel operators for their right of access to fishing areas, this being calculated to take account of the economic performance of fisheries. The catch fee has the same effects as a special tax imposed on vessel operators. This demonstrates that the legislature is constantly examining the best way of achieving the aim of efficiently controlling fishing and in the best interests of Iceland. The Parliament always further revises fisheries management arrangements and the right to makes catches. It can also make this right subject to conditions or choose a better method of serving the public interest.

8.8 The State party notes that the comparison of various fisheries management systems in Iceland and abroad and the research findings of scientists in marine biology and economics have unequivocally concluded that a quota system such as the Icelandic one is the best method of achieving the economic and biological goals of modern fisheries management systems. Reference is made to a report entitled “On Fisheries and Fisheries Management in Iceland – A background report”⁷. This report outlines the basic features and advantages of the ITQ system, and the experience of the system in other countries. The State party also recalls the OECD report “Towards Sustainable Fisheries: Economic Aspects of the Management of Living Marine Resources”.

⁷ The report is enclosed in the State party's observations.

8.9 The State party points out that the objective and reasonable grounds that existed when the ITQ system was introduced still exist. If all Icelandic citizens, on the basis of equality before the law, had an equal entitlement to begin fishing operations and to have catch quotas allocated to them for this purpose, then the basis for Iceland's fisheries management system would collapse. Such a situation would undermine the system stability. The quota rights that were originally allocated on the basis of catch performance have since to a large extent passed into other ownership. Those who have subsequently acquired quotas have either bought them at their full market value or hired them. They do not constitute a "privileged group". They have accepted the rules applying in Iceland's fisheries management system. If these entitlements were suddenly reduced or removed from their owners, to be equally distributed among all those who are interested in starting fishing operations, this would constitute a gross encroachment on the rights of those who have invested in these entitlements and have a legitimate expectation that they can continue to exercise them.

8.10 The State party demonstrates that the consequences of laws and regulations were not excessive for the authors and thus did not violate the principle of proportionality, in accordance with article 26 of the Covenant. The State party considers the authors' situation at two points in time: (a) at the time the Fisheries and Management Act No. 38/1990 was passed and harvest rights were initially allocated, and (b) at the time their request for a catch quota was rejected, as they did not fulfil the requirements of the Act.

8.11 Firstly, on 1 January 1991, when the Fisheries Management Act took effect, both authors were employed at sea on the same vessel, as captain and boatswain. They were in the same position as thousands of other vessel officers who had not invested any capital in the fishing vessels on which they based their livelihood. However, the catch performance history of the vessels on which they worked resulted in the vessels' receiving a quota share under the new fisheries management system. The new system did not alter anything in the context of the authors' employment as a vessel captain and boatswain. They were able to pursue their careers, and there were no excessive consequences for them. They did not have to discontinue the occupation for which they were educationally and culturally equipped, as claimed by them.

8.12 The State party rejects that article 26 of the Covenant prevented the authorities preparing the new legislation from making any distinction between persons who were the owners of fishing vessels (referred to by the authors as a "privileged group") and other persons who worked in the fishing industry. It denies that harvest rights should have been allocated to them all equally. There was a fundamental difference between the owners of the fishing vessel on which the authors worked and the seamen who worked on the ship.

8.13 The State party therefore considers that the distinction which was drawn between the authors and the owners of fishing vessels when the Act was introduced cannot be considered to constitute unlawful discrimination under article 26.

8.14 Secondly, the State party considers the situation when the authors decided to become vessel operators and purchased a fishing vessel with limited catch entitlements. Their intentions, when they purchased the ship, were impracticable, partly because of the substantial reductions of certain endangered fish stocks. These reductions in the total catch were applied equally to all fishing vessels

that held quota shares in the relevant species, and resulted in a temporary price increase in the market price of catch quotas for these species. The authorities' decision not to award the authors a quota was foreseeable. The loss of property and income was the consequence of their own decision to stop working in their previous employment as wage-earners in the fishing industry and to operate a vessel-operating company based on weak and risky premises. It was clear what legal conditions applied to those intending to start fishing-vessel operations at the time.

8.15 The State party argues that if the Committee accepts that, on the basis of their purchase of a fishing ship in 1998, the authors were entitled to have a quota allocated to them and to begin fishing operations, then it must also be accepted that at least all those persons who worked as vessel captains or crew members also had an equal right to start fishing operations and to have a quota share allocated to them. The consequences of the system are not more serious for the authors than for thousands of other seamen in Iceland who may wish to purchase fishing vessels and start fishing operations. The State party denies that it is justified for vessel operators to deliberately make unlawful catches of fish to protest against what they consider to be an unjust fishing management system. It is evident that those who break the law will be prosecuted. By doing so, they do not acquire the status of "victims" of unlawful discrimination.

8.16 Finally, the State party argues that if it were now decided to distribute equal fishing quotas to all persons who work at sea or who are interested in purchasing and operating fishing vessel, this would result in serious consequences for those parties that are currently active in the fishing industry and have invested in such rights. Such a decision would have consequences for the interest that society as a whole has to preserve the stability of the fishing industry. With greater demand for shares in the fish stocks (a limited resource) and an obligation on the Government to allocate equal shares to all fishermen, the stability of these entitlements would be uncertain. The result would be that investments in fishing vessels would become unprofitable, the industry as a whole would run into difficulties and there would be a return to the situation which was in place before the current arrangements took effect.

8.17 The State party argues that none of the authors' alleged financial losses can be attributed to the fisheries management system, but rather to their own decision to buy a fishing vessel without a quota share, knowing the legal requirements and foreseeable consequences of that situation.

Authors' comments

9.1 On 23 March 2007, the authors commented on the State party's merits observations. They argue that the State party has persistently upheld the policy adopted following the *Valdimar* judgment, disregarding every opportunity to institute a fisheries management system conforming to fundamental human rights principles. While the State party argues that the "vast majority" of the catch entitlements established by the system have now been sold, the authors agree that "many persons have become millionaires by selling their gift". However, many persons and companies remain in possession of their gift, either leasing it to others or using it for themselves. No accounts or records of the sales have been kept. The authors claim that the State party has succeeded in persuading innocent persons to purchase unlawfully acquired valuables. They argue, however, that purchase of illegally obtained valuables does not give rise to a right of ownership.

9.2 The authors claim that human rights are not subject to statutes of limitation and can not be set aside by prescription. They indicate that they are not claiming a share in a privilege. They insist, on the contrary, that limitations to fishing must be imposed subject to generally applicable conditions. They maintain that it is illegal in every normal domestic legal system, to restrict ocean fishing permanently to a circumscribed group that has been granted such a right *gratis*, and to oblige others to purchase a share in the privileges of its members by payments to their personal benefit.

9.3 The authors argue that the equality principle prohibits discrimination on the grounds stated in article 26 of the Covenant, which include “status”. For the purposes of these provisions, “discrimination” means treating a person less favourably than others on the basis of such grounds. If some persons are granted a privilege which is denied to others, a “status” is created, not only the status of the privileged, but also the status of the non-privileged. An alleged violator of Article 26 cannot logically invoke as a defence that all persons who do not enjoy the privilege have the same status.

9.4 On the State party’s argument that no discrimination under article 26 took place, the authors agree that the aim of the differentiation, i.e. the preservation and protection of natural resources, was lawful. However, they recall that the method which was used to pursue this aim was the distribution of the entire TAC among operators active during a certain period. The decision was then taken to make the TAC shares a private, assignable property. The effect was the institution of privilege in the recipients’ favour at the expense of the civil rights of others. As a result, only the recipients could engage in fishing. All others, including the authors, must purchase from them a portion of their donated TAC share if they also want to engage in fishing. The authors argue that the legitimacy of preservation and protection is irrelevant because of the effect of the measure.

9.5 The authors consider that the institution of the privilege lacks a legal basis because of its unconstitutionality. They add that discrimination is never justified and that the meaning of the term “discrimination” is the failure of the State to apply advantageous rules to all, or the application of disadvantageous rules only to some.

9.6 With respect to the State party’s claim that it was necessary to respect the right to employment of persons active in the fisheries sector, the authors question the impartiality of this argument. They argue that with the advent and entrenchment of the fisheries management system, the idea has settled that employment, or the right to continue in the employment one is active in, is in fact property, protected as such by article 72 of the Icelandic Constitution. The argument was invented subsequently to provide a justification of the fisheries management system, by declaring that the beneficiaries of the limitation of the fishing banks must have their constitutional rights protected.

9.7 The authors recall that the Icelandic fisheries management system came into being by evolution, followed by a decision to make it permanent. The reason why it was tolerated at first was that individuals and companies who had invested in vessels and equipment had to be given a chance to recover their investment. The authors refer to *Valdimar* case, in which it was stated that:

“Although temporary measures of this kind to avert the collapse of fish stocks may have been justifiable, which question is not at issue, providing permanently by law for the

discrimination ensuing from [...] the issue of fishing entitlements can not be regarded as logically necessary.”

9.8 The authors point out that the obligation of devising a fisheries management system that does not violate international human rights is the task of the Icelandic government, not of the authors. What they claim is an opportunity to pursue the occupation of their choice under the same conditions as those that apply to others. It is for the Icelandic Government or legislature to decide how this requirement is to be fulfilled.

9.9 On the State party’s fear that “clearly the basis for Iceland’s fisheries management system would collapse”, the authors argue that the fear of the collapse of the system of donated privilege is what has kept that system alive. A dismal outcome in this respect would to some degree be offset by reintroduction of legal principles and improved respect for law afterwards.

9.10 With respect to the State party’s contention that the fisheries management system did not affect the authors, because they were able to continue to pursue their careers as they had done all their working lives, the authors invoke the principle of equality of opportunity: the possibility for persons of any rank or stature to rise in social standing and wealth by work of any kind has been Iceland’s strength until now.

9.11 The authors consider that in an environment challenged as unlawful, domestically or internationally, a person’s attempts to accommodate his/her activities to that environment should not be taken as recognition of its legality, or as a waiver of his/her right to denounce that environment as unlawful. The authors refer to the provision of paragraph 1 of the Act, recognising the “common property of the nation”. Persons speaking for the Icelandic Government in public have increasingly taken the stand that this provision is meaningless. Such a statement insinuates that the provision was included in the Act for purposes of deception. In addition, the authors acted as they did because they felt a strong injustice.

9.12 The authors emphasise that their claim is not to have a quota share allocated to them by the authorities, but to be able to pursue the occupation of their choice on the same terms as others. It is not their task to say exactly how this requirement is to be fulfilled.

9.13 The authors explain that cod is, and always has been, by far the most common species of ocean catch in the waters around Iceland, and the species always yielding by far the highest export value. It is so widely distributed, and so common, that it generally accompanies any other ocean catches. A catch of any other species normally includes between 5 and 15 per cent of cod. Cod catches accompanying any other catch make it necessary for a fisherman to have a cod quota, even if he only intends to catch something else. To catch other species for which they had a quota, the authors would have had to receive or purchase a cod quota to cover the cod that was certain to be caught additionally. Since they had not been given any cod quota, they had to acquire it by lease or purchase.

9.14 The *Sveinn Sveinsson*, the authors’ ship, was 24 gross tons in size. They wanted to make their careers in the operation of fishing vessels of about that size, or if anything much larger, that is,

modern, ocean-going fishing ships. That is what they worked with, and that is what they trained for. The institution of the quota system in 1984 automatically encompassed all persons owning boats 10 gross tons and larger, but boats smaller than this limit were not brought under the system at once. This happened gradually, in various stages. By Act No. 97/1985, all fishing by net with boats less than 10 tons in size was brought under effort restrictions. By Act No. 8/1988, the limit set at 10 tons was reduced to 6 tons. Finally, Act No. 38/1990 provided for a continuation of the system instituted, for all boats larger than 6 tons. Even if it is correct that the process was only completed in 2004, this changes nothing as regards the authors' complaints.

9.15 On the protection of the right to freedom of employment, the authors argue that the purpose of article 75 of the Constitution is to keep employment open to all, subject to generally applicable requirements. Its purpose is not to protect the interests of people already employed. On the contrary, its purpose is to prevent interest groups from monopolising occupations or preventing others from entering them.

9.16 Counsel concludes that control of ocean fishing by means of individual ownership of catch entitlements is sensible. It is therefore vital, if such a system is instituted, to institute it lawfully, without any violation of constitutional principles and international human rights instruments. This can not lawfully be done by representatives of the public limiting the use of the fishing banks to a particular group and turning the privileges of its members into their personal property to be sold or leased by them to the remainder of the population.

Consideration of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

10.2 The main issue before the Committee is whether the authors, who are lawfully obliged to pay money to fellow citizens in order to acquire quotas necessary for exercising commercial fishing of certain fish species and thus to have access to such fish stocks that are the common property of the Icelandic nation⁸, are victims of discrimination in violation of article 26 of the Covenant. The Committee recalls its jurisprudence that under article 26, States parties are bound, in their legislative, judicial and executive action, to ensure that everyone is treated equally and without discrimination based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It reiterates that discrimination should not only be understood to imply exclusions and restrictions but also preferences based on any such grounds if they have the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of rights and freedoms⁹. It recalls that not every distinction constitutes discrimination, in violation of article 26, but that distinctions must be justified on

⁸ Formulation of Article 1 Act 38/1990.

⁹ General Comment No. 18 – Non-discrimination, para. 7.

reasonable and objective grounds, in pursuit of an aim that is legitimate under the Covenant¹⁰.

10.3 The Committee firstly notes that the authors' claim is based on the differentiation between groups of fishers. The first group received for free a quota share because they engaged in fishing of quota-affected species during the period between 1 November 1980 and 31 October 1983. Members of this group are not only entitled to use these quotas themselves but can sell or lease them to others. The second group of fishers must buy or rent a quota share from the first group if they wish to fish quota affected species for the simple reason that they were not owning and operating fishing vessels during this reference period. The Committee concludes that such distinction is based on grounds equivalent to those of property.

10.4 While the Committee finds that the aim of this distinction adopted by the State party, namely the protection of its fish stocks which constitute a limited resource, is a legitimate one, it must determine whether the distinction is based on reasonable and objective criteria. The Committee notes that every quota system introduced to regulate access to limited resources privileges, to some extent, the holders of such quotas and disadvantages others without necessarily being discriminatory. At the same time, it notes the specificities of the present case: On the one hand, the first Article of the Fisheries Management Act No 38/1990 states that the fishing banks around Iceland are common property of the Icelandic nation. On the other hand, the distinction based on the activity during the reference period which initially, as a temporary measure, may have been a reasonable and objective criterion, became not only permanent with the adoption of the Act but transformed original rights to use and exploit a public property into individual property: Allocated quotas no longer used by their original holders can be sold or leased at market prices instead of reverting to the State for allocation to new quota holders in accordance with fair and equitable criteria. The State party has not shown that this particular design and modalities of implementation of the quota system meets the requirement of reasonableness. While not required to address the compatibility of quota systems for the use of limited resources with the Covenant as such, the Committee concludes that, in the particular circumstances of the present case, the property entitlement privilege accorded permanently to the original quota owners, to the detriment of the authors, is not based on reasonable grounds.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including adequate compensation and review of its fisheries management system.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised in the

¹⁰ See Communications No. 1314/2004, *O'Neill and Quinn v. Ireland*, Views adopted on 24 July 2006; No. 1238/2004, *Jongenburger-Veerman v. The Netherlands*, Views adopted on 1 November 2005; No.983/2001 *Love et al. v. Australia*, Views adopted on 25 March 2003.

Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

APPENDIX

Dissenting opinion by Committee members Ms. Elisabeth Palm, Mr. Ivan Shearer and Ms. Iulia Antoanella Motoc

As the majority of the Committee has found, there is a differentiation between the group of fishers who received without payment a quota share and the other group of fishers who must buy or rent a quota share from the first group if they wish to fish quota affected species. We agree with the majority that the aim of this distinction, namely the protection of Iceland's fish stocks which constitute a limited resource, is a legitimate one. It rests to be decided if the distinction is based on reasonable and objective criteria.

In that respect we note that the Supreme Court in its judgment in 1998 in the Valdimir case considered that the economic benefits leading from the permanent nature of catch entitlements and possibilities for assignment of catch entitlements and quotas will lead to gainful utilization of the fish stocks for the benefit of the national economy. Moreover in the Vatnery case, of April 2000 the Supreme Court found that the restrictions on an individual's freedom to engage in commercial fishing was compatible with Iceland's constitution as they were based on objective considerations. In particular the Court noted that the arrangement of making catch entitlements permanent and assignable is supported by the consideration that this makes it possible for operators to plan their activities in the long term, and to increase or decrease their catch entitlements in individual species as may suit them.

It is also noteworthy that notwithstanding that particular boats benefit from quota entitlements they must, according to Act No. 85/2002, still pay a special catch fee for their right to access to fishing areas, this being calculated to take account of the economic performance of fisheries. According to the State party the catch fee has the same effect as a special tax imposed on vessel operators. In the State party's opinion a change of the fisheries management system would entail serious consequences for those who have bought quota shares from the initial quota holders and risk jeopardizing the stability of the fishing industry. According to the State party it would also have consequences for the State as a whole which has a legitimate interest in preserving the stability of the fishing industry. After several unsuccessful attempts to regulate the fisheries management, the current system was put into place and it has proved its economic efficiency and sustainability.

Taking into account all the factors mentioned above and the advantages which the current system offers for the fishing management in Iceland, notably the need to have a stable and robust system, as well as the disadvantages of the system for the authors i.e. the restrictions on the author's freedom to engage in commercial fishing we find that the State party has carried out a careful balance, through its legislative and judicial processes, between the general interest and the interest of the individual fishers. Moreover we find that the distinction between the two groups of fishers is based on objective ground and is proportionate to the legitimate aim pursued. It follows that there has been no violation of article 26 in the present case.

[*signed*] Ms. Elisabeth Palm

[*signed*] Mr. Ivan Shearer

[*signed*] Ms. Iulia Antoanella Motoc

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Dissenting opinion by Committee member Sir Nigel Rodley

I generally agree with the dissent of Mr Iwasawa and with the joint dissent of Ms. Palm and Mr. Shearer. While I am sympathetic to the sense of unfairness that the authors must feel at the creation of a privileged class entitled to exploit a precious resource that is associated with their livelihood and at their exclusion of access to that resource, I cannot conclude that the State party has violated the Covenant in respect of the authors.

The State party has drawn attention to evidence supporting its contention that its ITQ system was the most economically effective (see para. 8.8) and, as such, reasonable and proportionate. These are practical arguments that the authors fail adequately to engage with in the reply (see para. 9.8). It was essential that they confront this issue, especially in the light of the difficulties for a non-expert international body itself to master the issues at stake and the deference to the State party's argument that is consequently required.

Also, the Committee's Views seem to be affected, perhaps decisively, by the contextual factor that the fisheries are the common property of the Icelandic nation. It is not clear to me how the same facts in another country not having adopted the 'common property' doctrine could then justify the Committee's arriving at a different conclusion.

[*signed*] Sir Nigel Rodley

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Dissenting opinion by Committee member Mr. Yuji Iwasawa

According to the constant jurisprudence of this Committee, not every distinction constitutes discrimination in violation of Article 26 of the Covenant; specifically, a distinction can be justified on reasonable and objective grounds in pursuit of an aim that is legitimate under the Covenant.

The Views of the majority of the Committee do not question that the State party was pursuing a legitimate aim in adopting a fisheries management system in order to safeguard its limited natural resource, but found that the quota system introduced by the State party was not justified on “reasonable” grounds and accordingly in breach of Article 26 of the Covenant. I write separately to express my disagreement with that conclusion.

Article 26 of the Covenant lists a series of specific grounds such as race, colour, sex and the like upon which discrimination is prohibited and which warrant particularly careful scrutiny. It is certainly not an exhaustive list as is made clear by the phrase “such as” and the amorphous ground of “other status”, but it is important to note that this case involves none of the explicitly-listed grounds of prohibited discrimination. Moreover, the right affected by the quota system is a right to pursue the economic activity of one’s choice and goes to none of the civil and political rights which form the basis of a democratic society such as a freedom of expression or a right to vote. States should be allowed wider discretion in devising regulatory policies in economic areas than in cases in which they restrict, for instance, a freedom of expression or a right to vote. The Committee should be mindful of the limits of its own expertise in reviewing economic policies which had been formed carefully through democratic processes. The Committee should take these factors fully into account in evaluating whether a distinction can be justified on “reasonable” grounds.

“Property” is one of the prohibited grounds of discrimination, and the majority seems to assume that this case involves discrimination based on “property”, stating – rather unclearly – that the distinction is based on “grounds equivalent to those of property”. A quota system introduced by the State party in 1983, and made permanent in 1990, comprised an allocation of catch quotas to individual vessels on the basis of their catch performance during the reference period between 1 November 1980 and 31 October 1983. The distinction made on the basis of the catch performance of individual vessels during the reference period is, in my view, not a distinction based on “property”, but rather an objective distinction based on the economic activities of a person undertaken during a specified period of time.

The capacity of Iceland’s fishing fleet was surpassing the yield of its fishing banks and measures became necessary to safeguard its limited natural resource. The State party has argued – quite properly – that the public interest demands that restrictions be imposed on the freedom of individuals to engage in commercial fishing in order to prevent over-fishing, as many other State parties to the Covenant have done. The establishment of permanent and transferable harvest rights was seen as necessary in the State party’s circumstances to guarantee stability for those who have invested in fishing operations and to make it possible for them to plan their activities in the long term. In 2002, the scheme was modified so as to impose a special catch fee for vessel operators for their rights of access to fishing areas. The State party has explained that the catch fee has the same effect as a special tax imposed on vessel operators. The current system has proved its economic

efficiency and sustainability. The State party has argued that if the system were to be changed at this juncture, this would result in serious consequences for those parties that are currently active in the fishing industry and have invested in fishing operations, and possibly jeopardize the stability of the fishing industry.

While fishers who had invested in fisheries operations and were owners of fishing vessels during the reference period were given a quota, other fishers are prevented from commercial fishing without purchasing or leasing a quota from holders of a quota and suffer corresponding disadvantages. However, a fishing management system must of necessity contain restrictions on the freedom of individuals to engage in commercial fishing in order to achieve its intended purpose. In view of the advantages offered by the current system, I am unable to find that the disadvantages resulting for the authors – the restrictions on their right to pursue the economic activity of their choice to the extent they desire – are disproportionate. For these reasons, I am unable to share the conclusion of the majority that the distinction made by the State party on the basis of the catch performance of individual vessels during the reference period was “unreasonable” and in breach of Article 26.

[Signed]: Mr. Yuji Iwasawa

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Dissenting opinion by Committee member Ms. Ruth Wedgwood

I concur in the careful elucidation of the facts of this case, as set forth by my colleagues Elisabeth Palm and Ivan Shearer. The State party has provided an extended explanation of why Icelandic authorities concluded that a system of fishing quotas based upon historic catch would be the most feasible method for regulating and protecting Icelandic fisheries.

At the same time, I agree with my colleague Yuji Iwasawa on an important point of principle – namely, the Human Rights Committee has a distinctly limited scope of review in economic regulatory matters pleaded under article 26.

The alleged discrimination here was between fishermen operating at an earlier or later date. There is no suggestion that the distinction among fishermen was based on ethnicity, religion, gender, or political affiliation, or any other characteristic identified in article 26 or otherwise protected by the Covenant. The grandfathering of prior industry participation remains a common practice among various states – including in the award of taxi medallions, agricultural subsidy allotments, and telecommunications spectra. Free entry into new economic sectors may be desirable, but the International Covenant on Civil and Political Rights was not a manifesto for economic deregulation. To effectively protect the important rights that fall within the aegis of the Covenant, the Committee also must remain true to the *limits* of its competence, both legal and practical.

[Signed]: Ms. Ruth Wedgwood

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