HUMAN RIGHTS COMMITTEE

Maori tribes v. New Zealand

Communication No. 547/1993

13 October 1995

CCPR/C/55/D/547/1993*

ADMISSIBILITY

Submitted by: Apirana Mahuika et. al. [represented by counsel]

Alleged victims: The authors

State party: New Zealand

Date of communication: 10 December 1992 (initial submission)

Documentation references: Prior decisions - Special Rapporteur's rule 91 decision, transmitted to the State party on 14 June 1993 (not issued in document form)

Date of present decision: 13 October 1995

The Human Rights Committee, acting through its Working Group pursuant to rule 87, paragraph 2, of the Committee's rules of procedure, adopts the following decision on admissibility.

Decision on admissibility

1. The authors of communication are Apirana Mahuika and 18 other individuals, leaders of 14 Maori tribes in New Zealand. They claim to be victims of violations by New Zealand of articles 1, 2, 16, 18, 26 and 27 of the International Covenant on Civil and Political Rights. They are represented by counsel. The Covenant entered into force for New Zealand on 28 March 1979, and the Optional Protocol on 26 August 1989.

Facts as submitted by the authors

2.1 The Maori tribal people of New Zealand number approximately 500,000 and are organised in 75 distinct tribes. The authors are leaders and representatives of 14 Maori tribes, including 3 of the largest. In 1840, the Maori and the predecessor of the New Zealand Government, the British Crown,

signed the Treaty of Waitangi, which affirmed the rights of the Maori, including their right to self-determination and the right to control tribal fisheries. In the second article of the Treaty, the Crown guarantees to he Maori:

"The full exclusive and undisturbed possession of their lands, forests, fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession..."

2.2 In 1986, the Government of New Zealand amended the existing Fisheries Act and introduced a quota management system for the commercial use and exploitation of the country's fisheries. Section 88 (2) of the Fisheries Act provides "that nothing in this Act shall affect any Maori fishing rights". In 1987, the Maori tribes filed an application with the High Court of New Zealand, claiming that the implementation of the quota system would affect their tribal Treaty rights, and obtained interim injunctions against the Government.

2.3 In 1988, the Government started negotiations with the Maori, who were represented by four representatives. Many tribes unsuccessfully sought direct representation in the negotiations. The Maori gave their representatives a mandate to negotiate to obtain 50% of all New Zealand commercial fisheries. Dissatisfied with the results of the negotiations, the authors later revoked the authority of their representatives to act on their behalf.

2.4 In 1989, after negotiation and as an interim measure, the Maori agreed to the introduction of the Maori Fisheries Act 1989, which provided for the immediate transfer of 10% of all quota to a Maori Fisheries Commission which would administer the resource on behalf of the tribes. This allowed the introduction of the quota system to go ahead as scheduled. Negotiations continued until July 1992 on the basis that Maori tribes should control 50% of all available quota.

2.5 On 27 August 1992, the Maori negotiators, without prior consultation, agreed to a Memorandum of Understanding with the Government. Pursuant to this Memorandum, the Government would provide the Maori with funds required to purchase 50% of a major New Zealand fishing company, Sealord, which had been put up for sale. This would result in the transfer of 13% of quota to the Maori. In return, the Maori would withdraw all pending litigation and support the repeal of section 88 (2) of the Fisheries Act as well as an amendment to the Treaty of Waitangi, to exclude from the Waitangi Tribunal's jurisdiction claims relating to the commercial fishing. The authors state that this Memorandum fell far short of the aim of the negotiations, namely to obtain 50% of the fishing quota.

2.6 On 23 September 1992, a Deed of Settlement was executed by the New Zealand Government and Maori representatives. The Deed implements the Memorandum of Understanding and concerns not only sea fisheries but all freshwater and inland fisheries as well. Paragraph 5.1 of the Deed reads:

"Maori agree that this Settlement Deed, and the settlement it evidences, shall satisfy all claims, current and further, in respect of, and shall discharge and extinguish, all commercial fishing rights and interests of Maori whether in respect of sea, coastal or inland fisheries (including any commercial aspect of traditional fishing rights and interests), whether arising by statute, common

law (including customary law and aboriginal title), the Treaty of Waitangi, or otherwise, and whether or not such rights or interests have been the subject of recommendation or adjudication by the Courts or the Waitangi Tribunal."

Paragraph 5.2 reads:

"The Crown and Maori agree that in respect of all fishing rights and interests of Maori other than commercial fishing rights and interests their status changes so that they no longer give rise to rights in Maori or obligations on the Crown having legal effect (as would make them enforceable in civil proceedings or afford defences in criminal, regulatory or other proceedings). Nor will they have legislative recognition. Such rights and interests are not extinguished by this Settlement Deed and the settlement it evidences. They continue to be subject to the principles of the Treaty of Waitangi and where appropriate give rise to Treaty obligations on the Crown. Such matters may also be the subject of requests by Maori to the Government or initiatives by Government in consultation with Maori to develop policies to help recognise use and management practices of Maori in the exercise of their traditional rights."

2.7 Pursuant to the Deed, the Government pays the Maori tribes a total of NZ$ 150,000,000 to develop their fishing industry and gives the Maori 20% of new quota for species. The Maori fishing rights will no longer be enforceable in court and will be replaced by regulations. The Deed was signed by 43 signatories, representing 17 Maori tribes.

2.8 The authors state that the Deed effectively repeals the aboriginal fishing rights of all tribes, even of those who have not signed the Deed. They initiated legal proceedings in the High Court of New Zealand, seeking an interim order to prevent the Government from implementing the Deed by legislation. They argued inter alia that the Government's actions amounted to a breach of the New Zealand Bill of Rights Act 1990. The application was denied on 12 October 1992 and the authors appealed by way of interlocutory application to the Court of Appeal. On 3 November 1992, the Court of Appeal held that it was unable to grant the relief sought on the grounds that the Courts could not interfere in Parliamentary proceedings and that no issue under the Bill of Rights had arisen at that time. The authors state that they did not appeal the matter to the Privy Council, since they were advised by their senior legal adviser, a Queen's Counsel, that leave to appeal would be refused and further that the costs of continuing litigation was too onerous. They submit that they have exhausted domestic remedies for purposes of the Optional Protocol, since they cannot be expected to undertake costly legal procedure which is bound to fail.

2.9 Although the Government had accepted that the Deed was not binding on those Maori tribes that had not signed it, it introduced, on 3 December 1992, the Treaty of Waitangi (Fisheries Claims) Settlement Bill 1992. Contrary to normal procedure, the Bill was not referred to the competent Select Committee for hearing, but immediately presented and discussed in Parliament. The Bill became law on 14 December 1992. It provides inter alia for the payment of NZ$ 150,000,000 to the Maori, extinguishes the commercial component of traditional fishing rights, abrogates the traditional and aboriginal rights to fish for non-commercial purposes, and discontinues all current litigation proceedings based on treaty or statutory protection of fishing rights.

The complaint

3.1 The authors claim that the Government's actions violate the Maori's right to self-determination under article 1 of the Covenant, since this right is only effective when people have access to and control over their resources. They claim that the Treaty of Waitangi (Fisheries Claims) Settlement Act confiscates their fishing resources, denies them their right to freely determine their political status and interferes with their right to freely pursue their economic, social and cultural development.

3.2 The authors also claim to be victims of a violation of articles 16 and 26 of the Covenant, since they are being denied access to the Courts in relation to all fishing claims, in violation of their right to recognition and equality before the law without discrimination. They contend that, unlike other New Zealand citizens, they will not be able to protect their property and other rights by petitioning the courts. In this context, they refer to sections 9 and 10 of the Act, which read:

"9. Effect of Settlement on commercial Maori fishing rights and interests"

"- It is hereby declared that -

[...]

"(b) The obligations of the Crown to Maori in respect of commercial fishing are hereby fulfilled, satisfied, and discharged; and no court of tribunal shall have jurisdiction to inquire into the validity of such claims, the existence of rights and interests of Maori in commercial fishing, or the quantification thereof, the validity of the Deed of Settlement referred to in the Preamble to this Act, or the adequacy of the benefits to Maori...; and

"(c) All claims (current and future) in respect of, or directly or indirectly based on, rights and interests of Maori in commercial fishing are hereby fully and finally settled, satisfied, and discharged.

"10. Effect of Settlement on non-commercial Maori fishing rights and interests

"- It is hereby declared that claims by Maori in respect of non-commercial fishing for species or classes of fish, aquatic life, or seaweed that are subject to the Fisheries Act 1983 -

"(a) Shall, in accordance with the principles of the Treaty of Waitangi, continue to give rise to Treaty obligations on the Crown;

[...]

"(d) The rights or interests of Maori in non-commercial fishing giving rise to such claims, whether claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise, shall henceforth have no legal effect, and accordingly - (i) are not enforceable in civil proceedings; and (ii) shall not provide a defence to any criminal regulatory, or other proceeding, - except to the extent that such rights or interests are provided for in regulations made under section 89 of the Fisheries Act 1983."

3.3 The authors also refer to section 11 of the Act, which discontinues the civil proceedings initiated by the Maori based on treaty or statutory protection of fishing rights.

3.4 The authors further submit that Maori fishing practices are closely linked to their spiritual thoughts or beliefs. They claim that the regulations to be issued on the basis of the new law would affect some of these practices and thus will prevent them from fully exercising their right to freedom of belief in community with others and the full manifestation of that belief.

3.5 The authors finally claim that the Government's actions are threatening their way of life and the culture of their tribes. They submit that fishing is one of the main elements of their traditional culture, that they have present-day fishing interests and the strong desire to manifest their culture through fishing to the fullest extent of their traditional territories. They further submit that their traditional culture comprises commercial elements and does not distinguish clearly between commercial and other fishing. They claim that the new legislation removes their right to pursue traditional fishing other than in the limited sense preserved by the law and that the commercial aspect of fishing is being denied to them in exchange for a share in fishing quota. In this connection, the authors refer to the Committee's Views in communication No. 167/1984 (Ominayak v. Canada), where it was recognised that "the rights protected by article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong." 1/

The State party's observations on admissibility

4.1 By submission of 24 September 1993, the State party submits information and observations concerning the admissibility of the communication.

4.2 The State party explains that the 1840 Treaty of Waitangi is not enforceable in New Zealand law except insofar as it is given the force of law in whole or in part by Parliament in legislation. By Article the Second of the Treaty, the Crown confirmed and guaranteed the Maori the full, exclusive and undisturbed possession of their fisheries. No attempt was made to determine the extent of such fisheries until the introduction of the Quota Management System in the Fisheries Act 1983. That system, which constitutes the primary mechanism for the conservation of New Zealand's fisheries resources and for the regulation of commercial fishing in New Zealand, allocates permanent, transferable, property right in quota for each commercial species within the system.

4.3 Section 88 (2) of the Fisheries Act 1983 provided: "Nothing in this Act shall affect any Maori fishing rights." In order to bring the Quota Management System fully into effect it was necessary to provide for such Maori fishing rights beforehand. Maori negotiators were given a mandate at a national hui 2/ in June 1988 to secure a just and honourable settlement of Maori claims. As an interim step, Parliament enacted the Maori Fisheries Act 1989, which established the Maori Fisheries Commission and committed the Crown to transfer to the Commission ten per cent of quota in commercial fish species.

4.4 In 1992 the sale of Sealords Products Ltd was proposed. Sealords owned directly or indirectly 26% of the then available quota. A memorandum of understanding was initialled between the Maori negotiators and the Crown in August 1992 under which the Crown agreed to provide Maori with

capital (NZ$ 150 million) to underwrite a bid to purchase a half (and controlling) share in Sealords with a joint venture partner. The Crown agreed to allocate twenty per cent of quota issued for new species brought within the Quota Management System to the Maori Fisheries Commission, and to ensure that Maori would be able to participate in "any relevant statutory fishing management and enhancement policy bodies." In addition, in relation to non-commercial fisheries, the Crown agreed to empower the making of regulations, after consultation with Maori, recognizing and providing for customary food gathering and the special relationship between Maori and places of customary food gathering importance. In return Maori would withdraw all existing litigation, and support the repeal of legislative references to Maori fishing rights and interests, including the removal from the jurisdiction of the Waitangi Tribunal of claims related to commercial fishing.

4.5 The Maori negotiators sought a mandate from Maori from the deal outlined in the memorandum of understanding. The memorandum and its implications were debated at a national hui and at hui at 23 marae 3/ throughout the country. The Maori negotiators' report satisfied the Crown that a mandate had been given and that the understanding should be formalized in a deed of settlement. The Deed was negotiated in mid-September and entered into force on 23 September 1992. The Deed recorded that the name of the Maori Fisheries Commission would be changed to the "Treaty of Waitangi Fisheries Commission", and that the Commission would be accountable to Maori as well as to the Crown in order to give Maori better control of their fisheries guaranteed by the Treaty of Waitangi.

4.6 Maori dissatisfied with the proposed settlement brought proceedings against the Crown, seeking interim relief by way of injunction or declaration. In early November 1992 the Court of Appeal struck out those proceedings 4/. Claims were then brought to the Waitangi Tribunal 5/, which concluded that the settlement was not contrary to the Treaty except for some aspects which would be rectified in the anticipated legislation.

4.7 On 3 December 1992 the Government introduced into Parliament the Treaty of Waitangi (Fisheries Claims) Settlement Bill, designed to give effect to the Deed. The Bill was passed, with minor amendments, and received the royal assent on 14 December 1992 (and came into force on 23 December 1992). It is recorded in the preamble to the Act that:

The implementation of the Deed through legislation and the continuing relationship between the Crown and Maori would constitute a full and final settlement of all Maori claims to commercial fishing rights and would change the status of non-commercial fishing rights so that they no longer give rise to rights in Maori or obligations on the Crown having legal effect but would continue to be subject to the principles of the Treaty of Waitangi and give rise to Treaty obligations on the Crown.

4.8 The joint venture bid for Sealords was successful. After consultation with Maori, new Commissioners were adopted to the Treaty of Waitangi Fisheries Commission, and they have begun to fulfil their newly expanded mandate.

5.1 The State party notes that the communication purports to be submitted not only on behalf of the alleged victims but also on behalf on named Maori Tribes, but that no evidence is provided of any delegation of authority by any tribe or sub-tribe to the authors or to the Maori Legal Service to

submit the communication. The Government of New Zealand recalls the decision of Human Rights Committee in A.D. v. Canada 6/ and argues that, in the absence of evidence of delegation the claim that the communication is submitted on behalf of any tribes or sub-tribes, including those to which the authors might belong, must be rejected.

5.2 The State party further argues that the communication is inadmissible for failing to provide sufficient substantiation of the claim that any of the alleged victims' rights enumerated in the Covenant have been violated. The State party submits that no relevant assertion is made on behalf of the alleged victims that they personally are victims of a violation or violations of rights contained in the Covenant, but for the assertion that the alleged victims are the holders of the rights affirmed under Article 2 of the Treaty of Waitangi and that those rights cannot be taken away or extinguished without their express consent, freely given. According to the State party, the authors have not shown in what manner the actions of the Government of New Zealand may have prevented or prejudiced the enjoyment of any such rights under the Treaty purported to be held by them.

5.3 As regards the authors' claim that their rights under articles 1 and 2 of the Covenant have been violated, the State party recalls that the Optional Protocol provides a procedure under which individuals can claim that their individual rights (as set out in Part III of the Covenant, articles 6 to 27, inclusive) have been violated. The State party refers to the Committee's jurisprudence 7/ and argues that the Human Rights Committee is not empowered to consider communications under the Optional Protocol alleging violations of articles 1 and 2 of the Covenant. Accordingly, the State party argues that this part of the communication is inadmissible.

5.4 As regards the authors' claim under article 16 of the Covenant, the State party submits that the authors misunderstand the nature of the right therein contained. The State party refers to the travaux préparatories and submits that the article is intended to ensure that every person would be a subject, and not an object, of the law. The State party submits that the alleged victims have not made an argument that they have been deprived of their legal personality by the Government of New Zealand. In this connection, the State party observes that the assertion of the loss of right to bring proceedings with respect to fisheries claims before domestic courts has no relation to rights protected by article 16. The Government of New Zealand accordingly submits that the communication, in so far as it relates to an alleged violation of rights under article 16, is to be deemed inadmissible for failure to provide a sufficient substantiation.

5.5 As regards the authors' claim under article 18 of the Covenant, the State party acknowledges that Maori fishing practices incorporate matters of spiritual thought or belief. It notes however that the authors have not provided any information as to the manner in which the manifestation of their religion or belief has been impeded. As regards the authors' reference to regulations that are to be promulgated by the Government, the State party submits that it is not aware of any complaint that existing regulations prevent the enjoyment of rights under article 18. The State party notes that the communication is not alleging an actual current violation, but rather the potential for a violation, and it concludes that the claim should therefore be deemed inadmissible.

5.6 With regard to the authors' claim under article 26, the State party argues that the communication does not show in what manner actions of the Government of New Zealand have operated to deny either the equality of the alleged victims before the law or their entitlement to the equal protection

of the law without discrimination. In this connection, the State party submits that it is not aware of any instance in which the Human Rights Committee has accepted that article 26 may be invoked to protect the special rights of indigenous people under treaties, legislation, or customary law. In this connection the State party refers to the Committee's decision in Lovelace v. Canada 8/.

5.7 The State party further submits that the prohibition of certain kinds of legal proceedings concerning fisheries claims is a consequence of a settlement of those claims by the Deed of Settlement or the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. It is those claims which have been removed from the jurisdiction of the courts, rather than a removal of the right of Maori to commence legal proceedings generally. No other New Zealander retains the right to bring such proceedings concerning such claims. Moreover, Maori retain the right to bring a claim with respect to non-commercial fisheries rights under the Treaty of Waitangi to the Waitangi Tribunal, a right not enjoyed by other New Zealanders.

5.8 The State party accordingly argues that the communication, in so far as it relates to alleged violations of rights under article 26, is inadmissible for failure to provide a sufficient substantiation and as being incompatible with the provisions of the Covenant, contrary to article 3 of the Optional Protocol.

5.9 With regard to the authors' claim under article 27, the State party denies any violation of the rights contained in article 27. On the contrary, the State party contends that the right of Maori to engage in fisheries activities has been secured through legislation such as the Maori Fisheries Act 1989 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The State party submits that there was no prior acknowledgement in New Zealand law of the right of Maori to a specific share of quota in commercial fisheries, as a consequence of which uncertainty and dispute between the Crown and Maori as to the nature and extent of Maori fishing rights in the modern context existed. Following the enactment of the legislation, Maori have acquired through Government assistance effective control over the 26% of quota formerly held by Sealords, in addition to the ten per cent of quota provided under the Maori Fisheries Act 1989. Furthermore, Maori have access to species which are not yet subject to the Quota Management System, and a guaranteed right to acquired 20% of the quota for such species as they are brought within the system. In this context, the State party submits that Maori comprise between 9.7% and 15.1% of the population 9/.

5.10 As regards the claim that the settlement received only limited support from Maori, the State party recalls the process of consultation pursued by the Maori negotiators following the initialling of the memorandum of understanding, on the basis of which the Maori negotiators and subsequently the Crown concluded that there was a sufficient mandate for the negotiation and execution of the Deed of Settlement. The State party refers to the opinion of the Waitangi Tribunal that the report of the Maori negotiators to the Crown was "commendable for its thoroughness and detail", that the report conveyed the impression that there was indeed a mandate for the settlement, provided that the Treaty itself was not compromised and that in the light of the report it was reasonable for the Crown to believe it was justified in proceeding.

5.11 The State party notes the authors' claim that any mandate which the Maori negotiators might have had to represent their views and interests was denied or revoked. However, the State party refers to the opinion of the Waitangi Tribunal, which took the view "that the settlement should

proceed despite the inevitable compromise to the independent rangatiratanga 10/ of the dissentients... On the basis then that the settlement is to introduce new national policy for the benefit of tribes, to perfect rights rather than abrogate them and with protection for the customary position, we consider this settlement can be dealt with not just at an iwi 11/ level, but a pan iwi level, where the actual consent of each iwi is not a pre-requisite, and a general consensus can be relied upon" (Wai 307, page 17). The State party further refers to the Committee's decision in Grand Chief Donald Marshall et al. v. Canada 12/ where the Human Rights Committee rejected a claim that all tribal groups should have a right to participate in consultations on aboriginal matters.

5.12 The State party submits that fisheries, which are everywhere becoming more heavily exploited, must be subject to appropriate regulation and control by properly designated agencies of the State. It refers to the Committee's Views in Kitok v. Sweden 13/ and emphasizes that the right to enjoy culture embodied in article 27 has, as the Committee said, to be placed in context. According to the State party, the appropriate context with respect to fisheries rights is the need to ensure proper management of fisheries, including meeting international obligations for the conservation and management of marine living resources, while protecting the rights of all users.

5.13 On the basis of the above, the State party submits that the communication fails to disclose in what manner the actions of the Crown might have violated the rights guaranteed by article 27. Moreover, the authors provide no information to show that their rights under article 27 have personally been violated. The Government of New Zealand accordingly submits that the communication, in so far as it relates to alleged violations of rights under article 27, should be inadmissible for failure to provide a sufficient substantiation of the allegation.

6.1 The State party submits that, in the event that any violation of any rights provided for in the Covenant had occurred, the alleged victims would have a number of avenues available to them to seek domestic remedies. None of these have been exercised.

6.2 The State party states that, as regards non-commercial fisheries, the alleged victims have a continued right to bring claims before the Waitangi Tribunal. If the Tribunal considers that the claim is well-founded it may recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons being similarly affected in the future.

6.3 If the alleged victims believe that regulations relating to customary food gathering would contravene article 18 of the Covenant, a remedy would lie with the New Zealand courts to seek a declaration that such regulations were ultra vires the regulation-making power.

6.4 As regards commercial fisheries, the procedure to be developed by the Treaty of Waitangi Fisheries Commission for the distribution of the benefits of the settlement must include a procedure for Maori affected, to be heard on benefit issues. If the alleged victims are not satisfied with the proposed procedure, they may seek review of the Commission's decision by the courts. Moreover, the alleged victims may seek through their tribe to have Parliament refer draft legislation incorporating the procedure for distribution of benefits to the Waitangi Tribunal.

6.5 The State party concludes that the communication is inadmissible for non-exhaustion of domestic remedies.

7.1 The State party recalls that the authors submitted their initial communication before the legislation was finally enacted, and that they failed to update the communication to take account of their knowledge of the enactment of the legislation. The State party further contends that the authors have made no effort to substantiate the manner in which they, or the tribes and sub-tribes they purport to represent, have been the victims of violations of rights contained in the Covenant, nor have they made any effort to avail themselves of domestic remedies for the alleged wrongs done to them.

7.2 In the circumstances, the State party considers that the communication should be regarded as only a generalized attack against the settlement. The State party therefore requests the Committee to declare that the communication is inadmissible as constituting an abuse of the right of submission.

Authors' comments on the State party's submission

8. On 12 May 1995, counsel for the authors forwards 17 affidavits, duly signed by the authors, in support of the admissibility of the communication. By submission of 8 June 1995, counsel comments on the State party's observations.

9.1 As regards Article the Second of the Treaty of Waitangi, counsel submits that the Maori text contains a broader guarantee than in apparent from a bare reading of the English text. He explains that one of the most important differences in meaning between the two texts relates to the guarantee, in the Maori text, of "te tino rangatiratanga" (the full authority) over "taonga" (all those things important to them), including their fishing places and fisheries. According to counsel, there are three main elements embodied in the guarantee of rangatiratanga: the social, cultural, economical and spiritual protection of the tribal base, the recognition of the spiritual source of taonga and the fact that the exercise of authority is not only over property, but of persons within the kinship group and their access to tribal resources. The authors submit that the Maori text of the Treaty of Waitangi is authoritative.

9.2 The authors submit that by the Treaty of Waitangi the Government of New Zealand has guaranteed to actively protect their, and their tribes' or subtribes', full authority over their fishing places and fisheries. Furthermore, the right to full authority could not be taken away without free and voluntary consent. It is submitted that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 is in breach of the State party's obligations under the Treaty of Waitangi.

9.3 Counsel notes that Maori fishing rights have been blatantly breached and severely prejudiced by Government policies and legislation since the signing of the Treaty of Waitangi in 1840, and that Maori have voiced their dissatisfaction with those fisheries policies and laws on numerous occasions.

9.4 As regards the Quota Management System, introduced by the New Zealand Government, counsel notes that the Waitangi Tribunal found the QMS to be in "fundamental conflict" with the Treaty of Waitangi since it gave exclusive possession of property rights in fishing to non-Maori, and that the New Zealand High Court and Court of Appeal had in several decisions between 1987 and 1990 restrained the further implementation of the QMS on the basis that it was "clearly arguable" that the QMS unlawfully breached Maori fishing rights, protected by s 88 (2) of the Fisheries Act

1983. The authors recall that one of the express purposes of s 11 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 is to validate the 1986 QMS for all purposes. In this context, the authors note that the various court challenges to the QMS were based on s 88 (2) of the Fisheries Act 1983, rather than on the Treaty of Waitangi which, according to New Zealand law, is not directly enforceable in the courts. It is submitted that this underscores the fundamental legal importance of s 88 (2) of the Fisheries Act 1983 for the protection of Maori fishing rights both in respect of aboriginal and customary rights at common law and under the Treaty of Waitangi itself. The authors note that s 11 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 purports to statutorily discontinue all court proceedings challenging the QMS and that s 33 of the Act purports to repeal s 88 (2) of the Fisheries Act 1983.

9.5 The authors note that on 27 February 1990 Maori and the Crown agreed that there should be discussions between them "to ensure that the evolution of the Quota Management System, including the term of quota, meets both conservation and Treaty of Waitangi requirements." They also agreed that all substantive court proceedings should stand adjourned sine die to allow the discussions to continue. The Crown agreed that no further species would be brought within the QMS pending agreement or court resolution. The authors note that the mandate given to the Maori negotiators in June 1988 was one to secure 50% of all available commercial quota.

9.6 As regards the Memorandum of Understanding of August 1992, the authors observe that it does not intend to create legal relations, nor does it indicate in any way a Crown intention to statutorily bind those tribes or subtribes who did not agree with the Sealords proposals. The authors claim that in some cases the contents of the Memorandum of Understanding were not adequately disclosed or explained to tribes and sub-tribes. In some cases, therefore, informed decision-making on the proposals contained in the Memorandum of understanding was seriously inhibited. The authors emphasize that while some of the Hui were supportive of the proposed Sealords deal, a significant number of tribes and sub-tribes either opposed the deal completely or were prepared to give it conditional support only.

9.7 With regard to the State party's statement that it understood from the Maori negotiators' report that a mandate had been given to conclude the Sealords' deal, the authors argue that this statement does not appear to accurately reflected the true Crown position on the mandate issue. They recall that the New Zealand Cabinet had approved specific criteria for ascertaining the sufficiency of any mandate to proceed with the formalisation of the proposal by Deed of Settlement, and that the mandate obtained clearly fell short of these criteria. The authors further deny any knowledge of negotiations, which, according to the State party, led to the Deed of Settlement. The authors further note that the Maori negotiators have been at pains to make that they had no authority and did not purport to represent individual tribes and sub-tribes in relation to any aspect of the Sealords deal, including the conclusion and singing of the Deed of Settlement. Moreover, some of the authors in their affidavits draw attention to "serious and disturbing procedural irregularities in relation to the process of execution of the Deed of Settlement." The authors observe that one of the difficulties of ascertaining the precise number of tribes who signed the Deed of Settlement relates to verification of authority to sign on behalf of the tribes, and claim that it is apparent that a number of signatories did not possess such author or that there was doubt as to whether they possessed such authority.

9.8 The authors state that only 17 tribes signed the Deed of Settlement, whereas a total of 80 tribes

were identified by the Government of New Zealand as being relevant to the issue of determining the sufficiency of any mandate to proceed with execution of the Deed of Settlement. The authors further note that tribes claiming major commercial fisheries resources, were not among the signatories. The authors argue that the Deed cannot constitute a binding step to settle the fisheries rights and claims of numerous tribes or sub-tribes who did not agree, as was also recognized by the New Zealand Court of Appeal. The authors note, however, that the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 purport to bind all Maori, including non-signatories to the Deed of Settlement. The authors claim that this action by the Government of New Zealand seriously violates their rights or freedoms, and the rights or freedoms of their tribes or sub-tribes, under the International Covenant on Civil and Political Rights.

9.9 In this context, the authors also emphasize that Notices of Discontinuance of existing litigation were not signed by all of the litigants whose proceedings were statutorily determined by s 11 (1) and (2) of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. In particular, the authors emphasize that Notices of Discontinuance were not signed on behalf of their tribes or sub-tribes and that these proceedings were statutorily discontinued without their tribes' or sub-tribes' consent by s 11 (2) (g) and (i) of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The authors note that on 29 September 1992, their tribes and sub-tribes commenced proceedings to challenge the Deed of Settlement, and its implementation by legislation, in the New Zealand High Court. Whereas the New Zealand Court of Appeal specifically held that "the Deed [of Settlement] is not binding on non-signatories", it decided the case on the basis that there was a general prohibition on the courts interfering in the legislative process, without dealing with the merits of the plaintiff tribes' and sub-tribes' case. In this connection, the authors observe that pursuant to the New Zealand Bill of Rights, Acts of the New Zealand Parliament cannot be challenged for non-compliance with the New Zealand Bill of Rights or, indeed, for non-compliance with the International Covenant on Civil and Political Rights.

9.10 The authors take issue with the State party's assertion that the Waitangi Tribunal concluded that the settlement was not contrary to the Treaty. They state that the Tribunal considered that the Deed of Settlement violated the principles of the Treaty of Waitangi in several important and fundamental respects, and that legislation seeking to implement the Deed of Settlement should be modified accordingly. In particular, the Waitangi Tribunal considered that the proposed extinguishment and/or abrogation of Treaty interests in commercial and non-commercial fisheries was contrary to the Treaty of Waitangi. It emphasized that the proposed extinguishment or abrogation of customary fishing rights, being fundamentally contrary to the Treaty of Waitangi, would require the consent of each tribe or sub-tribe, and that only consenting groups should be bound by that proposal. It expressed the view that the exclusion of access to judicial review in relation to non-commercial regulations was also contrary to the Treaty of Waitangi and to the Crown's duty of active protection under the Treaty.

9.11 The Waitangi Tribunal recommended to the Government that the legislation make no provision for the extinguishment of treaty fishing interests, and that the legislation in fact provide for those interests, that fish regulations and policies be reviewable in the courts against the Treaty's principles, and that the courts be empowered to have regard to the settlement in the event of future claims affecting commercial fish management laws. According to the authors the Government of New Zealand consciously ignored these recommendations.

9.12 The authors note that during the parliamentary debates every Maori member of the New Zealand House of Representatives spoke against the Treaty of Waitangi (Fisheries Claims) Settlement Bill 1992, and that they did so in strong terms. The authors also note that a formal request to refer the Treaty of Waitangi (Fisheries Claims) Settlement Bill 1992 to the relevant parliamentary select Committee for Maori Affairs for consideration and public submissions was rejected by the Government of New Zealand, and that the Government of New Zealand failed to refer the Bill to the Waitangi Tribunal, pursuant to s 8 (2) (a) of the Treaty of Waitangi Act 1975, for its opinion as to whether its provisions were contrary to the principles of the Treaty of Waitangi.

10.1 The authors refer to their affidavits and emphasize that they are personally victims of violations of the Covenant and that they are duly authorized to represent their tribes and sub-tribes. The authors submit that the references in their affidavits to violations of the Treaty of Waitangi are relevant in that they support their claims that they personally are victims of violations of rights contained in the Covenant.

10.2 The authors recognize that the Human Rights Committee has expressed the opinion that article 1 of the Covenant cannot be raised in claims under the Optional Protocol, 14/ but having regard to the fact that the Optional Protocol does not itself expressly preclude the submission of claims alleging a violation of article 1, submit that the Committee should review its approach. In this connection, the authors note that the Draft Declaration on the Rights of Indigenous Peoples, recently adopted by the UN Working Group of Indigenous Populations includes, in draft article 3, the right of indigenous peoples to self-determination.

10.3 The authors accept that article 2 of the Covenant can be violated only in conjunction with some other substantive provision of the Covenant and submit that the circumstances of the present case raise issues under both article 2 (1) and (3) of the Covenant, taken in conjunction with a number of the substantive provisions of the Covenant. In this context, the authors submit that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 only affects Maori in the exercise and enjoyment of their rights under the Covenant, and that the State party's actions cannot be reasonably or objectively justified. The authors further submit that there is no effective remedy under New Zealand law to challenge those provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 which the authors allege are in violation of the Covenant.

10.4 The authors submit that ss 9,10,11 and 33 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 violate their rights under article 14 (1) of the Covenant, to have access to court for the determination of their rights and obligations in a suit at law (see paragraphs 3.2 and 3.3 above). The authors submit that Maori fishing rights are clearly "rights and obligations in a suit at law" within the meaning of article 14 (1) of the Covenant because they are proprietary in nature. 15/ Prior to the enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, Maori filed numerous fishing claims in the courts. The authors submit that article 14 (1) of the Covenant guarantees the authors, and their tribes or sub-tribes, the right to have these disputes determined by a tribunal which complies with all of the requirements of article 14. In this context, it is submitted that although customary and aboriginal rights or interests can still be considered by the Waitangi Tribunal in the light of the principles of the Treaty of Waitangi, the Waitangi Tribunal's powers remain recommendatory only. The authors observe that s 11 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 expressly discontinued pending proceedings to which several of their

tribes or sub-tribes were a party. Finally, the authors argue that the repeal of s 88 (2) of the Fisheries Act 1983 also violates their rights and the rights of their tribes or sub-tribes, under article 14 (1) of the Covenant.

10.5 As regards their claim under article 16 of the Covenant, the authors submit that article 16 gives rise to autonomous rights and holds a position which is central to the interpretation of all other relevant provisions of the Covenant. The authors further submit that "the concept of personality from a Maori perspective is somewhat broader than the traditional legal notion of that term. For Maori, there is an inextricable link between personality and the universe. Maori existence, identity and personality are only ascertainable by reference to the constituent elements of the universe." The authors submit that a proper interpretation of article 16 of the Covenant needs to take fully into account a minority's concept of personality, since article 16 must be interpreted in the light of the article 27 guarantees. The authors emphasize that the issue here goes to the very essence of personality and identify of being Maori.

10.6 With regard to their claim under article 18, the authors refer to their affidavits filed in support of the admissibility of this communication, and submit that these affidavits clearly demonstrate that the Treaty of Waitangi (Fisheries Claims) Act significantly and seriously interferes with ability of the authors, and their tribes or sub-tribes, to manifest their spiritual beliefs "in worship, observance, practice and teaching". The authors submit that the legislation fundamentally impairs the spiritual world in which they, and their tribes or sub-tribes, have traditionally lived, since it establishes a new regime for the regulation of Maori fisheries which includes a fundamental relocation of regulatory power in the hands of the Director-General of Fisheries, and removes from Maori the full regulatory power over their fisheries.

10.7 The authors further argue that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 violates their right under article 26 of the Covenant to the equal protection of the law. The authors submit that the relevant provisions of the Act are discriminatory in that they subject the authors, and their tribes or sub-tribes, to different treatment attributable to their belonging to an identifiable distinct category of persons. They emphasize that no other group is affected by this legislation. The authors contest the State party's argument that article 26 of the Covenant is not applicable because it does not protect the special rights of indigenous people under treaties, legislation or customary law. The authors refer to the Committee's General Comment 18 and recall that article 26 of the Covenant "prohibits discrimination in law or in fact in any field regulated or protected by public authorities." The authors also contest the State party's position that the violations complained of by the authors are properly to be considered under article 27, and submit that their communication raises issues under both article 26, as well as article 27, of the Covenant.

10.8 The authors refer to the Committee's General Comment on article 27 and submit that article 27 of the Covenant clearly protects Maori enjoyment of their fishing rights. They contest the State party's position that the right of Maori to engage in fisheries activities has been "secured" by the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the Maori Fisheries Act 1989. The authors disagree with the State party's assumption that the benefits provided to Maori under the legislation constitute lawful satisfaction for the extinguishment and/or effective abrogation of Maori rights. It is submitted that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 imposes an artificial division upon their fishing rights or interests in their fisheries without

regard to the scared nature of the relationship which exists between the authors (both personal and tribal) and their fisheries; it effectively curtails the ability of the authors, and their tribes or sub-tribes, to protect their fisheries for future generations; it extinguishes and/or effectively abrogates their common law and Treaty of Waitangi rights or interests; it affects their ability to harvest and manage their fisheries in accordance with their cultural and religious customs and traditions; and it imposes a regime which relocates regulatory power over Maori fisheries in the hands of the Director-General of Fisheries.

10.9 The authors reiterate that the level of mandate achieved for the execution of the Deed of Settlement was clearly insufficient even when judged by the Government's own criteria for assessing the sufficiency of a mandate. They submit that the Waitangi Tribunal considered that the sufficiency of a mandate was qualified by the necessity to comply with the Treaty of Waitangi, and that the Waitangi Tribunal appears to have been unaware of the criteria which the Government of New Zealand had adopted to assess the sufficiency of a mandate. They also argue that the Waitangi Tribunal clearly expressed the view that the acceptability of any "inevitable compromise to the independent rangatiratanga of the dissentients" was predicted upon the modification of the implementing legislation by the Government of New Zealand in accordance with the Waitangi Tribunal's recommendations. The authors further argue that their case is distinguishable from the case of Grand Chief Donald Marshall et al. v. Canada, since that case did not concern the necessity of obtaining a minority group's consent to the extinguishment and/or effective abrogation of its property rights and denial of access to the courts to enforce those rights.

10.10 The authors argue that article 27 of the Covenant requires the Government of New Zealand to adduce convincing and cogent evidence which establishes the necessity and proportionality of its interferences with the rights and freedoms of the authors, and their tribes or sub-tribes, as guaranteed by article 27. The authors submit that the State party has not advanced any reasons why, nor provided any empirical evidence to substantiate that ss 9, 10, 11, 33, 34, 37 and 40 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 are "reasonable or necessary" to achieve the objectives of ensuring proper management of fisheries, including meeting international obligations for the conservation and management of marine living resources.

10.11 Furthermore, the authors submit that article 27 of the Convention requires the Government of New Zealand to take positive steps to assist Maori to enjoy their own culture and to profess and practise their own religion. They argue that, far from fulfilling this aspect of its obligations under article 27 of the Covenant, the Government of New Zealand has, by its enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, seriously interfered with the enjoyment by the authors, and their tribes or sub-tribes, of their rights or freedoms under article 27. The authors also submit that article 27 of the Covenant requires the Government of New Zealand to implement the Treaty of Waitangi and contend that the present communication raises complex issues of law concerning the interrelationship between the obligations of the Government of New Zealand under the Treaty of Waitangi and article 27 of the Covenant.

11. The authors contest the State party's assertion that they, or their tribes or sub-tribes, have "a number of avenues available to them to seek domestic remedies", and that "[n]one of these have been exercised". They emphasize that according to New Zealand law, it is impossible to challenge any of the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 on the basis

that they violate rights or freedoms recognized in the Covenant. In these circumstances, the authors submit that there are no effective remedies available to them under New Zealand law and there has been full compliance with article 5 (2) (b) of the Optional Protocol. In this context, the authors recall that the findings and recommendations of the Waitangi Tribunal are not legally binding of the Government of New Zealand and that the Government of New Zealand's record of implementation of Waitangi Tribunal recommendations has been less than fulsome.

12. The authors refer to their affidavits and submit that their claims raise specific, serious, substantive and significant issues concerning the Government of New Zealand's compliance with its obligations under the Covenant. It is submitted that on no reasonable basis could it be maintained that the communication should be regarded as only a generalized attack against the settlement. Accordingly, the authors submit that the Government of New Zealand's contention that the present communication constitutes an abuse of the right of submission is without substance or foundation.

State party's further submission

13.1 By a further submission of 6 September 1995, the State party comments on some issues raised by the authors.

13.2 The State party notes that the authors have requested the Committee to consider specific allegations of violations of the Treaty of Waitangi and submits that the Committee has no competence to pronounce upon the validity of actions under the Treaty, except in so far as such actions may constitute a breach of articles 6 to 27 of the Covenant.

13.3 The State party also provides additional background information about the Fisheries Management in New Zealand. It states that the fishing industry saw a dramatic growth in the early 1960s with the expansion of an exclusive fisheries zone of nine, and later 12 miles. At that time, all New Zealanders, including Maori, could apply for and be granted a commercial fishing permit; the majority of commercial fishers were not Maori, and of those who were, the majority were part-time fishers. In the early 1980s, inshore fisheries were over-exploited and the Government placed a moratorium on the issue of new permits and removed part-time fishers from the industry. This measure had the unintended effect of removing many of the Maori fishers from the commercial industry. Since the efforts to manage the commercial fishery fell short of what was needed, the Government introduced a system of quota management in 1986. This system generated opposition from Maori, who, because of their low representation in the commercial fishing industry, had not been allocated significant quantities of quota. Following several actions the Courts instructed the Minister of Fisheries not to proceed with the implementation of the Quota Management System until Maori rights to commercial fishery had been resolved. The Government then embarked on negotiations with the Maori in an effort to reach a settlement. These negotiations first resulted in the Maori Fisheries Act 1989. Under the Act, Maori can apply to manage the fishery in areas which had customarily been of special significance to a tribe or sub-tribe, either as a source of food or for spiritual reasons.

13.4 Following the Waitangi Tribunal report of August 1992 on the Ngai Tahu Sea Fishing, in which it found that Ngai Tahu, the largest tribe from the South Island of New Zealand, had a development right to a reasonable share of deep water fisheries, the Maori Fisheries Negotiators and

the Maori Fisheries Commission approached the Government with a proposition that the Government provide funding for the purchase of Sealords as part of a settlement of Treaty claims to Fisheries. Negotiations were then entered into, leading to the signing of the Memorandum of Understanding and subsequently to the Deed of Settlement, which provided the platform for the enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

13.5 The State party emphasizes that it is evident from the Memorandum of Understanding that it was the common understanding of the Government and the Maori Fisheries Negotiators that the settlement was conditional on confirmation of the Negotiators' mandate to act on behalf of all Maori. Subject to this confirmation, the proposal stipulated that the Sealords purchase would result in the settlement of all Maori rights and interests in New Zealand's commercial fisheries, that the settlement would include the introduction of legislation to repeal section 88 (2) of the Fisheries Act 1983 and all other legislation conferring legal entitlements to all Maori fisheries rights and interests, the discontinuance of all litigation in pursuit of Maori rights or interests in commercial fishing and Maori endorsement of the Quota Management System. The State party refers to the Court of Appeal decision in Te Runanga o Wharekauri Rekohu v. Attorney-General, in which it was found that the proposal negotiated between the Government and the Maori Fisheries Negotiators was consistent with the Government's duty under the Treaty of Waitangi and that a failure to take the opportunity presented by the availability of Sealords for purchase would have been inconsistent with that duty. The State party further refers to similar sentiments expressed by the Waitangi Tribunal.

13.6 As regards the question whether the Deed had sufficient support from Maori, the Government refers to the finding of the Waitangi Tribunal, that there was indeed a mandate for the settlement, provided that the Waitangi Treaty was not compromised. In this connection, the State party emphasizes that it is essential to the process of reaching any agreement between Government and Maori that the Government be able to negotiate freely with persons who represent the spectrum of Maori interests and have an adequate mandate to speak on behalf of wider groups. In this connection, the State party submits that the settlement could only be workable if applicable to all Maori. The State party adds that the ascertainment of the adequacy of a mandate on the part of the Maori negotiators is complicated by the lack of formalised lines of accountability in the Maori community.

13.7 As to the actual negotiations, the State party submits that the four Maori negotiators had been appointed by a national hui of Maori held in June 1988. By the time of the Sealords negotiations they had been joined by four alternatives whose appointment had been endorsed at an annual general meeting of the Maori Fisheries Commission in July 1992. The State party emphasizes that the eight negotiators were chosen by Maori to represent Maori. The State party explains that, after the signing of the Memorandum of Understanding, the Negotiators embarked on a series of hui and other consultations to explain the agreement to Maori and to seek their endorsement, in the short time available for the confirmation of the Sealords deal. The State party provides figures of attendance and representation and concludes that it is clear that those iwi in support of the deal represented a large majority of Maori who are affiliated to an iwi. The State party acknowledges that Maori were not unanimously in support of the Sealords deal and that there were significant voices of opposition raised. It submits, however, that against this opposition, it had to weigh the fact that the large majority of Maori, including prominent and influential members, were in favour of the deal. Furthermore, the State party emphasizes that responsibility for satisfying the Government that the

proposal had the support of Maori lay with the Negotiators, and that the process of internal decision making within Maori was not a matter of direct concern to the Government which was entitled to reply on the report of the Negotiators. As regards the authors' contention that the support expressed fell short of the Government's own standards, the State party explains that the criteria referred to by the authors were developed in order to assess the political risk of a settlement. While not all the criteria established were satisfied, the general impression was that the Sealords' proposal had the overall support of Maori. In this connection, the State party points out that they received similar advice from the Maori Fisheries Commission on this point.

13.8 The State party submits that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 basically gives effect to the provisions of the Deed and takes into account the recommendations of the Waitangi Tribunal, expressing the settlement as being in fulfilment, satisfaction and discharge of Maori rights to commercial fishing. The State party emphasizes that while section 9 of the Act excludes from the jurisdiction of the court the ability to enquire directly into Maori commercial fishing claims, it does not affect the ability of the courts to enquire into Maori rights to the benefits secured by the settlement of such claims. As regards non-commercial fishing rights, the State party explains that section 10 of the Act does not extinguish Maori interests, but, in order to ensure certainty and equity as to the nature and content of non-commercial fishing rights, excludes those rights from direct legal enforcement except in the context of regulations recommended by the Minister, after consultations with Maori. Since the principles of the Treaty of Waitangi continue to apply to non-commercial fishing rights, the regulations or decisions made under the regulations can be reviewed by the courts for their compliance with the Treaty.

13.9 As to the authors' criticism of the Quota Management System, the State party states that the system was introduced out of the need for effective measures to conserve the depleted inshore fishery. In this context, the State party submits that it had a duty to all New Zealanders to conserve and manage the resource for further generations. The State party emphasizes that while the Quota Management System imposed a new regime which changed the nature of the Maori commercial fishing interest, this was based on the reasonable and objective needs of overall sustainable management.

13.10 As to recent developments, the State party submits that widespread consultation with Maori has been initiated at a local level in order to develop regulations under section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act, which will recognize and provide for Maori customary rights and interests. The State party adds that judicial review of the Minister's acts under the regulations is possible, as in a consideration of the form of the regulations by the Waitangi Tribunal.

13.11 The State party denies that the Treaty of Waitangi (Fisheries Claims) Settlement Act deprives Maori of their rights to access to the Courts in respect of fishing rights and refers to numerous cases pending before the Courts in relation to the proposed allocation of fisheries resources amongst Maori. The State party explains that the right to revenue through quota, together with Maori participation in the Sealords deal, is the modern day embodiment of Maori claims to the commercial fishery. The State party reiterates that the 1992 Act did not extinguish Maori rights to commercial fishing, but, on the contrary, satisfied and discharged them, and in so doing, changed the manner in which they found expression. The State party submits that while the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 excluded from the jurisdiction of the Courts the right to inquire directly

into commercial fishing rights per se, it imposed no restriction on the ability to challenge before the courts the right to revenue resulting from the settlement.

13.12 The State party further submits that a comprehensive review of all fisheries legislation is under way and that the draft Bill makes significant provision for Maori interests which will complement and consolidate the Treaty of Waitangi (Fisheries Claims) Settlement Act.

14.1 The State party maintains that the communication is inadmissible in all its aspects. Whereas the State party does not maintain its challenge to the standing of the authors, it points out that other Maori who have similar standing and claims to authority within the same tribes as some of the authors have taken very different positions from those of the authors, both as to the overall acceptability of the Fisheries Settlement and as to the extent to which their particular tribe consented to it.

14.2 As regards the authors' claim under article 1 of the Covenant, the State party reiterates that this claim is inadmissible in the light of the prior jurisprudence by the Committee. As to the reference made by the authors to the inclusion of a right to self-determination in a Draft Declaration on the Rights of Indigenous Peoples, the State party submits that this inclusion, which is still subject to negotiation among States, can have little bearing of the interpretation of article 1 of the Covenant and on the Committee's decisions under the Optional Protocol in this regard.

14.3 The State party reiterates that the authors' claim under article 2 of the Covenant is inadmissible, since they have failed to substantiate a breach by the State party of this article. The State party contends that, since there have been no violations of the rights guaranteed under part II of the Covenant in the context of the Fisheries Settlement, the issue of remedy is moot. In this connection, the State party explains that pursuant to the constitutional arrangements, the Bill of Rights cannot be invoked before the Courts as a ground for striking down legislation. However, if the Attorney - General is of the opinion that a provision in a Bill before Parliament might be inconsistent with the Bill of Rights, he has to prepare a report for consideration by Parliament. As regards the Treaty of Waitangi (Fisheries Claims) Settlement Bill, the Attorney-General concluded that no such inconsistency arose.

14.4 As regards the authors' claim that their rights under article 14, paragraph 1, have been violated, the State party contends that the authors' interpretation of article 14, paragraph 1, is clearly beyond the scope of what the right was intended to guarantee. The State party submits that the requirements of article 14, paragraph 1, do not exist in a vacuum but must be interpreted in the light of its object and purpose in the Covenant. In this connection, the State party refers to the Committee's general comment on article 14 and submits that the object and purpose of article 14, paragraph 1, are clear: the article prescribes procedural standards which must be upheld to ensure the proper administration of justice. The State party refers to the introductory words of the second sentence of article 14, paragraph 1, "in the determination of" and argues that these words establish the need for jurisdiction on the part of the competent courts or tribunals before the procedural requirements prescribed by the article arise. The State party submits that to the extent that rights are recognized in common law or statute as being justiciable, the authors are being guaranteed their right under article 14, paragraph 1. Whereas the State party acknowledges that article 14, paragraph 1, can be interpreted as guaranteeing a right to access to court where an individual has rights recognized at law and when

the court or tribunal has jurisdiction to consider those rights, it contests that article 14, paragraph 1, gives the right to have any matters adjudicated where there is no court or tribunal with jurisdiction to consider such matters and regardless of whether the claim is based on rights which have been recognized as justiciable under the domestic law in place at that time.

14.5 Moreover, the State party recalls that sections 9 and 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 do not abolish Maori rights to adjudication in matters of fishing (see 13.8 and 13.11 above). In this context, the State party explains that the rationale for the discontinuance of proceedings in section 11 of the Act was not to deny the claimants their right to adjudication, but because those claims had been settled through the Act.

14.6 As regards the authors' claim under article 16 of the Covenant, the State party notes that the arguments they put forward in substantiation of their claim, do not relate to and are therefore incompatible with article 16.

14.7 As to the arguments put forward by the authors in substantiation of their claim under article 18, the State party notes that their analysis of the effects of the new Act fails to acknowledge the very influential role that Maori will play in establishing the regulatory regime for non-commercial fishing under the Act, and ignores the fact that the regime itself is subject to the principles of the Treaty of Waitangi.

14.8 As to the authors' claim under article 26, the State party explains that, to the extent that a differentiation is made between Maori and non-Maori New Zealanders in the recognition of fishing rights, this differentiation is based on "reasonable and objective criteria", namely the Government's responsibility under the Treaty of Waitangi to protect the interests of Maori.

14.9 As regards the authors' claim under article 27, the State party reiterates that they have failed to substantiate their allegation, since the rights of Maori to engage in fisheries activities were not extinguished and have indeed been secured through the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The State party submits that the Act provides a vehicle for full Maori participation, on terms set by Maori, in a company controlled by Maori, in the commercial fishing industry, and specifically protects Maori rights in and influence over the non-commercial fishery. In this connection, the State party argues that the authors' claim that the right to freedom to religion guaranteed to minorities by article 27 entitles them to complete freedom from regulation cannot be sustained on the basis of the Covenant. The State party also takes issue with the authors' assertion that their case is distinguishable from the case of Grand Chief Donald Marshall et al. v. Canada and argues that the distinction made by the authors is not sustainable in the light of the comments made by the Waitangi Tribunal. The State party recalls that a minority's right to enjoy its culture must be viewed in context, and that such right may be subject to reasonable regulation or other controls or limitations, provided that this does not amount to a denial of the right, and provided that the measures have a reasonable and objective justification and are consistent with the other provisions of the Covenant. The State party submits that the Treaty of Waitangi (Fisheries Claims) Settlement Act fulfils these criteria.

Issues and proceedings before the Committee

15.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

15.2 The Committee has ascertained, as required under article 5, paragraph 2 (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

15.3 The Committee has taken note of the State party's contention that the authors have not exercised any avenues available to them to seek domestic remedies, including the possibility to bring claims concerning non-commercial fisheries before the Waitangi Tribunal, and the possibility to seek a declaration that regulations relating to customary food gathering were ultra vires; with regard to commercial fisheries, procedures exist for the Maori to seek review of the Treaty of Waitangi Fisheries Commission's decisions (see paras. 6.1-6.4 above). The Committee observes, however, that the State party has not shown how the stated remedies would, in practice, be available and effective in the specific circumstances of the authors' communication, which includes a specific complaint that remedies formerly available to them have now been repealed, it further notes that the authors' disputes with the Government of New Zealand are long-standing, in particular that the Maori tribes filed an application with the High Court of New Zealand in 1987 and that because of the nature of the disputes, the exhaustion of domestic remedies would be very prolonged. The Committee therefore finds that it is not precluded by article 5, paragraph 2 (b), from considering the communication.

15.4 As to the State party's argument that the authors' communication pertaining to self-determination should be declared inadmissible because the Committee is not empowered to consider communications alleging violations of article 1 of the Covenant, the Committee finds that, in the instant case, only the consideration of the merits of the case will enable the Committee to determine the relevance of article 1 to the authors' claims under article 27.

15.5 The Committee has taken due note of the authors' claim, formulated in its response to the State party's observations on admissibility (see para. 10.4), that the new legal regime in New Zealand effectively denies them the right to have access to court for the determination of their fishing rights, which they contend are "rights and obligations in a suit at law". In this connection, the Committee notes that the authors had already filed numerous fishing claims in the courts prior to the enactment of the 1992 Settlement Act, which were discontinued by virtue of the new law. The Committee has also noted the State party's contention that the authors' interpretation of article 14 is so far too broad and that the article does not provide a general right to access to court in the absence of rights and jurisdiction recognized by law. The Committee considers that the scope of article 14, paragraph 1, and its application to the authors' case is an issue which should be examined on the merits.

15.6 As to the authors' claim under article 16 of the Covenant, the Committee finds that the facts submitted do not appear to come within the scope of this article. It notes that whereas some claims are no longer justiciable, the Maori are not denied their legal personality to engage in legal proceedings generally. This part of the communication is therefore inadmissible.

15.7 With regard to the authors' allegations under articles 18 and 26 of the Covenant, the

Committee finds that the authors have not substantiated, for purposes of admissibility, how the Treaty in question or any actions of the Government of New Zealand could be deemed to violate their rights to freedom of religious worship and belief or otherwise subject them to discrimination or to a denial of equality before the law.

15.8 As to the authors' claims under article 27, the Committee recalls its jurisprudence that economic authority such as fishing may be part of a people's culture and as such protected under article 27. 16/ The Committee finds that the authors have substantiated their claims, for purposes of admissibility.

16. The Committee is well aware that both parties have already, in their submissions under rule 91 of the rules of procedure, commented extensively on the merits of the authors' claims. At this stage the Committee must, however, limit itself to the procedural requirement of deciding whether or not the communication is admissible. Should the State party wish to make a further submission on the merits of the case, it should do so within six months of the transmittal to it of the present decision. The authors of the communication will be given an opportunity to comment thereon. If no further explanations or statements are received from the State party under article 4, paragraph 2, of the Optional Protocol, the Committee will proceed to adopt its Views in the light of the written information already submitted.

17. The Human Rights Committee therefore decides:

(a) That the communication is admissible in so far as it may raise issues under articles 14, paragraph 1, and 27 in conjunction with article 1 of the Covenant;

(b) That, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by it;

(c) That any explanations or statements received from the State party shall be communicated by the Secretary-General to the authors, under rule 93, paragraph 3, of the Committee's rules of procedure, with the request that any comments which the authors may wish to submit thereon should reach the Human Rights Committee, in care of the Centre for Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

(d) That this decision shall be communicated to the State party and to the authors of the communication.

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*/ All persons handling this document are requested to respect and observe its confidential nature.

1/ Communication No. 167/1984, Views adopted on 26 March 1990, CCPR/C/38/D/167/1984, paragraph 32.2.

2/ hui: assembly.

3/ Marae: area set aside for the practice of Maori customs.

4/ Te Runanga o Wharekauri Rekohu Inc. v. Attorney General [1993] 2 NZLR 301.

5/ The Waitangi Tribunal is a specialized statutory body established by the Treaty of Waitangi Act 1975 having the status of a commission of enquiry and empowered inter alia to inquire into certain claims in relation to the principles of the Treaty of Waitangi.

6/ Communication No. 78/1980, declared inadmissible inter alia because "the author had not proven that he is authorized to act as a representative on behalf of the Mikmaq tribal society."

7/ Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada No. 167/1984, CCPR/C/38/D/167/1984 of 28 March 1990, para. 32.1, A.B. et al. v. Italy No. 413/1990, CCPR/C/40/D/413/1990 of 2 November 1990, para. 3.2.

8/ Communication No. 24/1977, Views adopted of 30 July 1981, paragraphs 13.1 and 13.2.

9/ Figures based on the 1991 census: the lower figure represents the number of people who identified themselves as belonging solely to the New Zealand Maori ethnic group, while the latter represents the number who identified themselves as having some Maori ancestry.

10/ rangatiratanga: the ability to exercise authority over assets, both physical and intangible.

11/ Iwi: tribe, incorporating a number of constituent hapu (sub-tribes).

12/ Communication No. 205/1986, Views adopted on 4 November 1991.

13/ Communication No. 197/1985, Views adopted on 27 July 1988.

14/ Communication No. 167/1984, Lubicon Lake Band v. Canada, Views adopted on 26 March 1990, CCPR/C/38/D/167/1984, para 32.1.

15/ The authors refer to jurisprudence of the European Court of Human Rights, which has consistently held that rights of property are "civil rights and obligations " within the meaning of Article 6 (1) of the European Convention on Human Rights. This, it is submitted, is highly persuasive authority for the view that rights of property are also " rights and obligations in a suit at law" within the meaning of article 14 (1) of the Covenant, since the relevant French texts of article 14 (1) and article 6 (1) are identical ("ses droits et obligations de caractère civil"), and the two provisions share a common genesis as demonstrated by their drafting history.

16/ Communication No. 197/1985, Kitok v. Sweden, Views adopted on 27 July 1988, para. 9.2.