

HUMAN RIGHTS COMMITTEE

Mahuika et al. v. New Zealand

Communication No 547/1993

27 October 2000

CCPR/C/70/D/547/1993

VIEWS

Submitted by: Apirana Mahuika et al. (represented by Maori Legal Service)

Alleged victim: The authors

State party: New Zealand

Date of communication: 10 December 1992 (initial submission)

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

- CCPR/C/55/D/547/1993, decision on admissibility, 13 October 1995

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

Meeting on 27 October 2000,

Having concluded its consideration of communication No. 574/1993 submitted to the Human Rights Committee by Apirana Mahuika et al. 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:

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

1. The authors of the communication are Apirana Mahuika and 18 other individuals, belonging to the Maori people of 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.

2. At its 55th session, the Human Rights Committee considered the admissibility of the communication and found that the requirements under article 5, paragraph 2, of the Optional Protocol did not preclude it from considering the communication. However, the Committee declared inadmissible the authors' claims under articles 16, 18 and 26 for failure to substantiate, for purposes of admissibility, that their rights under these articles were violated.

3. When declaring the authors' remaining claims admissible in so far as they might raise issues under articles 14(1) and 27 in conjunction with article 1, the Committee noted that only the consideration of the merits of the case would enable the Committee to determine the relevance of article 1 to the authors' claims under article 27.

4. In their submission on admissibility, both parties commented extensively on the merits of the claims before the Committee. After the communication was declared admissible, the State party presented additional observations, to which the authors did not comment.

The factual background

5.1 The Maori people of New Zealand number approximately 500,000, 70% of whom are affiliated to one or more of 81 iwi (1). The authors belong to seven distinct iwi (including two of the largest and in total comprising more than 140,000 Maori) and claim to represent these. In 1840, Maori and the predecessor of the New Zealand Government, the British Crown, signed the Treaty of Waitangi, which affirmed the rights of 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 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)

The Treaty of Waitangi is not enforceable in New Zealand law except insofar as it is given force of law in whole or in part by Parliament in legislation. However, it imposes obligations on the Crown and claims under the Treaty can be investigated by the Waitangi Tribunal. (3)

5.2 No attempt was made to determine the extent of the fisheries until the introduction of the Quota Management System in the 1980s. 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 rights in quota for each commercial species within the system.

5.3 The New Zealand fishing industry had seen a dramatic growth in the early 1960s with the expansion of an exclusive fisheries zone of nine, and later twelve 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. By 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, in 1986 the Government 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 contrary to section 88(2) of the Fisheries Act, and obtained interim injunctions against the Government.

5.4 In 1988, the Government started negotiations with Maori, who were represented by four representatives. The Maori representatives were given a mandate to negotiate to obtain 50% of all New Zealand commercial fisheries. In 1989, after negotiation and as an interim measure, 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. Under the Act, Maori can also 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.

5.5 Although the Maori Fisheries Act 1989 was understood as an interim measure only, there were limited opportunities to purchase any more significant quantities of quota on the market. In February 1992, Maori became aware that Sealords, the largest fishing company in Australia and New Zealand was likely to be publicly floated at some time during that year. 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. Initially the Government refused, but following the Waitangi Tribunal report of August 1992 on the Ngai Tahu Sea Fishing, in which the Tribunal 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 Government decided to enter into negotiations. These negotiations led on 27 August 1992 to the signing of a Memorandum of Understanding between the Government and the Maori negotiators.

5.6 Pursuant to this Memorandum, the Government would provide Maori with funds required to purchase 50% of the major New Zealand fishing company, Sealords, which owned 26% of the then available quota. In return, 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 Act 1975, to exclude from the Waitangi Tribunal's jurisdiction claims relating to commercial fishing. The Crown also agreed to allocate 20% 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.

5.7 The Maori negotiators sought a mandate from Maori for the deal outlined in the memorandum

of understanding. The memorandum and its implications were debated at a national hui (4) and at hui at 23 marae (5) throughout the country. The Maori negotiators' report showed that 50 iwi comprising 208,681 Maori, supported the settlement (6). On the basis of this report, the Government was satisfied that a mandate for a settlement had been given and 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. 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. Paragraph 5.1 of the Deed reads:

“Maori agree that this Settlement Deed, and the settlement it evidences, shall satisfy all claims, current and future, 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."

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.

5.8 According to the authors the contents of the Memorandum of Understanding were not always 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. The authors further note that the Maori negotiators

have been at pains to make clear 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 signing of the Deed of Settlement.

5.9 The Deed was signed by 110 signatories. Among the signatories were the 8 Maori Fisheries Negotiators (the four representatives and their alternates), two of whom represented pan-Maori organisations (7); 31 plaintiffs in proceedings against the Crown relating to fishing rights, including representatives of 11 iwi; 43 signatories representing 17 iwi; and 28 signatories who signed the Deed later and who represent 9 iwi. 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 authority or that there was doubt as to whether they possessed such authority. The authors note that tribes claiming major commercial fisheries resources, were not among the signatories.

5.10 Following the signing of the Deed of Settlement, the authors and others 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 (8). 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.

5.11 Claims were then brought to the Waitangi Tribunal, which issued its report on 6 November 1992. The report concluded that the settlement was not contrary to the Treaty except for some aspects which could be rectified in the anticipated legislation. In this respect, the Waitangi Tribunal considered that the proposed extinguishment and/or abrogation of Treaty interests in commercial and non-commercial fisheries was not consistent with the Treaty of Waitangi or with the Government's fiduciary responsibilities. The Tribunal recommended to the Government that the legislation make no provision for the extinguishment of interests in commercial fisheries and that the legislation in fact affirm those interests and acknowledge that they have been satisfied, that fishery 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.

5.12 On 3 December 1992, the Treaty of Waitangi (Fisheries Claims) Settlement Bill 1992 was introduced. Because of the time constraints involved in securing the Sealords bid, 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 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."

The Act provides *inter alia* for the payment of NZ\$ 150,000,000 to Maori. The Act also states in section 9, that "all claims (current and future) by Maori in respect of commercial fishing are hereby finally settled" and accordingly:

"The obligations of the Crown to Maori in respect of commercial fishing are hereby fulfilled, satisfied, and discharged; and no court or 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," "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."

With respect to the effect of the settlement on non-commercial Maori fishing rights and interests, it is declared that these shall continue to give rise to Treaty obligations on the Crown and that regulations shall be made to recognise and provide for customary food gathering by Maori. The rights or interests of Maori in non-commercial fishing giving rise to such claims shall no longer have legal effect and accordingly are not enforceable in civil proceedings and 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. According to the Act, the Maori Fisheries Commission was renamed to Treaty of Waitangi Fisheries Commission, and its membership expanded from seven to thirteen members. Its functions were also expanded. In particular, the Commission now has the primary role in safeguarding Maori interests in commercial fisheries.

5.13 The joint venture bid for Sealords was successful. After consultation with Maori, new Commissioners were appointed to the Treaty of Waitangi Fisheries Commission. Since then, the value of the Maori stake in commercial fishing has grown rapidly. In 1996, its net assets had increased to a book value of 374 million dollars. In addition to its 50% stake in Sealords, the Commission now controls also Moana Pacific Fisheries Limited (the biggest in-shore fishing company in New Zealand), Te Waka Huia Limited, Pacific Marine Farms Limited and Chatham Processing Limited. The Commission has disbursed substantial assistance in the form of discounted annual leases of quota, educational scholarships and assistance to Maori input into the development of a customary fishing regime. Customary fishing regulations have been elaborated by the Crown in consultation with Maori.

The complaint:

6.1 The authors 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. 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. In this context, the authors claim that the right to self-determination under article 1 of the Covenant is only effective when people have access to and control over their resources.

6.2 The authors claim that the Government's actions are threatening their way of life and the culture of their tribes, in violation of article 27 of the Covenant. 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." (9)

6.3 The authors recall that the Quota Management System was found by the Waitangi Tribunal to be in 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. With the enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, QMS has been validated for all purposes. They state that by repealing s 88(2) of the Fisheries Act 1983, Maori fishing rights are no longer protected.

6.4 Some of the authors claim that no Notices of Discontinuance were signed on behalf of their tribes or sub-tribes in respect of fisheries claims that were pending before the courts 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. This is said to constitute a violation of their right 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. In this context, 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. 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.

6.5 The authors submit that prior to the enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, they had a right of access to a court or tribunal based on s 88 of the Fisheries Act to protect, determine the nature and extent, and to enforce their common law and Treaty of Waitangi fishing rights or interests. The repeal of this section by the 1992 Act interferes with and curtails their right to a fair and public hearing of their rights and obligations in a suit at law as guaranteed by article 14(1) of the Covenant, because there is no longer any statutory framework within which these rights or interests can be litigated.

The State party's observations

7.1 With regard to the authors' claim under Article 27, the State party accepts that the enjoyment of Maori culture encompasses the right to engage in fishing activities and it accepts that it has positive obligations to ensure that these rights are recognised. The Fisheries Settlement, it submits, has achieved this. According to the State party, 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 outcome of the Fisheries Settlement is that Maori, who constitute approximately 15% of the population of New Zealand, now have effective control of New Zealand's largest deep water fishing fleet and over 40% of New Zealand's fishing quota. The Settlement is the vehicle that has ensured Maori participation in the commercial fishing industry - on terms set by Maori in a company in which Maori exercise effective control through their shareholding and their representatives on the Board of Directors. According to the State party, the Fisheries Settlement has placed Maori in an unprecedented position to expand their presence in the market through the acquisition of further quota and fishing assets, as well as through diversification in international catching, processing and marketing. This is a route that the Treaty of Waitangi Fisheries Commission and its companies, as well as individual tribes, are increasingly following. The Fisheries Settlement also specifically protects Maori non-commercial fishing rights and statutory regulations have been developed to ensure that provision is made for customary food gathering and that the special relationship between Maori and places of importance for customary food gathering is recognised.

7.2 Further, the State party notes that rights of minorities contained in Article 27 are not unlimited. They may be subject to reasonable regulation and other controls or limitations, provided that these measures have a reasonable and objective justification, are consistent with the other provisions of the Covenant and do not amount to a denial of the right. In the case of the Fisheries Settlement the State party had a number of important obligations to reconcile. It was necessary to balance the concerns of individual dissentients against its obligations to Maori as a whole to secure a resolution to fisheries claims and the need to introduce measures to ensure the sustainability of the resource.

7.3 Moreover, 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's 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.

7.4 As regards the authors' statement 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 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. The State party also refers to the opinion of the Waitangi Tribunal, "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 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". 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 rely on the report of the Negotiators. The State party further refers to the Committee's decision in *Grand Chief Donald Marshall et al. v. Canada* (11) where the Human Rights Committee rejected a claim that all tribal groups should have a right to participate in consultations on aboriginal matters.

7.5 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 future generations. The State party recalls that the decisions by the Waitangi Tribunal and the Court of Appeal, while criticising the initial implementation, recognised that the purpose and intention of the Quota Management System was not necessarily in conflict with the principles and terms of the Treaty of Waitangi. 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.

7.6 With regard to the Committee's statement when declaring the communication admissible that only at the determination of the merits of the case will the Committee be able to determine the relevance of Article 1 to the authors' claims under Article 27, the State party submits that it would be most concerned if the Committee were to depart from the position which has been accepted by States parties to the Covenant and by the Committee itself that the Committee has no jurisdiction to consider claims regarding the rights contained in Article 1. Those rights have long been recognised as collective rights. Therefore, they fall outside the Committee's mandate to consider complaints by individuals, and it is not within the ambit of the Optional Protocol procedures for individuals purporting to represent Maori to raise alleged violations of the collective rights contained in Article 1. The State party further argues that the rights in Article 1 attach to "peoples" of a state in their entirety, not to minorities, whether indigenous or not, within the borders of an independent and democratic state. Moreover, the State party challenges the authors' authority to speak on behalf of the majority of the members of their tribes.

7.7 With respect to the authors' claim that they are victims of a violation of Article 14(1) of the Covenant, the State party submits that the authors' complaint is fundamentally misconceived and amounts to an attempt to import into the Article a content which is not consistent with the language

of the Article and which was not intended at the time the Covenant was drafted. According to the State party, Article 14 does not provide a general right of access to courts in the absence of rights and jurisdiction recognised by law. Rather Article 14 sets out procedural standards which must be upheld to ensure the proper administration of justice. The requirements of Article 14 do not arise in a vacuum. The State party submits that the introductory words of the Article make it clear that the guarantee of those procedural standards arises only when criminal or civil proceedings are in prospect; that is, when there is a legal cause of action to be tried in a court of competent jurisdiction. The consequence of the position put forward by the authors would be that a State's legislature could not determine the jurisdiction of its Courts and the Committee would be involved in making substantive decisions on the justiciability of rights in domestic legal systems which extend far beyond the guarantees in the Covenant.

7.8 The State party adds that the authors' complaint seeks to obscure the central element of the 1992 Settlement. In the State party's opinion, the authors' argument that the Settlement extinguished a right to go to court in respect of pre-existing claims ignores the fact that the Settlement in fact settled those claims by transforming them into a guaranteed entitlement to participate in the commercial fisheries. Since those claims had been settled, by definition there could no longer be a right to go to court to seek a further expansion of those rights. The State party explains, however, that while any pre-existing claims can no longer found a cause of action, Maori fisheries issues do remain within the jurisdiction of the courts. Decisions of the Treaty of Waitangi Fisheries Commission regarding the allocation of the benefits of the Settlement are subject to review by the courts in the same manner as decisions of any other statutory body. Likewise the regulations regarding customary fishing rights and decisions taken pursuant to these regulations are reviewable by the courts and the Waitangi Tribunal. Recent litigation before the New Zealand courts, including that before the Court of Appeal regarding the extent to which urban Maori who are unaffiliated with iwi structures have the right to benefit from the Settlement and regarding a proposed allocation of benefit of the Settlement, demonstrate conclusively that access to the courts remains. In addition, Maori who are engaged in fishing activities have exactly the same rights as any other New Zealander to go to court to challenge decisions of the Government which affect those rights or to seek protection of those rights from encroachment by others.

7.9 In conclusion, the State party asserts that the Fisheries Settlement has not breached the rights of the authors, or of any other Maori, under the Covenant. On the contrary, the State party submits that the Settlement should be regarded as one of the most positive achievements in recent years in securing the recognition of Maori rights in conformity with the principles of the Treaty of Waitangi. The State party states that it is committed to resolve and settle Maori grievances in an honourable and equitable manner. It acknowledges that any such settlements, which require a degree of compromise and accommodation on both sides, are unlikely to attract unanimous support from Maori. In this context, it states that the Settlement did not have unanimous support from non-Maori New Zealanders either. Indeed, it was evident from public reaction at the time that a significant proportion of non-Maori New Zealanders were opposed to the Settlement and did not accept that Maori should be accorded distinctive rights to the New Zealand fisheries. However, the State party observes that it cannot allow itself to be paralysed by a lack of unanimity, and it will not use the withholding of agreement by some dissentients, Maori or non-Maori, as an excuse for failing to take positive action to redress Maori grievances in circumstances where such action has the clear support of the majority of interested Maori. The State party therefore submits that the Committee should

dismiss the authors' complaints.

Authors' comments on the State party's submission:

8.1 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. The authors further submit that "if the Government of New Zealand wishes to arrogate to itself the power to regulate Maori fisheries without the consent of the authors, and their tribes or sub tribes who are recognised as having rangatiratanga and dominion over, and property interests in, those fisheries pursuant to the Treaty of Waitangi, article 27 of the Covenant requires the Government of New Zealand to adduce convincing and cogent evidence which established 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 adduced any such evidence.

8.2 Furthermore, the authors submit that article 27 of the Covenant requires the State party to take positive steps to assist Maori to enjoy their own culture. They argue that, far from fulfilling this aspect of its obligations under article 27 of the Covenant, the State party 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. The authors emphasize that fishing is a fundamental aspect of Maori culture and religion. As an articulation of this close relationship they refer to the following passage in the Muriwhenua Fishing Report by the Waitangi Tribunal. (12)

"To understand the significance of such key Treaty words as "taonga" and "tino rangatiratanga" each must be seen within the context of Maori cultural values. In the Maori idiom "taonga" in relation to fisheries equates to a resource, to a source of food, an occupation, a source of goods for gift-exchange, and is a part of the complex relationship between Maori and their ancestral lands and water. The fisheries taonga contains a vision stretching back into the past, and encompasses 1,000 years of history and legend, incorporates the mythological significance of the gods and taniwha, and of the tipuna and kaitiaki. The taonga endures through fluctuations in the occupation of tribal areas and the possession of resources over periods of time, blending into one, the whole of the land, waters, sky, animals, plants and the cosmos itself, a holistic body encompassing living and non-living elements.

This taonga requires particular resource, health and fishing practices and a sense of inherited guardianship of resources. When areas of ancestral land and adjacent fisheries are abused through over-exploitation or pollution, the tangata whenua and

their values are offended. The affront is felt by present-day kaitiaki (guardians) not just for themselves but for their tipuna in the past.

The Maori "taonga" in terms of fisheries has a depth and a breadth which goes beyond quantitative and material questions of catch volumes and cash incomes. It encompasses a deep sense of conservation and responsibility to the future, which colours their thinking, attitude and behaviour towards their fisheries.

The fisheries taonga includes connections between the individual and tribe, and fish and fishing grounds in the sense not just of tenure, or "belonging", but also of personal or tribal identity, blood and genealogy, and of spirit. This means that a "hurt" to the environment or to the fisheries may be felt personally by a Maori person or tribe, and may hurt not only the physical being, but also the prestige, the emotions and the mana.

The fisheries taonga, like other taonga, is a manifestation of a complex Maori physico-spiritual conception of life and life's forces. It contains economic benefits, but it is also a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength.

This vision provided the mauri (life-force) which ensured the continued survival of the iwi Maori. Maori fisheries include, but are not limited to a narrow physical view of fisheries, fish, fishing ground, fishing methods and the sale of those resources, for monetary gain; but they also embrace much deeper dimensions in the Maori mind."

8.3 In this context, 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. Indeed, they claim that these rights have been effectively extinguished and/or abrogated and that the benefits provided to Maori under the legislation do not constitute lawful satisfaction. 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 sacred 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.

8.4 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 predicated 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.

8.5 With respect to the discontinuance of the legal proceedings in the Court, five authors argue that the notices of discontinuance signed on behalf of their tribe were not signed by those who had the authority to do so. Another five authors state that no notice of discontinuance was signed on behalf of their tribes.

Issues and proceedings before the Committee

9.1 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 in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee observes that the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive.⁽¹³⁾ As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27.

9.3 The first issue before the Committee therefore is whether the authors' rights under article 27 of the Covenant have been violated by the Fisheries Settlement, as reflected in the Deed of Settlement and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. It is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant; it is further undisputed that the use and control of fisheries is an essential element of their culture. In this context, the Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of a community. ⁽¹⁴⁾ The recognition of Maori rights in respect of fisheries by the Treaty of Waitangi confirms that the exercise of these rights is a significant part of Maori culture. However, the compatibility of the 1992 Act with the treaty of Waitangi is not a matter for the Committee to determine.

9.4 The right to enjoy one's culture cannot be determined in abstracto but has to be placed in context. In particular, article 27 does not only protect traditional means of livelihood of minorities, but allows also for adaptation of those means to the modern way of life and ensuing technology. In this case the legislation introduced by the State affects, in various ways, the possibilities for Maori to engage in commercial and non-commercial fishing. The question is whether this constitutes a denial of rights. On an earlier occasion, the Committee has considered that:

" A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his own culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons

belonging to a minority will not necessarily amount to a denial of the right under article 27." (15)

9.5 The Committee recalls its general comment on article 27, according to which, especially in the case of indigenous peoples, the enjoyment of the right to one's own culture may require positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority communities in decisions which affect them. (16) In its case law under the Optional Protocol, the Committee has emphasised that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. (17) The Committee acknowledges that the Treaty of Waitangi (Fisheries Settlement) Act 1992 and its mechanisms limit the rights of the authors to enjoy their own culture.

9.6 The Committee notes that the State party undertook a complicated process of consultation in order to secure broad Maori support to a nation-wide settlement and regulation of fishing activities. Maori communities and national Maori organizations were consulted and their proposals did affect the design of the arrangement. The Settlement was enacted only following the Maori representatives' report that substantial Maori support for the Settlement existed. For many Maori, the Act was an acceptable settlement of their claims. The Committee has noted the authors' claims that they and the majority of members of their tribes did not agree with the Settlement and that they claim that their rights as members of the Maori minority have been overridden. In such circumstances, where the right of individuals to enjoy their own culture is in conflict with the exercise of parallel rights by other members of the minority group, or of the minority as a whole, the Committee may consider whether the limitation in issue is in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected. (18)

9.7 As to the effects of the agreement, the Committee notes that before the negotiations which led to the Settlement the Courts had ruled earlier that the Quota Management System was in possible infringement of Maori rights because in practice Maori had no part in it and were thus deprived of their fisheries. With the Settlement, Maori were given access to a great percentage of quota, and thus effective possession of fisheries was returned to them. In regard to commercial fisheries, the effect of the Settlement was that Maori authority and traditional methods of control as recognised in the Treaty were replaced by a new control structure, in an entity in which Maori share not only the role of safeguarding their interests in fisheries but also the effective control. In regard to non-commercial fisheries, the Crown obligations under the Treaty of Waitangi continue, and regulations are made recognising and providing for customary food gathering.

9.8 In the consultation process, special attention was paid to the cultural and religious significance of fishing for the Maori, inter alia to securing the possibility of Maori individuals and communities to engage themselves in non-commercial fishing activities. While it is a matter of concern that the settlement and its process have contributed to divisions amongst Maori, nevertheless, the Committee concludes that the State party has, by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities, taken the necessary steps to ensure that the Fisheries Settlement and its enactment through

legislation, including the Quota Management System, are compatible with article 27.

9.9 The Committee emphasises that the State party continues to be bound by article 27 which requires that the cultural and religious significance of fishing for Maori must deserve due attention in the implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act. With reference to its earlier case law (19), the Committee emphasises that in order to comply with article 27, measures affecting the economic activities of Maori must be carried out in a way that the authors continue to enjoy their culture, and profess and practice their religion in community with other members of their group. The State party is under a duty to bear this in mind in the further implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act.

9.10 The authors' complaints about the discontinuance of the proceedings in the courts concerning their claim to fisheries must be seen in the light of the above. While in the abstract it would be objectionable and in violation of the right to access to court if a State party would by law discontinue cases that are pending before the courts, in the specific circumstances of the instant case, the discontinuance occurred within the framework of a nation wide settlement of exactly those claims that were pending before the courts and that had been adjourned awaiting the outcome of negotiations. In the circumstances, the Committee finds that the discontinuance of the authors' court cases does not amount to a violation of article 14(1) of the Covenant.

9.11 With regard to the authors' claim that the Act prevents them from bringing claims concerning the extent of their fisheries before the courts, the Committee notes that article 14(1) encompasses the right to access to court for the determination of rights and obligations in a suit at law. In certain circumstances the failure of a State party to establish a competent court to determine rights and obligations may amount to a violation of article 14(1). In the present case, the Act excludes the courts' jurisdiction to inquire into the validity of claims by Maori in respect to commercial fishing, because the Act is intended to settle these claims. In any event, Maori recourse to the Courts to enforce claims regarding fisheries was limited even before the 1992 Act; Maori rights in commercial fisheries were enforceable in the Courts only to the extent that s 88(2) of the Fisheries Act expressly provided that nothing in the Act was to affect Maori fishing rights. The Committee considers that whether or not claims in respect of fishery interests could be considered to fall within the definition of a suit at law, the 1992 Act has displaced the determination of Treaty claims in respect of fisheries by its specific provisions. Other aspects of the right to fisheries, though, still give the right to access to court, for instance in respect of the allocation of quota and of the regulations governing customary fishing rights. The authors have not substantiated the claim that the enactment of the new legislative framework has barred their access to court in any matter falling within the scope of article 14, paragraph 1. Consequently, the Committee finds that the facts before it do not disclose a violation of article 14, paragraph 1.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any of the articles of the Covenant.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden, Mr. Abdallah Zakhia.

The text of an individual opinion signed by one Committee member is appended to the present document.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be translated into Arabic, Chinese and Russian as part of the Committee's Annual Report to the General Assembly.]

Appendix

Individual opinion by Mr. Martin Scheinin (partly dissenting)

I concur with the main findings of the Committee in the case, related to article 27 of the Covenant. However, I express my dissent on paragraph 9.10 of the Views. In my opinion, the fact that an overall settlement of fisheries claims is found to be compatible with article 27, provided that the conditions of effective consultation and securing the sustainability of culturally significant forms of Maori fishing are met, does not exempt the State party from its obligations under article 14, paragraph 1. In my opinion, there has been a violation of the rights of the authors under article 14, paragraph 1, to the extent that:

- the legislation in question had the effect of discontinuing pending lawsuits instituted by the same authors or persons duly representing them;
- such discontinuation was not approved by the authors or other persons duly authorised to withdraw the lawsuit in question; and
- the implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act or other measures provided by the State party have not resulted in those authors subject to discontinuation meeting the conditions above having received an effective remedy in accordance with article 2, paragraph 3, of the Covenant.

M. Scheinin [signed]

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

Notes

1. Iwi: tribe, incorporating a number of constituent hapu (sub-tribes)
2. Counsel submits that the Maori text contains a broader guarantee than is 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.
3. 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.
4. Hui: assembly
5. Marae: area set aside for the practice of Maori customs.
6. The report showed also that 15 iwi representing 24,501 Maori, opposed the settlement and 7 iwi groups comprising 84,255 Maori were divided in their views.
7. The National Maori Congress, a non-governmental organisation comprising representatives from up to 45 iwi, and the New Zealand Maori Council, a body which represents district Maori councils throughout New Zealand.
8. Breaches were claimed of sections 13 (freedom of thought, conscience and religion), 14 (freedom of expression), 20 (rights of minorities) and 27 (right to justice).
9. Communication No. 167/1984, Views adopted on 26 March 1990, CCPR/C/38/D/167/1984, para. 32.2.
10. rangatiratanga: the ability to exercise authority over assets, both physical and intangible.
11. Communication No. 205/1986, Views adopted on 4 November 1991, CCPR/C/43/D/205/1986.
12. Waitangi Tribunal, Muriwhenua Fishing Report, pp 180-181, para 10.3.2.
13. See the Committee's Views in case no. 167/1984 (Ominayak v. Canada), Views adopted on 26 March 1990, CCPR/C/38/D/167/1984.
14. See *inter alia* the Committee's Views in Kitok v. Sweden, communication No. 197/1985, adopted on 27 July 1988, CCPR/C/33/D/197/1985, paragraph 9.2. See also the Committee's Views

in the two Länsman cases, Nos. 511/1992, 26 October 1994 (CCPR/C/52/D/511/1992) and 671/1995, 30 October 1996 (CCPR/C/58/D/671/1995).

15. Committee's Views on case No. 511/1992, Lansmann et al. v. Finland, CCPR/C/52/D/511/1992, para. 9.4

16. General Comment No. 23, adopted during the Committee's 50th session in 1994, paragraph 3.2.

17. Committee's Views on case 511/1992, I. Länsman et al. v. Finland, paras. 9.6 and 9.8 (CCPR/C/52/D/511/1992).

18. See the Committee's Views in case No. 197/1985, Kitok v. Sweden, adopted on 27 July 1988, CCPR/C/33/D/197/1985.

19. Committee's Views on case 511/1992, I. Länsman et al. v. Finland, para. 9.8, CCPR/C/52/D/511/1992.