

## INDIGENOUS PEOPLES

### III. JURISPRUDENCE

#### CERD

- *Hagan v. Australia* (26/2002), CERD, A/58/18 (20 March 2003) 139 (CERD/C/62/D/26/2002) at paras. 1, 2.1, 7.2, 7.3 and 8.

1. The petitioner, Stephen Hagan, is an Australian national, born in 1960, with origins in the Kooma and Kullilli tribes of south-western Queensland. He alleges to be a victim of a violation by Australia of articles 2, in particular, paragraph 1 (c); 4; 5, paragraphs d (i) and (ix), e (vi) and f; 6 and 7 of the International Convention on the Elimination of All Forms of Racial Discrimination. He is represented by counsel.

2.1 In 1960, the grandstand of an important sporting ground in Toowoomba, Queensland, where the author lives, was named the “E.S. ‘Nigger’ Brown Stand”, in honour of a well-known sporting and civic personality, Mr. E.S. Brown. The word “nigger” (“the offending term”) appears on a large sign on the stand. Mr. Brown, who was also a member of the body overseeing the sports ground and who died in 1972, was of white Anglo-Saxon extraction who acquired the offending term as his nickname, either “because of his fair skin and blond hair or because he had a penchant for using ‘Nigger Brown’ shoe polish”. The offending term is also repeated orally in public announcements relating to facilities at the ground and in match commentaries.

...

7.2 The Committee has taken due account of the context within which the sign bearing the offending term was originally erected in 1960, in particular the fact that the offending term, as a nickname probably with reference to a shoeshine brand, was not designed to demean or diminish its bearer, Mr. Brown, who was neither black nor of Aboriginal descent. Furthermore, for significant periods neither Mr. Brown (for 12 years until his death) nor the wider public (for 39 years until the petitioner’s complaint) objected to the presence of the sign.

7.3 Nevertheless, the Committee considers that use and maintenance of the offending term can at the present time be considered offensive and insulting, even if for an extended period it may not have necessarily been so regarded. The Committee considers, in fact, that the Convention, as a living instrument, must be interpreted and applied taking into the circumstances of contemporary society. In this context, the Committee considers it to be its duty to recall the increased sensitivities in respect of words such as the offending term appertaining today.

8. The Committee therefore notes with satisfaction the resolution adopted at the Toowoomba public meeting of 29 July 1999 to the effect that, in the interest of

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reconciliation, racially derogatory or offensive terms will not be used or displayed in the future. At the same time, the Committee considers that the memory of a distinguished sportsperson may be honoured in ways other than by maintaining and displaying a public sign considered to be racially offensive. The Committee recommends that the State party take the necessary measures to secure the removal of the offending term from the sign in question, and to inform the Committee of such action it takes in this respect.

### ICCPR

- *Lovelace v. Canada* (24/1977)(R.6/24), ICCPR, A/36/40 (30 July 1981) 166 at paras 13.1, 14-18 and Individual Opinion by Mr. N'jib Bouziri, 175.

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13.1 The Committee considers that the essence of the present complaint concerns the continuing effect of the Indian Act, in denying Sandra Lovelace legal status as an Indian, in particular because she cannot for this reason claim a legal right to reside where she wishes to, on the Tobique Reserve...In this respect the significant matter is her last claim, that "the major loss to a person ceasing to be Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity".

...

14. The rights under article 27 of the Covenant have to be secured to "persons belonging" to the minority. At present Sandra Lovelace does not qualify as an Indian under Canadian legislation. However, the Indian Act deals primarily with a number of privileges which, as stated above, do not as such come within the scope of the Covenant. Protection under the Indian Act and protection under article 27 of the Covenant therefore have to be distinguished. Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant. Since Sandra Lovelace is ethnically a Maliseet Indian and has only been absent from her home reserve for a few years during the existence of her marriage, she is, in the opinion of the Committee, entitled to be regarded as "belonging" to this minority and to claim the benefits of article 27 of the Covenant. The question whether these benefits have been denied to her, depends on how far they extend.

15. ...Restrictions on the right to residence, by way of national legislation, cannot be ruled out under article 27 of the Covenant. This also follows from the restrictions to article 12 (1) of the Covenant set out in article 12 (3). The Committee recognizes the need to define the category of persons entitled to live on a reserve, for such purposes as those explained by the Government regarding protection of its resources and preservation of the identity of its people. However, the obligations which the Government has since undertaken under the

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Covenant must also be taken into account.

16. In this respect, the Committee is of the view that statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole. Article 27 must be construed and applied in the light of the other provisions mentioned above, such as articles 12, 17 and 23 in so far as they may be relevant to the particular case, and also the provisions against discrimination, such as articles 2, 3 and 26, as the case may be. It is not necessary, however, to determine in any general manner which restrictions may be justified under the Covenant, in particular as a result of marriage, because the circumstances are special in the present case.

17. The case of Sandra Lovelace should be considered in the light of the fact that her marriage to a non-Indian has broken up. It is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her marriage her main cultural attachment again was to the Maliseet band. Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to.

18. In view of this finding, the Committee does not consider it necessary to examine whether the same facts also show separate breaches of the other rights invoked...The rights to choose one's residence (article 12), and the rights aimed at protecting family life and children (articles 17, 23 and 24) are only indirectly at stake in the present case. The facts of the case do not seem to require further examination under those articles.

### Individual Opinion of Mr. Nejb Bouziri:

In the Lovelace case, not only article 27 but also articles 2 (para. 1), 3, 23 (paras. 1 and 4) and 26 of the Covenant have been breached, for some of the provisions of the Indian Act are discriminatory, particularly as between men and women. The Act is still in force and, even though the Lovelace case arose before the date on which the Covenant became applicable in Canada, Mrs. Lovelace is still suffering from the adverse discriminatory effects of the Act in matters other than that covered by article 27.

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- *Kitok v. Sweden* (197/1985), ICCPR, A/43/40 (27 July 1988) 221 at paras. 9.1-9.8.

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9.1 The main question before the Committee is whether the author of the communication is the victim of a violation of article 27 of the Covenant because, as he alleges, he is arbitrarily denied immemorial rights granted to the Sami community, in particular, the right to membership of the Sami community and the right to carry out reindeer husbandry. In deciding whether or not the author of this communication has been denied the right to “enjoy [his] own culture”, as provided for in article 27 of the Covenant, and whether section 12, paragraph 2, of the 1971 Reindeer Husbandry Act, under which an appeal against a decision of a Sami community to refuse membership may only be granted if there are special reasons for allowing such membership, violates article 27 of the Covenant, the Committee bases its findings on the following considerations.

9.2 The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant...

9.3 ...[T]he right to enjoy one’s own culture in community with the other members of the group cannot be determined *in abstracto* but has to be placed in context. The Committee is thus called upon to consider statutory restrictions affecting the right of an ethnic Sami to membership of a Sami village.

9.4 With regard to the State party’s argument that the conflict in the present case is not so much between a conflict between the author as a Sami and the State party, but rather between the author and the Sami community...[T]he Committee observes that the State party’s responsibility has been engaged, by virtue of the adoption of the Reindeer Husbandry Act of 1971, and that it is therefore State action that has been challenged...[A] decision of the Sami community to refuse membership can only be granted if there are special reasons for allowing such membership;...

9.5 According to the State party, the purposes of the Reindeer Husbandry Act are to restrict the number of reindeer breeders for economic and ecological reasons and to secure the preservation and well-being of the Sami minority. Both parties agree that effective measures are required to ensure the future of reindeer breeding and the livelihood of those for whom reindeer farming is the primary source of income. The method selected by the State party to secure these objectives is the limitation of the right to engage in reindeer breeding to members of the Sami villages. The Committee is of the opinion that all these objectives and measures are reasonable and consistent with article 27 of the Covenant.

9.6 The Committee has none the less had grave doubts as to whether certain provisions of

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the Reindeer Husbandry Act, and their application to the author, are compatible with Article 27 of the Covenant...

9.7 ...[T]he Act provides certain criteria for participation in the life of an ethnic minority whereby a person who is ethnically a Sami can be held not to be a Sami for the purposes of the Act. The Committee has been concerned that the ignoring of objective ethnic criteria in determining membership of a minority, and the application to Mr. Kitok of the designated rules, may have been disproportionate to the legitimate ends sought by the legislation. It has further noted that Mr. Kitok has always retained some links with the Sami community, always living on Sami lands and seeking to return to full-time reindeer farming as soon as it became financially possible...for him to do so.

9.8 In resolving this problem, in which there is an apparent conflict between the legislation, which seems to protect the rights of the minority as a whole, and its application to a single member of that minority, the Committee has been guided by the *ratio decidendi* in the Lovelace case (No. 24/1977, *Lovelace v. Canada*), namely, that a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole. After a careful review of all the elements involved in this case, the Committee is of the view that there is no violation of article 27 by the State party...

- *Ominayak v. Canada* (167/1984), ICCPR, A/45/40 vol. II (26 March 1990) 1 at paras. 32.2 and 33.

...

32.2 Although initially couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under article 27. The Committee recognizes 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.

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33. Historical inequities...and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band and constitute a violation of article 27 so long as they continue.

*For dissenting opinion in this context, see Ominayak v. Canada* (167/1984), ICCPR, A/45/40 vol. II (26 March 1990) 1 at Individual Opinion by Mr. Nisuke Ando, 28.

### **See also:**

- *R. L. et al. v. Canada* (358/1989), ICCPR, A/47/40 (5 November 1991) 358

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(CCPR/C/43/D/358/1989).

- *Mikmaq Tribal Society v. Canada* (205/1986), ICCPR, A/47/40 (4 November 1991) 205 (CCPR/C/43/D/205/1986) at paras. 5.4, 5.5 and 6.

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5.4 It remains to be determined what is the scope of the right of every citizen, without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives. Surely, it cannot be the meaning of article 25(a) of the Covenant that every citizen may determine either to take part directly in the conduct of public affairs or to freely chosen representatives. It is for the legal and constitutional system of the State party to provide for the modalities of such participation.

5.5 It must be beyond dispute that the conduct of public affairs in a democratic State is the task of representatives of the people, elected for that purpose, and public officials appointed in accordance with the law. Invariably, the conduct of public affairs affects the interest of large segments of the population or even the population as a whole, while in other instances it affects more directly the interests of more specific groups in society. Although prior consultations, such as public hearings or consultations with the most interested groups may often be envisaged by law or have evolved as public policy in the conduct of public affairs, article 25(a) cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of article 25 (a).

6. Notwithstanding the right of every citizen to take part in the conduct of public affairs without discrimination and without unreasonable restrictions, the Committee concludes that, in the specific circumstances of the present case, the failure of the State party to invite representatives of the Mikmaq tribal society to the constitutional conferences on aboriginal matters, which constituted conduct of public affairs, did not infringe that right of the authors or other members of the Mikmaq tribal society. Moreover, in the view of the Committee, the participation and representation at these conferences have not been subjected to unreasonable restrictions. Accordingly, the Committee is of the view that the communication does not disclose a violation of article 25 or any other provisions of the Covenant.

- *Länsman v. Finland* (511/1992), ICCPR, A/50/40 vol. II (26 October 1994) 66 (CCPR/C/52/D/511/1992) at paras. 9.1-9.8 and 10.

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9.1 ...The issue to be determined by the Committee is whether quarrying on the flank of Mt. Etelä-Riutusvaara, in the amount that has taken place until the present time or in the amount that would be permissible under the permit issued to the company which has expressed its intention to extract stone from the mountain (i.e. up to a total of 5,000 cubic metres), would violate the authors' rights under article 27 of the Covenant.

9.2 It is undisputed that the authors are members of a minority within the meaning of article 27 and as such have the right to enjoy their own culture; it is further undisputed that reindeer husbandry 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 an ethnic community.<sup>5/</sup>

9.3 The right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party's submission. Therefore that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant. Furthermore, mountain Riutusvaara continues to have a spiritual significance relevant to their culture. The Committee also notes the concern of the authors that the quality of slaughtered reindeer could be adversely affected by a disturbed environment.

9.4 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 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.

9.5 The question that therefore arises in this case is whether the impact of the quarrying on Mount Riutusvaara is so substantial that it does effectively deny to the authors the right to enjoy their cultural rights in that region. The Committee recalls paragraph 7 of its General Comment on article 27, according to which minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing or, as in the instant case, reindeer husbandry, and that measures must be taken "to ensure the effective participation of members of minority communities in decisions which affect them".

9.6 Against this background, the Committee concludes that quarrying on the slopes of Mt.

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Riutusvaara, in the amount that has already taken place, does not constitute a denial of the authors' right, under article 27, to enjoy their own culture. It notes in particular that the interests of the Muotkatunturi Herdsmens' Committee and of the authors were considered during the proceedings leading to the delivery of the quarrying permit, that the authors were consulted during the proceedings, and that reindeer herding in the area does not appear to have been adversely affected by such quarrying as has occurred.

9.7 As far as future activities which may be approved by the authorities are concerned, the Committee further notes that the information available to it indicates that the State party's authorities have endeavoured to permit only quarrying which would minimize the impact on any reindeer herding activity in Southern Riutusvaara and on the environment; the intention to minimize the effects of extraction of stone from the area on reindeer husbandry is reflected in the conditions laid down in the quarrying permit. Moreover, it has been agreed that such activities should be carried out primarily outside the period used for reindeer pasturing in the area. Nothing indicates that the change in herding methods by the Muotkatunturi Herdsmens' Committee...could not be accommodated by the local forestry authorities and/or the company.

9.8 With regard to the authors' concerns about future activities, the Committee notes that economic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. Furthermore, if mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors' rights under article 27, in particular of their right to enjoy their own culture. The State party is under a duty to bear this in mind when either extending existing contracts or granting new ones.

10. The Human Rights Committee...is of the view that the facts as found by the Committee do not reveal a breach of Article 27 or any other provision of the Covenant.

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### Notes

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5/ Views on communication No.197/1985 (*Kitok v. Sweden*), adopted on 27 July 1988, para. 9.2.

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- *Länsman v. Finland* (671/1995), ICCPR, A/52/40 vol. II (30 October 1996) 191 (CCPR/C/58/D/671/1995) at paras. 10.5-10.7.

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10.5 After careful consideration of the material placed before it by the parties, and duly noting that the parties do not agree on the long-term impact of the logging activities already carried out and planned, the Committee is unable to conclude that the activities carried out as well as approved constitute a denial of the authors' right to enjoy their own culture. It is uncontested that the Muotkatunturi Herdsmen's Committee, to which the authors belong, was consulted in the process of drawing up the logging plans and in the consultation, the Muotkatunturi Herdsmen's Committee did not react negatively to the plans for logging. That this consultation process was unsatisfactory to the authors and was capable of greater interaction does not alter the Committee's assessment. It transpires that the State party's authorities did go through the process of weighing the authors' interests and the general economic interests in the area specified in the complaint when deciding on the most appropriate measures of forestry management, i.e. logging methods, choice of logging areas and construction of roads in these areas. The domestic courts considered specifically whether the proposed activities constituted a denial of article 27 rights. The Committee is not in a position to conclude, on the evidence before it, that the impact of logging plans would be such as to amount to a denial of the authors' rights under article 27 or that the finding of the Court of Appeal affirmed by the Supreme Court, misinterpreted and/or misapplied article 27 of the Covenant in the light of the facts before it.

10.6 As far as future logging activities are concerned, the Committee observes that on the basis of the information available to it, the State party's forestry authorities have approved logging on a scale which, while resulting in additional work and extra expenses for the authors and other reindeer herdsmen, does not appear to threaten the survival of reindeer husbandry. That such husbandry is an activity of low economic profitability is not, on the basis of the information available, a result of the encouragement of other economic activities by the State party in the area in question, but of other, external, economic factors.

10.7 The Committee considers that if logging plans were to be approved on a scale larger than that already agreed to for future years in the area in question or if it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation of the authors' right to enjoy their own culture within the meaning of article 27. The Committee is aware, on the basis of earlier communications, that other large scale exploitations touching upon the natural environment, such as quarrying, are being planned and implemented in the area where the Sami people live. Even though in the present communication the Committee has reached the conclusion that the facts of the case do not reveal a violation of the rights of the authors, the Committee deems it important to point out that the State party must bear in mind when taking steps affecting the rights under article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture.

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- *Hopu v. France* (549/1993), ICCPR, A/52/40 vol. II (29 July 1997) 70 (CCPR/C/60/D/549/1993) at paras. 10.2 and 10.3.

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10.2 The authors claim that they were denied access to an independent and impartial tribunal, in violation of article 14, paragraph 1. In this context, they claim that the only tribunals that could have had competence to adjudicate land disputes in French Polynesia are indigenous tribunals and that these tribunals ought to have been made available to them. The Committee observes that the authors could have brought their case before a French tribunal, but that they deliberately chose not to do so, claiming that French authorities should have kept indigenous tribunals in operation. The Committee observes that the dispute over ownership of the land was disposed of by the Tribunal of Papeete in 1961 and that the decision was not appealed by the previous owners. No further step was made by the authors to challenge the ownership of the land, nor its use, except by peaceful occupation. In these circumstances, the Committee concludes that the facts before it do not disclose a violation of article 14, paragraph 1.

10.3 The authors claim that the construction of the hotel complex on the contested site would destroy their ancestral burial grounds, which represent an important place in their history, culture and life, and would arbitrarily interfere with their privacy and their family lives, in violation of articles 17 and 23. They also claim that members of their family are buried on the site. The Committee observes that the objectives of the Covenant require that the term "family" be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term "family" in a specific situation. It transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. This has not been challenged by the State party; nor has the State party contested the argument that the burial grounds in question play an important role in the authors' history, culture and life. The State party has disputed the authors' claim only on the basis that they have failed to establish a kinship link between the remains discovered in the burial grounds and themselves. The Committee considers that the authors' failure to establish a direct kinship link cannot be held against them in the circumstances of the communication, where the burial grounds in question pre-date the arrival of European settlers and are recognized as including the forbears of the present Polynesian inhabitants of Tahiti. The Committee therefore concludes that the construction of a hotel complex on the authors' ancestral burial grounds did interfere with their right to family and privacy. The State party has not shown that this interference was reasonable in the circumstances, and nothing in the information before the Committee shows that the State party duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of a hotel complex. The Committee concludes that there has been an arbitrary interference with the authors' right to family and

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privacy, in violation of articles 17, paragraph 1, and 23, paragraph 1.

*For dissenting opinions in this context, see Hopu v. France (549/1993), ICCPR, A/52/40 vol. II (29 July 1997) 70 (CCPR/C/60/D/549/1993) at Individual Opinion by David Kretzmer and Thomas Buergenthal, Nisuke Ando and Lord Colville, 81 at paras. 1-7.*

- *Arhuacos v. Colombia (612/1995), ICCPR, A/52/40 vol. II (29 July 1997) 173 (CCPR/C/60/D/612/1995) at paras. 8.3-8.5 and 9.*

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8.3 In respect of the alleged violation of article 6, paragraph 1, the Committee observes that decision No. 006/1992 of the Human Rights Division of 27 April 1992 clearly established the responsibility of State agents for the disappearance and subsequent death of the three indigenous leaders. The Committee accordingly concludes that, in these circumstances, the State party is directly responsible for the disappearance and subsequent murder of Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres, in violation of article 6 of the Covenant.

8.4 As to the claim under article 7 in respect of the three indigenous leaders, the Committee has noted the results of the autopsies, and also the death certificates, which revealed that the indigenous leaders had been tortured prior to being shot in the head. Given the circumstances of the abduction of Mr. Luis Napoleón Torres Crespo, Mr. Angel María Torres Arroyo and Mr. Antonio Hugues Chaparro Torres, together with the results of the autopsies and the lack of information from the State party on that point, the Committee concludes that Mr. Luis Napoleón Torres Crespo, Mr. Angel María Torres Arroyo and Mr. Antonio Hugues Chaparro Torres were tortured after their disappearance, in violation of article 7.

8.5 As to the Villafañe brothers' claim under article 7, the Committee has noted the conclusions contained in the decision of 27 April 1992, to the effect that the brothers were subjected to ill-treatment by soldiers from the No. 2 Artillery Battalion "*La Popa*", including being blindfolded and dunked in a canal. The Committee concludes that José Vicente and Amado Villafañe were tortured, in violation of article 7 of the Covenant.

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9. The Human Rights Committee...is of the view that the facts before it reveal a violation by the State party...of articles 6, 7 and 9 of the Covenant in the case of the three leaders Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres.

- *Mahuika et al. v. New Zealand (547/1993), ICCPR, A/56/40 vol. II (27 October 2000) 11 at paras. 5.1-5.13, 9.3-9.11 and 10.*

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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.

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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

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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,

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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.<sup>8/</sup> 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.

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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...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" ... 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.

...

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. <sup>14/</sup> 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.

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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

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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

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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...is of the view that the facts before it do not reveal a breach of any of the articles of the Covenant.

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### 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

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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).

...

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, *Länsman 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.

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*For dissenting opinion in this context, see Mahuika et al. v. New Zealand (547/1993), ICCPR, A/56/40 vol. II (27 October 2000) 11 at Individual Opinion by Mr. Martin Scheinin (partly dissenting), 29.*

- *Äärelä and Näkkäläjärvi v. Finland (779/1997) ICCPR, A/57/40 vol. II (24 October 2001) 117 (CCPR/C/73/D/779/1997) at paras. 2.1-2.5, 4.11, 7.2-7.7, 8.1, 8.2, Individual Opinion by Prafullachandra N. Bhagwati (concurring), and Individual Opinion by Abdelfattah Amor, Nisuke Ando, Christine Chanet, Eckart Klein, Ivan Shearer and Max Yalden (partly dissenting).*

...

2.1 The authors are reindeer breeders of Sami ethnic origin and members of the Sallivaara Reindeer Herding Co-operative. The Co-operative has 286,000 hectares of State-owned land available for reindeer husbandry. On 23 March 1994, the Committee declared a previous communication, brought by the authors among others and which alleged that logging and road-construction activities in certain reindeer husbandry areas violated article 27 of the Covenant, inadmissible for non-exhaustion of domestic remedies. 1/ In particular, the Committee considered that the State party had shown that article 27 could be invoked in the relevant domestic proceedings, which the authors should have engaged before coming to the Committee. Thereafter, following unsuccessful negotiations, the authors brought a suit in the Lappi District Court of first instance against the National Forestry and Park Service (Forestry Service). The suit sought the enjoinder, on the basis *inter alia* of article 27 of the Covenant, of any logging or road-construction in the Mirhaminmaa-Kariselkä area. This area is said to be amongst the best winter herding lands of the Sallivara Co-operative.

2.2 On 30 August 1996, the District Court decided, following an on-site forest inspection at the authors' request, to prohibit logging or road construction in the 92 hectare Kariselkä area, but to allow it in the Mirhaminmaa area. 2/ The Court applied a test of "whether the harmful effects of felling are so great that they can be deemed to deny to the Sami a possibility of reindeer herding that is part of their culture, is adapted to modern developments, and is profitable and rational". The Court considered that logging in the Mirhaminmaa area would be of long-term benefit to reindeer herding in the area and would be convergent with those interests. In the Kariselkä area, differing environmental conditions meant that there would be a considerable long-term decrease in lichen reserves. Relying *inter alia* on the decisions of the Committee, 3/ the Court found that these effects of logging, combined with the fact that the area was an emergency feeding ground, would prevent reindeer herding in that area. A factor in the decision was the disclosure that an expert testifying for the Forestry Service disclosed he had not visited the forest in question. After the decision, logging duly proceeded in the Mirhaminmaa area.

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2.3 On appeal by the Forestry Service to the Rovaniemi Court of Appeal, the Forestry Board sought the then exceptional measure of oral hearings. The Court granted this motion, while rejecting the author's motion that the appellate court itself conduct an on-site inspection. The expert witness, having in the meanwhile examined the forest, repeated his first instance testimony for the Forestry Service. Another expert witness for the Forestry Service testified that the authors' herding co-operative would not suffer greatly in the reduction of herding land through the logging in question, however the Court was not informed that the witness already had proposed to the authorities that the authors' herd should be reduced by 500 owing to serious overgrazing.

2.4 On 11 July 1997, the Appeal Court, reversing the first instance decision, allowed logging also in the Kariselkä area, and awarded costs of 75,000 Finnish marks against the authors.<sup>4/</sup> The Court took a different view of the expert evidence. It found that the small area of logging proposed (which would not involve further roadworks) would have minimal effects on the quantities of arboreal lichen and, over time, increase the amounts of ground lichen. In light of the finding that the area was not the main winter pasture and in recent years had not been used as a back-up area, the Court concluded it had not been shown that there would be adverse effects on reindeer in the long run and even the immediate effects would be small. The authors were not made aware by the Appeal Court or the Forestry Service that the latter had presented allegedly distorted arguments to the Court based on the Committee's finding of no violation of article 27 of the Covenant in the separate case of *Jouni Länsman et al. v. Finland*.<sup>5/</sup> The authors learned of this brief only upon receiving the Appeal Court's judgement, in which it stated that the material had been taken into account, but that an opportunity for the authors to comment was "manifestly unnecessary". On 29 October 1997, the Supreme Court decided, in its discretion and without giving reasons, not to grant leave to appeal. Thereafter, logging took place in the Kariselkä area, but no roads were constructed.

2.5 On 15 December 1997, the Ombudsman decided that the municipality of Inari and its mayor had exerted inappropriate pressure on the authors by formally asking them to withdraw from their legal proceedings, but did not find that the Forestry Service had acted unlawfully or otherwise wrongly.<sup>6/</sup> The Ombudsman limited his remedy to bringing this conclusion to the attention of the parties. On 1 June 1998, a decision of the Ministry of Agriculture and Forestry (of 13 November 1997) entered into effect reducing the permissible size of the Sallivaara herd by 500 head from 9,000 to 8,500 animals. On 3 and 11 November 1998, the Forestry Service required a total sum of over 20,000 Finnish marks from the authors towards meeting the costs judgement.<sup>7/</sup> This sum distrained by the Forestry Service corresponds to a major share of the authors' taxable income.

...

4.11 As to the imposition of costs, the State party points out that under its law there is an obligation for the losing party to pay, when sought, the reasonable legal costs of the successful party.<sup>15/</sup> The law does not alter this situation when the parties are a private

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individual and public authority, or when the case involves human rights issues. These principles are the same in many other States, including Austria, Germany, Norway and Sweden, and are justified as a means of avoiding unnecessary legal proceedings and delays. The State party argues this mechanism, along with free legal aid for lawyers' expenses, ensures equality in the courts between plaintiffs and defendants. The State party notes however that, from 1 June 1999, an amendment to the law will permit a court *ex officio* to reduce a costs order that would otherwise be manifestly unreasonable or inequitable with regard to the facts resulting in the proceedings, the position of the parties and the significance of the matter.

...

7.2 As to the authors' argument that the imposition of a substantial award of costs against them at the appellate level violated their rights under article 14, paragraph 1, to equal access to the courts, the Committee considers that a rigid duty under law to award costs to a winning party may have a deterrent effect on the ability of persons who allege their rights under the Covenant have been violated to pursue a remedy before the courts. In the particular case, the Committee notes that the authors were private individuals bringing a case alleging breaches of their rights under article 27 of the Covenant. In the circumstances, the Committee considers that the imposition by the Court of Appeal of substantial costs award, without the discretion to consider its implications for the particular authors, or its effect on access to court of other similarly situated claimants, constitutes a violation of the authors' rights under article 14, paragraph 1, in conjunction with article 2 of the Covenant. The Committee notes that, in the light of the relevant amendments to the law governing judicial procedure in 1999, the State party's courts now possess the discretion to consider these elements on a case by case basis.

7.3 As to the authors' claims under article 14 that the procedure applied by the Court of Appeal was unfair in that an oral hearing was granted and an on-site inspection was denied, the Committee considers that, as a general rule, the procedural practice applied by domestic courts is a matter for the courts to determine in the interests of justice. The onus is on the authors to show that a particular practice has given rise to unfairness in the particular proceedings. In the present case, an oral hearing was granted as the Court found it necessary to determine the reliability and weight to be accorded to oral testimony. The authors have not shown that this decision was manifestly arbitrary or otherwise amounted to a denial of justice. As to the decision not to pursue an on-site inspection, the Committee considers that the authors have failed to show that the Court of Appeal's decision to rely on the District Court's inspection of the area and the records of those proceedings injected unfairness into the hearing or demonstrably altered the outcome of the case. Accordingly, the Committee is unable to find a violation of article 14 in the procedure applied by the Court of Appeal in these respects.

7.4 As to the author's contention that the Court of Appeal violated the authors' right to a fair

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trial contained in article 14, paragraph 1, by failing to afford the authors an opportunity to comment on the brief containing legal argument submitted by the Forestry Authority after expiry of filing limits, the Committee notes that it is a fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party.<sup>17/</sup> The Court of Appeal states that it had "special reason" to take account of these particular submissions made by the one party, while finding it "manifestly unnecessary" to invite a response from the other party. In so doing, the authors were precluded from responding to a brief submitted by the other party that the Court took account of in reaching a decision favourable to the party submitting those observations. The Committee considers that these circumstances disclose a failure of the Court of Appeal to provide full opportunity to each party to challenge the submissions of the other, thereby violating the principles of equality before the courts and of fair trial contained in article 14, paragraph 1, of the Covenant.

7.5 Turning to the claim of a violation of article 27 in that logging was permitted in the Kariselkä area, the Committee notes that it is undisputed that the authors are members of a minority culture and that reindeer husbandry is an essential element of their culture. The Committee's approach in the past has been to inquire whether interference by the State party in that husbandry is so substantial that it has failed to properly protect the authors' right to enjoy their culture. The question therefore before the Committee is whether the logging of the 92 hectares of the Kariselkä area rises to such a threshold.

7.6 The Committee notes that the authors, and other key stakeholder groups, were consulted in the evolution of the logging plans drawn up by the Forestry Service, and that the plans were partially altered in response to criticisms from those quarters. The District Court's evaluation of the partly conflicting expert evidence, coupled with an on-site inspection, determined that the Kariselkä area was necessary for the authors to enjoy their cultural rights under article 27 of the Covenant. The appellate court finding took a different view of the evidence, finding also from the point of view of article 27, that the proposed logging would partially contribute to the long-term sustainability of reindeer husbandry by allowing regeneration of ground lichen in particular, and moreover that the area in question was of secondary importance to husbandry in the overall context of the Collective's lands. The Committee, basing itself on the submissions before it from both the authors and the State party, considers that it does not have sufficient information before it in order to be able to draw independent conclusions on the factual importance of the area to husbandry and the long-term impacts on the sustainability of husbandry, and the consequences under article 27 of the Covenant. Therefore, the Committee is unable to conclude that the logging of 92 hectares, in these circumstances, amounts to a failure on the part of the State party to properly protect the authors' right to enjoy Sami culture, in violation of article 27 of the Covenant.

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7.7 In the light of the Committee's findings above, it is not necessary to consider the authors' additional claims brought under article 2 of the Covenant.

8.1 The Human Rights Committee...is of the view that the facts before it reveal a violation by Finland of article 14, paragraph 1, taken in conjunction with article 2 of the Covenant, and additionally a violation of article 14, paragraph 1, of the Covenant taken alone.

8.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the authors are entitled to an effective remedy. In terms of the award of costs against the authors, the Committee considers that as the costs award violated article 14, paragraph 1, of the Covenant and, moreover, followed proceedings themselves in violation of article 14, paragraph 1, the State party is under an obligation to restate to the authors that proportion of the costs award already recovered, and to refrain from seeking execution of any further portion of the award. As to the violation of article 14, paragraph 1, arising from the process applied by the Court of Appeal in handling the brief submitted late by the Forestry Service (para. 7.4), the Committee considers that, as the decision of the Court of Appeal was tainted by a substantive violation of fair trial provisions, the State party is under an obligation to reconsider the authors' claims. The State party is also under an obligation to ensure that similar violations do not occur in the future.

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### Notes

1/ *Sara et al. v. Finland*, Communication 431/1990.

2/ The State party points out that the 92 hectare area amounts to some 3 per cent of the 6,900 hectares of the Co-operative's lands used for forestry.

3/ *Sara v. Finland* (Communication 431/1990), *Kitok v. Sweden* (Communication 197/1985), *Ominayak v. Canada* (Communication 167/1984), *Ilmari Länsman v. Finland* (Communication 511/1992); and moreover the Committee's General Comments 23 (50).

4/ Costs, for which the authors were jointly liable, totalled 73,965.28 Finnish marks, with 11 per cent annual interest.

5/ Communication 671/1995.

6/ The complaint had been submitted almost three years earlier.

7/ No information is provided on whether the Forestry Service is pursuing the outstanding portion of costs awarded to it (some 55,000 Finnish marks).

...

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15/ Chapter 21, section 1, *Code of Judicial Procedure* 1993.

...

17/ In *Jansen-Gielen v. The Netherlands* (Communication 846/1999), the Committee stated: "Consequently, it was the duty of the Court of Appeal, which was not constrained by any prescribed time limit to ensure that each party could challenge the documentary evidence which the other filed or wished to file and, if need be, to adjourn proceedings. In the absence of the guarantee of equality of arms between the parties in the production of evidence for the purposes of the hearing, the Committee finds a violation of article 14, paragraph 1 of the Covenant."

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...

Individual Opinion by Prafullachandra N. Bhagwati (concurring)

I have gone through the text of the views expressed by the majority members of the Committee. I agree with those views save in respect of paragraph 7.2 and, partly, in respect of paragraph 8.2. Since I am in substantial agreement with the majority on most of the issues, I do not think it necessary to set out the facts again in my opinion and I will therefore straightaway proceed to discuss my dissenting opinion in regard to paragraphs 7.2 and 8.2.

So far as the alleged violation of article 14, paragraph 1, in conjunction with article 2, by the imposition of substantial costs is concerned, the majority members have taken the view that such imposition, on the facts and circumstances of the case, constitutes a violation of those articles. While some of the members have expressed a dissenting view, I agree with the majority view but I would reason in a slightly different way.

It is clear that under the law as it then stood, the Court had no discretion in the matter of award of costs. The Court was under a statutory obligation to award costs to the winning party. The Court could not tailor the award of costs – even refuse to award costs – against the losing party taking into account the nature of the litigation, the public interest involved, and the financial condition of the party. Such a legal provision had a chilling effect on the exercise of the right of access to justice by none too wealthy litigants, and particularly those pursuing an *actio popularis*. The imposition of substantial costs under such a rigid and blind-folded legal provision in the circumstances of the present case, where two members of the Sami tribe were pursuing public interest litigation to safeguard their cultural rights against what they felt to be a serious violation, would, in my opinion, be a clear violation of article 14, paragraph 1, in conjunction with article 2. It is a matter of satisfaction that such a situation would not arise in the future, because we are told that the law in regard to the imposition of costs has since been amended. Now the Court has a discretion whether to award costs at all to the winning party, and, if so, what the amount of such costs should be depending upon various circumstances such as those I have mentioned above.

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So far as paragraph 8.2 is concerned, I would hold that the authors are entitled to the relief set out in paragraph 8.2 in regard to the costs, not only because the award of costs followed upon the proceedings in the appellate Court which were themselves in violation of article 14, paragraph 1, for the reasons set out in paragraph 7.4, but also because the award of costs was itself in violation of article 14, paragraph 1, read in conjunction with article 2, for the reasons set out in paragraph 7.2. I entirely agree with the rest of paragraph 8.2

Individual Opinion by Abdelfattah Amor, Nisuke Ando, Christine Chanet, Eckart Klein, Ivan Shearer and Max Yalden (partly dissenting)

While we share the Committee's general approach with regard to the award of costs (see also *Lindon v Australia* (Communication 646/1995), we cannot agree that in the present case it has convincingly been argued and proven that the authors were in fact so seriously affected by the relevant decision taken at the appellate level that access to the court was or would in future be closed to them. In our view, they have failed to substantiate a claim of financial hardship.

Concerning possible deterrent effects in future on the authors or other potential authors, due note must be given to the amendment of the code of judicial procedure according to which a court has the power to reduce a costs order that would be manifestly unreasonable or inequitable, having regard to the concrete circumstances of a given case (see paragraph 4.11 above).

However, given that we share the view that the Court of Appeal's judgment is vitiated by a violation of article 14, paragraph 1, of the Covenant (see paragraph 7.4 above), its decision relating to the costs is necessarily affected as well. We therefore join the Committee's finding that the State party is under an obligation to refund to the authors that proportion of the costs award already recovered, and to refrain from executing any further portion of the award (see paragraph 8.2 of the Committee's views).

- *Länsman III v. Finland* (1023/2001), ICCPR, A/60/40 vol. II (17 March 2005) 90 at paras. 2.1-2.4, 3.1, 3.2, 10.1-10.3 and 11.

...

2.1 On 30 October 1996, the Committee delivered its Views in *Länsman et al. v. Finland* ("the earlier communication") 1/. The Committee found, on the evidence then before it, no violation of the rights under article 27 of the current two individual authors (and others) in the completed logging of some 250 hectares in Pyhäjärvi and the proposed logging of some further 250 hectares in Kirkko-outa (both are in the Angeli area).

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### 2.2 The Committee went on to find:

10.6 As far as future logging activities are concerned, the Committee observes that on the basis of the information available to it, the State party's forestry authorities have approved logging on a scale which, while resulting in additional work and extra expenses for the authors and other reindeer herdsman, does not appear to threaten the survival of reindeer husbandry. That such husbandry is an activity of low economic profitability is not, on the basis of the information available, a result of the encouragement of other economic activities by the State party in the area in question, but of other, external, economic factors.

10.7 The Committee considers that if logging plans were to be approved on a scale larger than that already agreed to for future years in the area in question or if it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation of the authors' right to enjoy their own culture within the meaning of article 27. The Committee is aware, on the basis of earlier communications, that other large-scale exploitations touching upon the natural environment, such as quarrying, are being planned and implemented in the area where the Sami people live. Even though in the present communication the Committee has reached the conclusion that the facts of the case do not reveal a violation of the rights of the authors, the Committee deems it important to point out that the State party must bear in mind when taking steps affecting the rights under article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture.

2.3 By 1999, all 500 hectares of the two areas at issue in the earlier communication had been logged. Moreover, in 1998, a further 110 hectares were logged in the Paadarskaidi area of the Herdsmen's Committee (not part of the areas covered by the earlier communication).

2.4 By the date of submission of the communication, yet another logging operation in Paadarskaidi had been proposed, with minimal advance warning to the Herdsmen's Committee and with an imminent commencement date. At that point, the Herdsmen's Committee had yet to receive a written plan of the nature and scope of the logging operation. The National Forest & Park Service had indicated that it would send the plans to the Herdsmen's Committee at a later date, having indicated in its previous plan that the next logging operation would be due to take place only after a year and in a different location.

...

3.1 The authors allege a violation of their rights as reindeer herders under article 27 of the Covenant, both inasmuch as it relates to logging already undertaken and to logging proposed. At the outset, they complain that since the 1980s, some 1,600 hectares of the Herdsmen's

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Committee's grazing area in Paadarskaidi have been logged, accounting for some 40 per cent of lichen (utilized for feeding reindeer) in that specific area.

3.2 As to the effect of the logging on the author's herd, it is submitted that reindeer tend to avoid areas being logged or prepared for logging. They therefore stray to seek other pastures and thereby incur additional labour for the herders. After logging, logging waste prevents reindeer grazing and compacted snow hampers digging. The logging operations result in a complete loss of lichen in the areas affected, allegedly lasting for hundreds of years.

...

10.1 As to the claims relating to the effects of logging in the Pyhäjärvi, Kirkko-outa and Paadarskaidi areas of the territory administered by the Muotkatunturi Herdsmen's Committee, the Committee notes that it is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant and as such have the right to enjoy their own culture. It is also undisputed that reindeer husbandry is an essential element of their culture and that economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community 6/. Article 27 requires that a member of a minority shall not be denied the right to enjoy his culture. Measures whose impact amounts to a denial of the right are incompatible with the obligations under article 27. As noted by the Committee in its Views on case No. 511/1992 of *Länsman et al. v. Finland*, however, measures with only a limited impact on the way of life and livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27.

10.2 The Committee recalls that in the earlier case No. 511/1992, which related to the Pyhäjärvi and Kirkko-outa areas, it did not find a violation of article 27, but stated that if logging to be carried out was approved on a larger scale than that already envisaged or if it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation of article 27. In weighing the effects of logging, or indeed any other measures taken by a State party which has an impact on a minority's culture, the Committee notes that the infringement of a minority's right to enjoy their own culture, as provided for in article 27, may result from the combined effects of a series of actions or measures taken by a State party over a period of time and in more than one area of the State occupied by that minority. Thus, the Committee must consider the overall effects of such measures on the ability of the minority concerned to continue to enjoy their culture. In the present case, and taking into account the specific elements brought to its attention, it must consider the effects of these measures not at one particular point in time - either immediately before or after the measures are carried out - but the effects of past, present and planned future logging on the authors' ability to enjoy their culture in community with other members of their group.

10.3 The authors and the State party disagree on the effects of the logging in the areas in

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question. Both express divergent views on all developments that have taken place since the logging in these areas, including the reasons behind the Minister's decision to reduce the number of reindeer kept per herd: while the authors attribute the reduction to the logging, the State party invoke the overall increase in reindeer threatening the sustainability of reindeer husbandry generally. While the Committee notes the reference made by the authors to a report by the Finish Game and Fisheries Research Institute that "loggings - even those notified as relatively mild - will be of greater significance for reindeer husbandry" if such husbandry is based on natural pastures only...it also takes note of the fact that not only this report but also numerous other references in the material in front of it mention other factors explaining why reindeer husbandry remains of low economic profitability. It also takes into consideration that despite difficulties the overall number of reindeers still remains relatively high. For these reasons, the Committee concludes that the effects of logging carried out in the Pyhäjärvi, Kirkko-outa and Paadarskaidi areas have not been shown to be serious enough as to amount to a denial of the authors' right to enjoy their own culture in community with other members of their group under article 27 of the Covenant.

11. The Human Rights Committee...is of the view that the facts before the Committee do not reveal a breach of article 27 of the Covenant.

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### Notes

1/ Case No. 671/1995.

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6/ Views on case No. 197/1985 (*Kitok v. Sweden*), Views adopted 27 July 1988, para. 9.2; on case No. 511/1992 (*I. Länsman et al. v. Finland*), adopted 26 October 1994, para. 9.2.

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- *Howard v. Canada* (879/1998), ICCPR, A/60/40 vol. II (26 July 2005) 12 at paras. 12.4-12.11 and 13.

...

12.4 The Committee notes that it is undisputed that the author is a member of a minority enjoying the protection of article 27 of the Covenant and that he is thus entitled to the right, in community with the other members of his group, to enjoy his own culture. It is not disputed that fishing forms an integral part of the author's culture.

12.5 The question before the Committee, as determined by its admissibility decision, is thus whether Ontario's Fishing Regulations as applied to the author by the courts have deprived him, in violation of article 27 of the Covenant, of the ability to exercise, individually and in community with other members of his group, his aboriginal fishing rights which are an

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integral part of his culture.

12.6 The State party has submitted that the author has the right to fish throughout the year on and adjacent to his Nation's reserves and that, with a fishing licence, he can also fish in other areas in the region which are open for fishing when the area surrounding the reserves is closed. The author has argued that there is not enough fish on and adjacent to the reserves to render the right meaningful and that the other areas indicated by the State party do not belong to his Nation's traditional fishing grounds. He has moreover argued that fishing with a licence constitutes a privilege, whereas he claims to fish as of right.

12.7 Referring to its earlier jurisprudence, the Committee considers that States parties to the Covenant may regulate activities that constitute an essential element in the culture of a minority, provided that the regulation does not amount to a *de facto* denial of this right 16/. The Committee must therefore reject the author's argument that the requirement of obtaining a fishing licence would in itself violate his rights under article 27.

12.8 The Committee notes that the evidence and arguments presented by the State party show that the author has the possibility to fish, either pursuant to a treaty right on and adjacent to the reserves or based on a licence outside the reserves. The question whether or not this right is sufficient to allow the author to enjoy this element of his culture in community with the other members of his group, depends on a number of factual considerations.

12.9 The Committee notes that, with regard to the potential catch of fish on and adjacent to the reserves, the State party and the author have given different views. The State party has provided detailed statistics purporting to show that the fish in the waters on and adjacent to the reserves are sufficiently abundant so as to make the author's right to fish meaningful and the author has denied this. Similarly, the parties disagree on the extent of the traditional fishing grounds of the Hiawatha First Nation.

12.10 The Committee notes in this respect that these questions of fact have not been brought before the domestic courts of the State party. It recalls that the evaluation of facts and evidence is primarily a matter for the domestic courts of a State party, and in the absence of such evaluation in the present case the Committee's task is greatly impeded.

12.11 The Committee considers that it is not in a position to draw independent conclusions on the factual circumstances in which the author can exercise his right to fish and their consequences for his enjoyment of the right to his own culture. While the Committee understands the author's concerns, especially bearing in mind the relatively small size of the reserves in question and the limitations imposed on fishing outside the reserves, and without prejudice to any legal proceedings or negotiations between the Williams Treaties First

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Nations and the Government, the Committee is of the opinion that the information before it is not sufficient to justify the finding of a violation of article 27 of the Covenant.

13. The Human Rights Committee...is of the view that the facts before it do not disclose a violation of the International Covenant on Civil and Political Rights.

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### Notes

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16/ See *inter alia* *Kitok v. Sweden*, communication No. 197/1985, Views adopted on 27 July 1988, CCPR/C/33/D/197/1985 and *Länsmann v. Finland*, communication No. 511/1992, Views adopted on 26 October 1994, CCPR/C/52/D/511/1992 and communication No. 671/1995, Views adopted on 30 October 1996, CCPR/C/58/D/671/1995.

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