The Sealord Fishing Settlement: An International Perspective

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I: INTRODUCTION

New Zealand became a party to the United Nations International Covenant on Civil and Political Rights ("the Covenant") on 28 December 1978. In so doing, New Zealand undertook to respect and ensure the rights guaranteed in the Covenant. Indeed, the purpose of the New Zealand Bill of Rights Act 1990 is partly to fulfil these international obligations.

There are three means of ensuring that a signatory State's behaviour is in conformity with its international obligations. The first is the mandatory requirement that each signatory "submit reports on the measures they have adopted which give effect to the rights recognised [in the Covenant] and on the progress made in the enjoyment of those rights".[1] These reports are made to the Human Rights Committee ("the Committee").

The Committee is a body with 18 members, each of whom must be nationals of the signatory states of the Covenant. They should be "persons of high moral character, and recognised competence in the field of human rights" with "consideration being given to the usefulness of the participation of some persons having legal experience".[2] The 18 members of the Committee are to serve in their personal capacity, not as nominees of their domestic governments.

The second method of supervision is the inter-state complaints procedure. By Article 41 of the Covenant, states recognise the competence of the Committee to

1 United Nations International Covenant on Civil and Political Rights, Art 40(1)

2 Article 28(2).

receive complaints from one signatory that another has breached, or is breaching, its obligations under the Covenant. This is an optional commitment, and one which New Zealand made in 1978. To date, it would appear that the provision has never been utilised, probably because of the political sensitivity associated with direct complaints regarding human rights.[3]

The third method of supervising and enforcing the rights in the Covenant is established in its First Optional Protocol ("the Protocol"). This allows individuals in signatory states which have adopted the Protocol to make submissions to the Committee alleging that they are victims of a breach of the rights protected by the Covenant. New Zealand became a party to the Protocol on 26 May 1989. To date, no New Zealand citizen has made a complaint to the Committee.

Article 1 of the Covenant provides that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development". Article 27 provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

In making its first mandatory report to the Committee in 1982, New Zealand asserted that: "[n]o New Zealand law exists that would deny persons belonging to any ethnic ... minority the right to enjoy their own culture"[4] thus submitting that none of its laws was in contravention of Article 27. In support of that submission, New Zealand referred to, *inter alia*, the Maori Affairs Amendment Act 1975, which required the Maori Affairs Department to have regard to the preservation, encouragement, and transmission of Maori language, custom, and tradition. It further referred to the New Zealand Maori Arts and Crafts Institute Act 1963, which established a financially independent institute to train Maori craftsmen in traditional carving.

On 14 December 1992, however, Parliament passed the Treaty of Waitangi (Fisheries Claims) Settlement Act ("the Settlement Act"). This Act effectively extinguished traditional Maori fishing rights in regard to commercial fisheries,[5] and rendered unenforceable rights and interests relating to non-commercial fishing.[6] While some iwi (tribes) consented to this extinction of rights, others did not. Nonetheless, all are bound and constrained by the legislation.

The purpose of this article is to decide whether or not those Maori who are aggrieved by the settlement could successfully make a complaint to the Committee that, by passing legislation which extinguished Maori fishing rights, the New

3 Nowak, "The Effectiveness of the ICCPR" (1980) 1 HRLJ 136, 151-152.

4 UN Doc CCPR/C/10/Add 6 (11 Jan 1982) para 331.

5 Section 9.

6 Section 10.

Zealand Parliament has acted in breach of its international obligations as expressed in the Covenant.

Before proceeding, it is necessary to give some explanation of the history of fishing disputes between the Crown and nga iwi Maori (Maori tribes), the way in which these disputes have been settled, and the rights questions which are raised by the settlement.

II: THE SETTLEMENT

1. Background to the Disputes

Maori fishing claims against the Crown have been made for the past 150 years. Article 2 of the English version of the Treaty of Waitangi 1840 ("the Treaty") guarantees to Maori "the full, exclusive and undisturbed possession of their ... fisheries ... for so long as it is their wish and desire to retain the same in their possession".

The Treaty did not confer on Maori the right to their fisheries. Rather, Article 2 of the Treaty simply evidenced the Crown's recognition that Maori had been in possession of fisheries for hundreds of years before its own arrival, and was a solemn undertaking not to interfere with that possession. Any rights which Maori may have had to the fisheries were recognised in the Treaty, but not created by it.[7]

It is only in recent years, however, that this distinction has become relevant. Early cases overlooked it entirely. *Wi Parata v Bishop of Wellington*[8] held that any claim Maori may have to rights which were in any way associated with the Treaty were moral alone, binding only upon the honour of the Crown. Consistent with this view was the interpretation which the courts gave to s 77(2) of the Fisheries Act 1908. That subsection provided that nothing in the Act itself affected "any existing Maori fishing rights". In *Waipapakura v Hempton*,[9] the Court interpreted this as protecting only rights which were conferred by statute. Thus, it did not seem to matter whether rights were created or recognised by the Treaty, for in neither case were they considered enforceable.

The legislative descendant of the Fisheries Act 1908 is the Fisheries Act 1983. Section 88(2) of this Act provided that "[n]othing in this Act shall affect any Maori fishing rights".[10] It seems unlikely that the removal of the word "existing" carried any legal significance. Nevertheless, in *Te Weehi v Regional Fisheries Officer*,[11] Williamson J gave the section a much wider interpretation than it had been given in

7 New Zealand Law Commission, *The Treaty of Waitangi and Maori Fisheries* Preliminary Paper No 9 (March 1989) 41.

8 (1877) 3 NZ Jur (NS) 72 (SC).

9 (1914) 33 NZLR 1065.

10 This has been repealed by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

11 [1986]1 NZLR 682.

the past. His Honour held that s 88(2) could be invoked by a Maori who had been fishing according to tikanga Maori (Maori tradition), as a defence to a regulatory fishing offence.

His Honour stated that the phrase "any Maori fishing rights" included rights which Maori had retained to their fisheries in accordance with the doctrine of aboriginal title. Therefore, as these rights had not been legislatively removed, they were to be given precedence over any regulations made under the Fishing Act 1983. These rights were not to be seen as Treaty rights since they did not originate from the Treaty. In this way, Williamson J distinguished *Wi Pirata.*

2. The Quota Management System

In 1986, Parliament passed the Fisheries Amendment Act which introduced the Quota Management System ("the QMS") to control commercial fishing. The aim of the Act was to conserve and manage fisheries by making commercial fishing a proprietary right. Individual Transferable Quotas were issued to fishers, and could then be traded on the open market. The amending statute provided that the Minister shall:[12]

> a) after having regard to the total allowable catch for the fishery ... allow for;
>
> i) Maori, traditional, recreational and other non-commercial interests in the fishery.

The introduction of this policy produced a plethora of legal claims, and complaints to the Waitangi Tribunal. Many iwi feared that the proprietary nature of the fishing rights created by the QMS would be inconsistent with their own proprietary interests in fishing. Review proceedings were brought by iwi seeking a declaration that the QMS was an unlawful breach of the Maori fishing rights protected by s 88(2), and seeking an injunction restraining the Minister from issuing further quota.

The injunction was granted in *Ngai Tahu Maori Trust Board v Attorney-General.*[13] Grieg J, in granting the injunction, relied on traditional rights as protected by s 88(2). While being careful not to define precisely the nature or the scope of those rights, his Honour found that "before 1840 Maori ... fisheries had a commercial element and were not purely recreational or ceremonial or merely for the sustenance of the local dwellers".[14]

Accordingly, by purporting to make it illegal for Maori to fish commercially

12 Fisheries Act 1983, s 28(d)(a).

13 High Court, Wellington. 2 November 1987 CP 559/87 Greig J. Noted [1987] BCL 1599; [1988] NZ Recent Law Review 242; CCA (2nd) F-64; [1990] NZLJ 35; (1990) 4 Canta LR 241.

14 Ibid, p6.

without Pakeha quota, Grieg J found that "[w]hat has been done in the promulgation and the operation of the quota management system has been done without taking into account the Maori rights in fisheries".[15] In summary, Grieg J held that Maori fishing rights have included a commercial component since 1840; that these rights have not been taken away by statute; that it would be surprising if the common law had removed these; but that in any event, those rights were expressly protected by s 88(2). This section was interpreted as having a certain degree of paramountcy, meaning that nothing could be done under the Fisheries Act that would affect, restrain, limit, or extinguish those fishing rights.

The Muriwhenua Report of the Waitangi Tribunal supported the finding that pre-European fishing in Aoteoroa (New Zealand) did indeed have a commercial component. In an attempt to transpose this fact into a modern context, the Tribunal found that:[16]

> It is readily imaginable that with state encouragement, not discouragement, Maori would have developed an offshore fishing capability. The pre 1840 experience is indicative of that.

Due to action in the courts and the Waitangi Tribunal which found legal authority for Maori fishing claims, the Crown delayed implementing its fishing policy until the nature and scope of these rights were determined. While both the courts and the Waitangi Tribunal were able to conclude that traditional Maori fishing rights were to some extent commercial, neither was prepared to precisely define the limits of those rights. It was generally agreed that this was a matter to be negotiated between the Treaty partners. Until it was so negotiated, the injunctions placed on furthering the QMS would remain.

3. The Sealord Settlement

In June 1988, Maori negotiators received a mandate at a national hui (meeting) to seek a settlement of fishing disputes with the Crown. The substance of this mandate was that the negotiators were to settle for not less than 50 percent of the fisheries, on the basis that the Treaty guaranteed them 100 percent, but that as partners under the Treaty they would share the resource evenly.[17]

Following negotiation, the Maori Fisheries Act 1989 was passed. This provided for ten percent of the total fishing quota to be acquired by the Crown, and transferred to the Maori Fisheries Commission. Although not expressly stated in the Act, the Maori Fisheries Act 1989 was only intended to be an interim settlement. Section 88(2) remained in force, as did the injunctions earlier granted by the courts.

15 Ibid, p9.

16 Waitangi Tribunal, *Muriwhenua Report* (Wai 22 1988) 236.

17 Waitangi Tribunal, *The Fisheries Settlement Report* (Wai 307 1992) 2.

In 1992, Sealord Products Ltd ("Sealord"), which held 26 percent of the total fishing quota, became available for sale. The Crown saw this as an opportunity to finally settle the fishing disputes. On 27 August 1992, the Crown and Maori negotiators reached a Memorandum of Understanding. This was an agreement in principle which was made subject to Maori ratification. Maori negotiators took this to 23 hui around the country, where its provisions were explained and discussed. The result was a 260 page report indicating the extent of Maori endorsement of the proposed deal. While this endorsement was far from complete, it was sufficient for the Crown to conclude there was a mandate from Maori that the agreement should be formalised.

On 23 September 1992, Ministers of the Crown and Maori representatives signed a Deed of Settlement ("the Deed") pursuant to the Memorandum of Understanding. There were 32 Maori signatories to the Deed, representing 17 separate iwi. The structure of the Deed has been criticised for being unnecessarily legalistic and technical. In making its report on the Fisheries Settlement, the Waitangi Tribunal observed that:[18]

> The spirit became lost in the small print ... it is not the extinguishment of rights that is essential but the affirmation of them. Somehow the deed does not capture this, apart from the preamble.

Earlier, in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*,[19] Cooke P described the Deed as a "most unusual document, and, perhaps even designedly, obscure in some major respects".[20] Perhaps any lack of clarity in the structure of the Deed is a direct result of the commercial and political urgency under which it was constructed. Nevertheless, if the President of the Court of Appeal and members of the Waitangi Tribunal found the Deed obscure and confusing, the extent to which it was understood by its lay signatories is questionable. This is especially so when one considers that these signatories were given only a short time to read and understand the Deed before signing it on behalf of their respective iwi.

4. Substance Of The Agreement

The Deed of Settlement provides that it "shall discharge and extinguish, all commercial fishing rights of Maori" and shall satisfy all current and future claims.[21] Further, all non-commercial rights and interests in fisheries are rendered legally unenforceable.[22] These non-commercial fishing rights will no longer

18 Ibid, 21.
19 [1993] 2 NZLR 301 (CA).
20 Ibid, 306.
21 Clause 5.1.
22 Clause 5.2.

provide Maori with a defence to regulatory fishing offences since s 88(2) has been repealed, but the Minister is empowered to make regulations "providing for ... the special relationship between the tangata whenua and those places which are of customary food gathering importance".[23]

In signing the Deed, Maori agreed:

(i) to discontinue current proceedings relating to fisheries,[24] and to bring no others;[25]

(ii) to endorse the QMS as a lawful and appropriate regime for the sustainable management of fishing in New Zealand;[26] and

(iii) that previous negotiated arrangements in respect of Maori Fisheries were to be cancelled.[27]

In return the Deed provides for the Crown to advance $150 million to enable Maori, in joint venture with Brierley Investments Limited, to purchase a 100 percent interest in Sealord.[28] The Maori Fisheries Commission is to be reconstituted to make it more accountable to Maori, and renamed the Treaty of Waitangi Fisheries Commission. This Commission will be responsible for managing Maori interests in fisheries, including the 50 percent holding in Sealord. Ominously, the Deed stated that "this settlement will necessarily restrict the Crown's ability to meet from any fund ... the settlement of other claims arising from the Treaty of Waitangi".[29]

Clause 3.5, entitled "Crown to Introduce Amending Legislation", makes it clear that the Crown has agreed to introduce legislation to give effect to the various proposals contained in the Deed. These changes were effected through the Settlement Act and included the repeal of s 88(2) of the Fisheries Act, amendments to the Treaty of Waitangi Act 1975 designed to reduce the Waitangi Tribunal's jurisdiction, and the extinguishment of any court proceedings which are not voluntarily halted by the Maori plaintiffs concerned. Obviously, the Crown's main concern in entering into the agreement was its finality and permanence.

23 Clause 3.5.1.1.
24 Clause 4.3.1.
25 Clause 4.3.2.
26 Clause 4.2.
27 Clause 1.3.
28 Clause 3.1.
29 Clause 4.6.

5. Tribal Discontent

(a) General Discontent

Only 17 iwi have representatives who signed the Deed of Settlement. Many were not prepared to ratify the Deed, or at least wanted more time for the negotiation of its terms and the explanation of their effect. While individual iwi have different reasons for their dissatisfaction with the deal, it is possible to extract some general complaints.

(i) Allocation of benefits

At the time the Deed was ratified there was no settled arrangement between the various iwi groups as to how the benefits of the deal were to be allocated. There was concern that when the reconstituted Commission came to allocate the benefits, it should do so fairly and impartially. There was distrust of the Maori Fisheries Commission (the pre-settlement body), as this was seen as being controlled by Ngai Tahu interests. Two main methods of allocation have been mooted: mana whenua, mana moana, (placing control of the sea in proportion to the control of the land), and allocation on the basis of population.

The Waitangi Tribunal questioned the extent to which mana whenua, mana moana could claim to be in accordance with tradition, since the areas which were fished in 1992 may well have been considered open in 1840. The recommendation was that the method of allocation be based simply on what is tika (fair).[30] Nevertheless, while the Tribunal agreed that there were "legitimate anxieties over the future internal management of the settlement",[31] this in itself was no reason to reject it in its entirety. In September 1993, a group of North Island iwi jointly applied to the High Court for interim orders preventing the Treaty of Waitangi Fisheries Commission from allocating leases of pre-settlement Individual Transferable Quotas under the Maori Fisheries Act 1989.[32] The Court of Appeal upheld the High Court decision, emphasising that it is the Commission's function to consider customary, economic, and social arguments for and against different methods of allocation. The Court stated:[33]

> Nor do we wish to usurp the Commission's statutory role to do equity within Maoridom, a role of which the members of the Commission will plainly be fully conscious, especially in the light of these proceedings.[34]

30 Supra at note 17, at 21.

31 Ibid, 23.

32 *Area 1 Consortium Ltd v The Treaty of Waitangi Fisheries Commission*, Court of Appeal. 29 September 1993, CA 224/93 Cooke P, McKay and Gallen JJ. Noted [1993] BCL 1961.

33 Ibid, p6.

34 At the time of publication various iwi groups such as Area 1 Consortium and Treaty Tribes were continuing to contest the final method of allocation. A discussion document had been prepared by the Treaty of Waitangi Fisheries Commission and a series of hui were planned.

(ii) Extinguishment of rights

Many iwi did not want to surrender fully their rights to fish in return for shares in Sealord, regardless of the monetary benefits. The Waitangi Tribunal found that to the extent that the Deed purported to extinguish Maori fishing rights, it was inconsistent with the Treaty.[35] It recommended that this part of the Deed not be included in the settlement legislation. Perhaps in an attempt to comply with this recommendation, the legislation provides that "[a]ll claims ... based on rights and interest of Maori in commercial fishing are hereby fully and finally settled, satisfied and discharged".[36]

While the word "extinguish" is not employed, the Tribunal's recommendation was based on more than mere semantics. It was founded on the notion that rights which are protected by the Treaty cannot be unilaterally taken away by the Crown. If the fisheries settlement were to extinguish these rights then the Crown would need much wider consent from Maori than it was in fact given.[37]

The hapu was the holder of traditional fishing rights. While the Tribunal found that in the circumstances iwi or even pan-iwi level consent could bind dissenting groups to an agreement that was designed to be a contemporary expression of those rights, only the hapu or iwi themselves could agree to the permanent extinguishment of them. The substance of the settlement legislation, however, remains the same as that of the Deed: bearers of traditional rights have been stripped of those rights without their consent.

(iii) Non-Commercial fishing regulations

Both cl 5.2 of the Deed and s 10 of the Settlement Act provide for the making of regulations regarding traditional and customary fishing rights and interests. Given that the settlement is commercially based, however, it may be asked why non-commercial aspects of traditional Maori fishing should ever have been included within it.[38]

At the time the Deed was signed, the nature and effect of any future regulations were unknown to Maori. No guarantee was given in the Deed, nor in the Settlement Act, that the customary law regulations that were recognised in *Te Weehi* would continue to be recognised by the Minister making the regulations.

Both the Deed and the Settlement Act provided for nothing more than consultation with Maori. Whatever the substance of the regulations may be, the power to make controlling regulations has been removed from the tribal level and given to a governmental and non-Maori body. The Waitangi Tribunal recommended that these regulations be reviewable by the courts against the principles of the Treaty,[39]

35 Waitangi Tribunal, supra at note 17, at 24.

36 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, s 9(c).

37 Waitangi Tribunal, supra at note 17, at 17.

38 McHugh, "Sealords and Sharks: The Maori Fisheries Agreement" [1992] NZLJ 354, 357.

39 Supra at note 17, at 24.

but this has not been implemented. Because of the shift in law making power provided for in the settlement, Maori have suffered a significant reduction in their control over tribal fisheries.

(b) Te Runanga o Wharekauri Inc

In its report, the Waitangi Tribunal recognised that "[t]here was ... very real anxiety that the scheme might not give a sufficient protection for certain special interests".[40] The Chatham Island Maori were said to have a particularly strong case in this regard. Their culture has historically been economically dependent on fisheries. They have had an exclusive right to fish, acknowledged in the Treaty, and protected by s 88(2) of the Fisheries Act 1983. They did not ratify the Deed of Settlement, nor did they consent to the subsequent legislation. Yet, since 14 December 1992, their right to fish has been replaced by a right to receive an as yet unquantified amount of dividend and quota from the Treaty of Waitangi Fisheries Commission.

After the signing of the Deed, but before the passage of the settlement legislation, Te Runanga o Wharekauri (the iwi of the Chatham Islands) brought an action in the High Court. This sought a declaration that the Maori representatives had acted unlawfully in signing the Deed, and also an injunction halting implementation of the settlement. This action failed at first instance, and on appeal.[41] The Court of Appeal held that in so far as the Deed was contractual, its signatories bound only their own iwi. To the extent that the Deed was a statement of legislative intent, the Court considered that the "established principle of non-interference by the Courts in parliamentary proceedings" meant that it had no jurisdiction to grant the remedies claimed.[42] For these reasons, the Court of Appeal struck out the proceedings as disclosing no reasonable cause of action.[43]

If the Court had no jurisdiction to review the Deed, then it certainly has no jurisdiction to review the settlement in its legislated form. It may be, however, that because of the absence of any domestic remedy against the settlement, the aggrieved iwi may be able to successfully make a claim to the Committee. It is submitted that the settlement may infringe both Article 1 and Article 27 of the Covenant. This possibility will be explored from the perspective of the Chatham Island Maori.

40 Ibid, 20.
41 Supra at note 19.
42 Ibid, 307.
43 Ibid.

III: THE CLAIM AT INTERNATIONAL LAW

1. Enforcement

The Human Rights Committee is not an international court. Rather, it concludes its task of considering a communication by forwarding its views to both the complainant and the accused signatory State.[44] When the Committee has the view that the signatory State has indeed acted in breach of the rights it undertook to uphold, it will usually express an opinion as to what that State should do to remedy the violation of the victim's rights. Often it will advise the State of measures it might take to ensure that such violations do not occur again.[45] However, despite the judicial appearance of the Committee's procedures and the resemblance of its recorded views to legal decisions, the Committee has no jurisdiction to make judgments which are legally binding on the State concerned.

Despite the obvious limitations that this entails, the Committee's views are not without authority. The signatory State voluntarily undertakes to act in accordance with the rights expressed in the Covenant, and voluntarily recognises the competence of the Committee to consider complaints from individuals within its own jurisdiction.

Accordingly, while the views of the Committee may not be strictly binding, a finding of a breach is effectively a declaration that the guilty State is acting inconsistently with its international obligations. Further, the Committee has developed a practice of including in its reports to the United Nations General Assembly full copies of its decisions.[46]

The political embarrassment suffered by a State which is found to have acted inconsistently with its international human rights obligations should not be underestimated. This is well illustrated by *The Case of Sandra Lovelace*[47] where the Committee found that s12(1)(b) of the Canadian Indian Act RSC 1970 was in breach of Article 27 of the Covenant. This was only the sixteenth time that the Committee had found that a State had acted inconsistently with the Covenant; 14 of the previous 15 findings had been made against the military regime which was at that time controlling Uruguay. Although Canada had shown an unwillingness to comply with the Committee's investigations, the final views of the Committee were partly responsible for the subsequent amendments to the infringing sections of the Indian Act.[48]

44 First Optional Protocol to the International Covenant on Civil and Political Rights, Art 5(4).

45 Davidson, "The Procedure and Practice of the Human Rights Committee Under the First Optional Protocol to the ICCPR" (1991) 4 Canta LR 337, 353.

46 By Art 6 of the First Optional Protocol it need only include a summary of its activities in its report to United Nations General Assembly.

47 Human Rights Communication R 6/24.

48 Bayefsky, "The HRC and the Case of Sandra Lovelace", *Canadian Yearbook of International Law* (1982) 244.

2. The Procedures of the Committee

A significant feature of the Committee's procedure is that it is conducted totally in writing. Neither the complainant nor the signatory State are required to appear in person before the Committee. This creates problems when it comes to assessing evidence, especially when the evidence of the complainant is at odds with that of the State. However, the benefit of this method is that access to the Committee is relatively inexpensive.[49]

Before stating its final views the Committee will have considered the complaint at two different stages. First, it is necessary for the Committee to be satisfied that the complaint is admissible. Only then will it examine the merits of the complaint.

(a) Admissibility

There are a number of requirements with which both the complaint and its author must comply before it will be declared admissible. While these requirements are expressed in the Protocol itself, they are not defined. Because of this, many of the requirements derive much of their substantive meaning from the developing jurisprudence of the Committee.

(i) Exhaustion of domestic remedies

Article 5(2)(b) of the Protocol provides that only those who have "exhausted all available domestic remedies" may submit a written communication to the Committee. The policy behind this seems to be to prevent a State from being forced to justify its actions to an international body before it has had the opportunity to justify, or, if necessary, remedy, these actions by internal means. It is a concession to the sovereignty of the State. Similar requirements seem to be made in other instruments which create international procedures to consider human rights.[50]

If this requirement were interpreted strictly, New Zealand may be able to successfully request the Committee to declare any Maori complaint inadmissible for the simple reason that no proceedings were taken to the Privy Council. Further, because "domestic remedies" is likely to include administrative as well as judicial remedies, Maori may be unable to make a complaint until a scheme for the allocation of benefits has been finally settled and judicially upheld.

The Committee has, however, taken a flexible approach to this requirement. In

49 Although this relative inexpense seems to be applauded by all the commentators, it may to some extent be offset by the need to have exhausted all domestic remedies.

50 See, for example, European Convention on Human Rights, Art 26.

The Case of Sandra Lovelace,[51] for example, the Committee admitted the author's complaint although she had not pursued the matter in the domestic courts. The Committee recognised the effect of the earlier case *Attorney-General of Canada v Lavell*,[52] which stated that s 12(1)(b) of the Indian Act RSC 1970 was not rendered inoperative by the Canadian Bill of Rights. Given this, the Committee did not interpret Article 2 of the Protocol as requiring Lovelace to go through the domestic courts when those courts would be bound by an earlier decision to find against her.

The Committee made plain its position on this requirement in *Ominayak v Canada*.[53] The complainant was the unanimously elected leader of a band of Native Indians, the Lubicon Lake Band. The substance of the complaint to the Committee was that the Government had contracted out the rights to deplete the natural resources found on land which had been set aside as a reserve for the Band. The complaint made to the Committee was that by so contracting, the Canadian government had breached, *inter alia*, Articles 1 and 27 of the Covenant.

Ominayak had been to the Canadian Courts seeking an interim injunction, but this had been refused. Instead of then proceeding with the claim for a permanent injunction, Ominayak appealed the refusal to grant interim relief. When he then made a complaint to the Committee, Canada submitted that by failing to seek a permanent injunction, Ominayak had not exhausted all domestic remedies, and that therefore his complaint should be declared inadmissible.

Ominayak attempted to justify his methods by arguing that the interim injunction was necessary to maintain the status quo, since by the time a final judgment on the merits was given, the resources would have been already depleted. Referring to its established jurisprudence, the Committee accepted Ominayak's argument, finding that "the exhaustion of domestic remedies can be required only to the extent that these remedies are effective and available".[54]

In accordance with this established jurisprudence, it is submitted that a Maori complaint to the Committee concerning the fisheries settlement would not fail simply because the complainant had failed to exhaust all domestic remedies. One of the main functions of the settlement, at least from the Crown perspective, was to put an end to the dispute. Bound by the doctrine of parliamentary supremacy, the courts now have no jurisdiction to consider the settlement legislation. In so far as the complainants are opposed to the settlement per se, there are now no effective and available domestic remedies it can take.

(ii) Communications from victims

Although Article 1 of the Protocol recognises the Committee's competence to receive communications from individuals who claim to be victims, the Committee has developed a practice of admitting complaints from interested third parties on

51 Supra at note 47.

52 (1974) 38 DLR (3d) 481 (SCC).

53 Human Rights Communication 167/1984.

54 Ibid, para 13.2.

the victim's behalf. Accordingly, many complaints are made by lawyers on behalf of the alleged victim. A unanimously elected leader of a tribal band may have standing to bring a complaint on behalf of other members of his or her tribe.[55]

(b) The merits of the case

The Committee's rules of procedure provide that no communication may be ruled admissible until the signatory State has been given an opportunity to comment on it. Once it has been declared admissible, the State has six months in which to provide the Committee with written information explaining the matter, and indicating any remedial action that may have been taken. Examination of the written evidence is conducted at closed meetings. Once this is complete, its final views are forwarded to the State concerned and to the individual.

3. The Sealord Complaint

There exists the potential for Maori to forward a complaint to the Committee based on breaches of Articles 1 and 27 of the Convention. Admissibility is the first hurdle that such a complaint would need to overcome. The requirement that the victim be an individual is likely to have a different effect on the admissibility of each of the two allegations.

(a) Article 1: The right to self-determination

By Article 1 of the Covenant, a signatory undertakes to guarantee to all peoples the right of self-determination. By virtue of this right, peoples are entitled to freely determine their political status and pursue their economic and cultural development. This seems to be one of the most powerful rights which the Covenant purports to protect. Interpreted literally, it might seem to confer on all peoples a right to political separatism, or statehood.

However, before looking at the interpretation of Article 1, it should be seen whether or not the Protocol would be interpreted as conferring procedural competence on those aggrieved by the settlement in order to present a case to the Committee.

In *AD v Canada*,[56] the author of the communication claimed to be the Grand Captain of the Mikmaq tribal society. He submitted the communication on behalf of the Mikmaq people, claiming that the Government of Canada had denied them the right of self-determination, in violation of Article 1. Purporting to represent an

55 Ibid.

56 Human Rights Communication 78/1980.

indigenous people, the author expressly denied the relevance of Article 27; he did not accept the classification of his people as an ethnic minority. The express objective of the communication was "that the traditional Government of the Mikmaq tribal society be recognised as a State".[57] While seeking to clarify the standing of the author, however, the Committee received a letter from the Grand Chief of the Grand Council of the Mikmaq tribal society which informed them that the author was not authorised to act as a representative of the Mikmaq society. For this reason the complaint was declared inadmissible. By focusing on the author's inability to represent the tribe, the Committee was able to avoid the other complex issues which were raised by the complaint.

In *Ominayak v Canada*,[58] the Committee was forced to face these wider issues. Chief Bernard Ominayak, the undisputed leader of the Lubicon Lake Band, also claimed that the way the Government of Canada had acted towards his people constituted a breach of Article 1. Nevertheless, the Committee concluded that Ominayak's complaint, in so far as it concerned a breach of Article 1 of the Covenant, was inadmissible.

Although the Committee reaffirmed the importance of self-determination, commenting that recognition of that right was a necessary step towards the observance, promotion, and strengthening of all other human rights,[59] it was of the opinion that Article 1 is a collective right, not an individual right. The peoples' right to self-determination could not be enjoyed by an individual, but only by the group itself. The corollary of this was that an individual could not complain that he or she was a victim of any infringement of the peoples' right to self-determination, since only the people as a whole could be so victimised. Because of this, the Committee could not admit this part of Ominayak's complaint.

While the Committee does not appear to be bound by its previous decisions, it is nevertheless unlikely that any complaint which the Chatham Island Maori may make to the Committee, alleging that the Settlement Act breaches their right to self-determination, will get to be considered on its merits. While an iwi leader would obviously have standing to make a complaint if he or she were a victim, he or she is not likely to be considered a victim of a breach of a collective right that is given to peoples. He or she may have standing to bring a complaint on behalf of other individuals in his or her tribe, but not on behalf of the tribe itself.

While there is some logic in the Committee's reasoning, it would seem likely that the main reason for declining jurisdiction to consider claims under Article 1 is its wish to avoid difficult problems concerning a State's internal political organisation generally, and more specifically, claims of minority groups to a right of secession. Traditionally, self-determination was a right which was generally considered to apply only in the post-colonial context. The concept of peoples who were to have the right to self-determination was a concept which was defined

57 Ibid, para 2.2.

58 Supra at note 53.

59 Ibid, para 13.3.

territorially, not ethnically.[60] The territorial integrity of the colonies was to be maintained beyond independence. Within the former colonies, self-determination in the international law context seemed to be little more than a statement of majority rule.

In the post-colonial age, the most important unit in international relations and international law is the State. The most fundamental premise on which the United Nations is based is the sovereignty of states. It is not surprising therefore that the Committee, which is responsible for supervising and ensuring State compliance with a United Nations Covenant, refuses to consider claims that Article 1 of that Covenant gives indigenous ethnic minorities a right of political separatism.

In 1984 the Committee adopted a General Comment on the applicability of Article 1.[61] One of its purposes was to offer some advice to signatories as to what was expected of them when they made their mandatory reports to the Committee as required by Article 40(1) of the Covenant. It was made clear that the right to self-determination does apply outside the colonial context, and even includes some degree of internal self-determination.

It appears that the Committee is prepared to give more consideration to the peoples' right of self-determination in its supervisory role of hearing mandatory reports than it is prepared to do in its enforcement role under the Protocol. Therefore, if Maori were to make a complaint to the Committee, it should include an allegation that the settlement was in breach of Article 1. While it is unlikely to be declared admissible, it may put the Committee on notice to question New Zealand on the effect the settlement has had on Maori ability to "freely pursue their economic, social and cultural development".[62]

(b) Article 27

Thornberry has described the right recognised in Article 27 as a hybrid with reference to the individual right/collective right dichotomy.[63] The right to enjoy culture is conferred on individuals as individuals, but it recognises that the existence of the community itself is a necessary condition precedent to the enjoyment of that right. Thus, in *Ominayak* the Committee found that the Chief had standing to complain on behalf of each of the individual members of the Band that each of their rights protected by Article 27 had been infringed. He could not, however, complain on behalf of the Band itself that the collective right of self-determination had also been infringed.[64] Article 27, therefore, protects limited rights in a limited cultural sphere, while self-determination is related to the broader issue of control

60 Thornberry, *Minorities and Human Rights Law*, The Minority Rights Group, Report No. 73, 1991.

61 UN Doc A/C 3/SR 399 para 4.

62 United Nations Covenant on Civil and Political Rights, Art 1.

63 Thornberry, *International Law and the Rights of Minorities* (1991) 208.

64 Supra at note 53.

by a people of its political, social, and cultural arrangements. This perhaps goes some way to explaining the Committee's readiness to consider Article 27 of the Covenant, but not Article 1.

Accordingly, a complaint that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 breaches the rights protected in Article 27 of the Covenant may be made by a recognised tribal leader on behalf of Chatham Islands Maori fishers.

(i) Ethnic minority

When Article 27 was first discussed by the United Nations, many states were suspicious of the obligations which it would impose on them. In the post-colonial age, many states have populations which include indigenous peoples, and also identifiable immigrant cultures. It was feared that Article 27, followed through to its logical conclusion, could be used by these groups as a vehicle to threaten national unity.

The Australian delegation, for instance, stated that Australia was "doing its best to encourage new immigrants not to set up separatist minority groups, but to merge completely with the Australian community and enrich it".[65] Similarly, Australia referred to "a small group of aborigines whose way of life was still very primitive but who could not be considered a "minority"".[66] The wishes of such States were accommodated to some extent, and no precise definition of minority was included in the official records or Covenants of the United Nations.

To date the Committee has upheld three complaints that Article 27 has been breached,[67] but has not offered any indication as to what constitutes an ethnic minority. In all three cases the complaints were made by or on behalf of indigenous people, and, perhaps because of this, it was never disputed by the accused states that the complainants were indeed part of ethnic communities. While indigenous peoples are often insulted to be classified as ethnic minorities, the Covenant makes no special provision for the rights of indigenous peoples. Whatever these rights may be, they will at least include the rights afforded to other minorities.

Those individuals aggrieved by the Settlement Act are plainly members of an ethnic minority in so far as they belong to the community of people known as Maori. However, if they were to base their complaint to the Committee on nothing more than this, it may be open to New Zealand to respond that Maori had in fact consented to the fishing settlement. The Memorandum of Understanding was taken to Maori, the Deed was signed by Maori, prominent Maori have been appointed to the Treaty of Waitangi Fisheries Commission, and this Commission

65 United Nations General Assembly, Official Records of 16th Session, 3rd Committee, 1103rd Meeting, para 25.

66 Ibid, para 26.

67 *The Case of Sandra Lovelace*, supra at note 47; *Kitok v Sweden* 197/1985 CCPR/C/33/D/197/1985; *Ominayak v Canada.*, supra at note 53.

is to be accountable to Maori. In the litigation following the ratification of the Deed, Heron J held in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General*[68] that the settlement did not infringe s 20 of the New Zealand Bill of Rights Act 1990 (which for present purposes is identical to Article 27 of the Covenant) because "[the plaintiffs] are being treated as Maori and will be treated in that respect in the future".[69]

However, members of Wharekauri Rekohu may be able to claim that iwi was itself an ethnic minority for the purposes of Article 27. Although there is no official definition of minority, Capotorti, a member of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, forwarded a possible definition to the United Nations Human Rights Commission. He defined a minority as:[70]

> [A] group numerically inferior to the rest of the population of the State, in a non-dominant position, whose members possess ethnic ... characteristics differing from those of the rest of the population and show a sense of solidarity, directed towards preserving their culture, traditions, religion or language.

An ethnic minority on this definition has both objective characteristics and a subjective desire to retain these characteristics through to some form of legal recognition. It is open to Wharekauri Rekohu, and indeed all individual iwi, to argue that their iwi was itself an ethnic minority for the purposes of Article 27.

Each iwi has its own traditions and its own history. Indeed, the very notion of Maori as a single collective unity resulted only from the presence of the European colonisers. The Treaty was not ratified by all Maori, but by chiefs of the respective tribes. Further, the Waitangi Tribunal has recognised that the fishing rights protected in the Treaty were not vested in Maori as whole, but in the various iwi, hapu, and other sub-groups. The Crown itself seems to have accepted this, having in the past made a number of significant settlement arrangements with individual iwi.[71]

If the Committee accepted that membership of an iwi itself constituted membership of an ethnic minority, a submission by the Crown that the fishing settlement had been consented to by members of that minority would be far less persuasive. It would not be enough to "treat Maori as Maori".[72] The Waitangi Tribunal has advised that if the settlement were to extinguish fishing rights, there could be no delegated consent. Such consent would need to be given by those holding the rights being extinguished. Such consent was not forthcoming from the level of the hapu.

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68 High Court , Wellington. 12 October 1992 CP 682/92. Noted [1992] BCL 2266; NZ CLD (2nd) C-587.

69 Ibid, p40.

70 Capotorti, *Study of the Rights of a Person belonging to Ethnic, Religious and Linguistic Minorities* UN Doc E/CN 4/Sub 2/384/Add 1-7, UN Sales No E 78 XIV I.

71 Many of these are repealed by the settlement which is why many iwi were opposed to it, for example Te Runanga A Rangitane O Wairoa.

72 Waitangi Tribunal, supra at note 17, at 17.

(ii) Enjoying their culture

The complainant would also need to show that fishing was part of the culture of the relevant minority. Fishing was of fundamental importance to many pre-European Maori, and that importance continues today. Fishing, the right to fish, and the sea are central to the social, religious, and economic practices of particular iwi. The Waitangi Tribunal has consistently described fishing as a taonga (treasure) within Article 2 of the Treaty (Maori version).[73] This was accepted as correct by the Law Commission in its report *The Treaty of Waitangi and Maori Fisheries*.[74] Further, point K of the preamble to the Deed itself declares that:

> The Crown recognises that traditional fisheries are of importance to Maori and the Crown's Treaty duty is to develop policies to help recognise use and management practices and provide protection for and scope for exercise of rangitiratanga in respect of traditional fisheries.

It is submitted that fishing is a central aspect of the culture of the Chatham Island Maori. Their culture and livelihood is dependent on the sea.

The Crown could argue, however, that since the settlement is primarily concerned with commercial fishing, it is removed from the protection of cultural rights. While the Waitangi Tribunal and the New Zealand courts have accepted that traditional Maori fishing did include fishing on a wide scale for trade, the Committee could find this submission persuasive.

In *Kitok v Sweden*,[75] the Committee heard a complaint from a member of a Sami family who by operation of Swedish law had lost his membership of a Sami village for the purposes of farming reindeer. The law provided that once an individual had practised another occupation for a period of more than three years, he or she lost membership of the village. The rationale of this legislation was to maintain a reasonable standard of living for those involved in breeding reindeer. The Committee accepted this and found that the legislation did not breach Article 27.

In so finding, the Committee held that "the regulation of an economic activity is normally a matter for the state alone".

This is not surprising: a State's internal economy is not readily susceptible to scrutiny from an international Human Rights Committee. However, the Committee did qualify its comment by advising that in other circumstances "where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under Art 27".[76]

Similarly, in *Ominayak* the Committee declared that "the rights protected by Art 27 include the rights of persons in community with others to engage in economic and social activities which are part of the culture to which they be-

73 See, for example, Waitangi Tribunal, *Muriwhenua Report*, supra at note 16.

74 Supra at note 7.

75 Supra at note 67.

76 Ibid, para 9.2.

long".[77] Therefore, even commercial fishing would have to be accepted by the Committee as part of the culture of the Chatham Island Maori.

(iii) Denial of the right to culture

In *The Case of Sandra Lovelace*, the Committee held that "not every interference can be regarded as a denial of rights within the meaning of Art 27".[78] That the Committee has found that an interference is not necessarily a denial illustrates the reasonableness qualification inherent in Article 27. It would be likely that if the Committee considered that the impugned conduct of the State was reasonable, then that conduct would at most be found to constitute an interference. One may also tentatively suggest that the ability to distinguish between interferences and denials provides the Committee with an escape clause which it can use when faced with difficult cases, such as this one, which concern the management of the internal economy as well as race relations.

The author of a complaint to the Committee would therefore have to show that the settlement legislation would deny Maori the right to enjoy their culture, rather than simply interfere with that right. In the High Court, Heron J commented that the settlement is "not a denial of the right to enjoy the culture, but there is some limitation arguably on that right in exchange for a different set of rights more precisely defined".[79]

It is difficult to predict whether the Committee would consider that the fishing settlement was a denial of rights, or merely an interference with them. Nevertheless, s 9 of the Settlement Act completely extinguishes the Maori right to pursue traditional fishing in so far as that traditional fishing is of a commercial nature. To extinguish rights is to effectively deny them, not merely to interfere with them. The commercial aspect of Maori fishing rights is plainly of economic, cultural, and social value to them, and it is this which has been denied.

(c) Remedies?

In *Ominayak* the Committee found that the actions of the Canadian Government added to historical inequities by threatening the way of life and culture of the Lubicon Lake Band, and as such constituted a violation of Article 27.[80] In negotiating with the Band, the Government had offered it $45 million, which would approximate $500,000 per family of five.[81] During the negotiations this had been rejected, but the Committee accepted that this amount would be appropriate to rectify the situation.

77 Supra at note 53, at para 32.2.
78 Supra at note 47, at para 15.
79 Supra at note 68, at 40.
80 Supra at note 53, at para 33.
81 Ibid, para 29.10.

The situation in Canada differs from that in New Zealand because the resources had already been depleted; there was little else available other than a monetary payment. Nevertheless, even if the Committee did conclude that the Settlement Act breached Article 27, it seems unlikely that the Committee would recommend that the Settlement Act be repealed. Such a recommendation might serve only to underline the Commission's weaknesses, since there is no requirement that the Government pay any attention to the recommended remedies.

If, however, the Committee did find that the settlement was inconsistent with the requirements of Article 27, it would send a clear message to the Government that its current methods of settling resource disputes with Maori are unacceptable and inconsistent with its international obligations under the Covenant. It would reinforce the argument of many Maori that it is not sufficient to deal with these disputes by making full and final payouts to some collective which purports to represent Maori, when there are many iwi who do not wish to give up their rights in such a way.

IV: CONCLUSION

Until this Covenant came into effect, states were the only subjects of international law. The individual was merely an object of the law, enjoying whatever benefits the State conferred, and enduring the burdens it saw fit to impose. The significance of the Human Rights Committee's jurisdiction under the Protocol is that it makes the individual a subject of international law.

Indigenous peoples, ethnic minorities, and other distinct groups are not individuals, nor are they states. As such, these groups are still not recognised as subjects of international law. The closest that these groups come to such recognition is through the hybrid rights protected by Article 27 of the Covenant. However, political reality has meant that the Committee has been cautious interpreting Article 27. It has been considered in three cases. Although in two of those cases the Committee found that the right had been infringed, it has always kept its analysis specifically to the facts and does not seem to be willing to lay down broad principles.

As a result, it is difficult to predict the likelihood of success of a claim made from an iwi aggrieved at the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. Nevertheless, it seems to be within Article 27's parameters for the Committee to find that it had been breached by the Settlement Act. It would be relatively inexpensive for a representative of the iwi to make the complaint. If the people of Wharekauri Rekohu continue to be disgruntled at the effects of the settlement, it is submitted that making a complaint to the Human Rights Committee would be worthwhile.