



Peace Movement Aotearoa

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20 April 2009

John Hayes, MP, Chairperson,
Foreign Affairs, Defence and Trade Select Committee.

Petition 2008/06

Dear Mr Hayes and Committee members,

We appreciate this opportunity to provide a preliminary submission on the petition requesting the House of Representatives to urge the government to support the United Nations Declaration on the Rights of Indigenous Peoples.

Due to other commitments, we are not at this time in a position to provide a full submission on this matter, and request the opportunity to submit further supporting evidence, and to make an oral submission to the Committee.

We are aware that other organisations wish to provide submissions on the petition and would appreciate your advice on how this can be done. In particular, because we are a primarily Pakeha organisation, we can only provide a Pakeha perspective on this matter, and it is of crucial importance that Maori have the opportunity to convey their views on the subject of the petition to the Committee.

We would therefore like to know if the Committee will be calling for submissions on the petition. If not, then we are prepared to collect submissions from the organisations we know are interested and submit them as supporting evidence. It would be helpful if you could indicate when you are likely to consider the petition, and the deadline for submitting further evidence.

Enclosed with this letter are the following documents:

- Preliminary Submission on Petition 2008/06;
- Annex A: United Nations Declaration on the Rights of Indigenous Peoples;
- Annex B: 'The Rights of Indigenous Peoples', C. Charters, New Zealand Law Journal, 2006;
- Annex C: A further 765 signatures in support of the petition.

Thank you for your consideration of the petition, and we look forward to hearing from you at the earliest opportunity with regard to the requests above.

Yours sincerely,

Edwina Hughes,
Coordinator, Peace Movement Aotearoa.

Preliminary Submission on Petition 2008/06

Our preliminary submission begins with an introductory section, then provides an outline of matters pertaining to the petition under these headings:

- 1) What is the United Nations Declaration on the Rights of Indigenous Peoples?
- 2) Does the Declaration create new or special rights?
- 3) Is the Declaration legally binding on states?
- 4) Is the Declaration compatible with the Treaty of Waitangi?
- 5) Is the Declaration compatible with domestic human rights legislation?
- 6) Is the Declaration compatible with New Zealand's obligations under international law?
- 7) How was New Zealand's position on the Declaration developed, and is it valid?

There then follows a brief concluding section.

Introduction

Peace Movement Aotearoa is the national networking peace organisation, registered as an incorporated society in 1982. Our purpose is networking and providing information and resources on peace, social justice and human rights issues. Our membership and networks mainly comprise Pakeha organisations and individuals, and we currently have just under two thousand people (including representatives of eighty three peace, social justice, church, community, and human rights organisations) on our mailing list.

We have worked on the United Declaration on the Rights of Indigenous Peoples (the Declaration) since 2000, with increasingly deep concern about the then government's opposition to it. As you will be aware, New Zealand was one of only four United Nations (UN) member states to vote against the Declaration when it was adopted by the UN General Assembly in September 2007, with one hundred and forty three states voting in favour (subsequently adjusted to one hundred and forty four votes in favour), and eleven abstentions.

With the Australian government having formally announced its support for the Declaration on 3 April 2009¹, New Zealand is now one of only three UN member states² that remain opposed to this important international human rights instrument. Being included in such a tiny minority is extremely harmful to New Zealand's international reputation in relation to the government's stated commitment to the protection and promotion of international human rights.³

We coordinated this petition to encourage informed consideration of the government's position on the Declaration by the House of Representatives. So far as we are aware, this has never taken place. As mentioned in our covering letter, because we are a primarily Pakeha organisation, we can only provide a Pakeha perspective on this matter, and it is of crucial importance that Maori have the opportunity to convey their views on the subject of the petition to the Committee.

1) What is the United Nations Declaration on the Rights of Indigenous Peoples?

"The Declaration is a visionary step towards addressing the human rights of indigenous peoples. It sets out a framework on which states can build or re-build their relationships with indigenous peoples. The result of more than two decades of negotiations, it provides a momentous opportunity for states and indigenous peoples to strengthen their relationships, promote reconciliation, and ensure that the past is not repeated. I encourage Member States and indigenous peoples to come together in a spirit of mutual respect, and make use of the Declaration as the living document it is so that it has a real and positive effect throughout the world." Ban Ki-moon, UN Secretary General⁴

Around the world, indigenous peoples have historically been, and continue to be, subjected to gross and persistent human rights violations including: dispossession of their lands, territories and resources; attempts to destroy their political, legal, social, and economic systems and institutions; marginalisation, racism and discrimination, and genocide. The need for a human rights instrument which would apply existing fundamental human rights protections to indigenous peoples' particular circumstances has long been recognised, but it has been slow in coming.

In 1985, the Working Group on Indigenous Populations began drafting the text of the Declaration in a process involving Working Group experts, representatives of states (including those who voted against the Declaration in 2007), and indigenous peoples' representatives (including Maori). The draft Declaration text was agreed in 1993, and unanimously adopted by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1994. In June 2006, a partly reworded version was adopted by the UN Human Rights Council, and a further reworded version was adopted by the UN General Assembly on 13 September 2007.

When adopting the Declaration, the General Assembly stated its conviction that:

*"the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith."*⁵

The Declaration provides "minimum standards for the survival, dignity and well-being of the indigenous peoples of the world".⁶ It has twenty four preambular paragraphs and forty six Articles, which outline indigenous peoples' collective and individual rights.

These cover a range of fundamental freedoms and human rights including: the right of self-determination; ownership and use of traditional lands and natural resources, and the right to redress where those have been taken; the honouring of treaties and agreements concluded with indigenous peoples; the right to preserve and develop their cultural characteristics and distinct identities; the right to a nationality; the right to participate in the political, economic and social life of the society in which they live; rights related to health, religion, language, and education; and protection against genocide.

A copy of the Declaration is attached as Annex A for your convenience.

2) Does the Declaration create new or special rights?

The Declaration does not create any new or special rights; rather it applies already existing fundamental human rights to the particular circumstances of indigenous peoples. In this context, the Declaration is part of the ongoing process of the application of basic human rights to the circumstances of specific groups - for example, the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention on the Rights of the Child (1989), and the Convention on the Rights of Persons with Disabilities (2006).

The sources of the human rights elaborated in the Declaration are already well established in international law by, for example: the UN Charter (1945), the Universal Declaration of Human Rights (1948), the Convention on the Prevention and Punishment of the Crime of Genocide (1951), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), and the Indigenous and Tribal Peoples Convention, ILO 169 (1989); the jurisprudence of the human rights treaty monitoring bodies; regional human rights instruments; and international customary law.

3) Is the Declaration legally binding on states?

The Declaration is an aspirational human rights instrument with declarative effect, therefore it does not impose legally binding obligations on states. It is "a standard of achievement to be pursued in a spirit of partnership and mutual respect".⁷

However, it does have considerable moral weight, especially as it was adopted by such an overwhelming majority of UN member states.

The Declaration represents a commitment on the part of the UN and all of its member states (regardless of whether or not they voted in favour it), within the framework of the obligations established by the UN Charter, to promote and protect human rights on a non-discriminatory basis.⁸

Since its adoption by the General Assembly, some states have chosen to enact legislation to give legal force to the Declaration, for example, Bolivia and Ecuador; and similar initiatives are being discussed in other states.⁹ Similarly, in some jurisdictions the Declaration is already being applied by the courts, for example, the Supreme Court of Belize applied it in a decision affirming the rights of indigenous Maya communities in October 2007.¹⁰

Within the UN system, the Declaration is being used to advance the work of the Office of the High Commissioner for Human Rights¹¹, the human rights treaty monitoring bodies and Special Procedures, the UN Permanent Forum on Indigenous Issues, and guidelines have been developed to assist the UN system to mainstream and integrate indigenous peoples' issues into policies, activities and programmes at the country level¹².

4) Is the Declaration compatible with the Treaty of Waitangi?

Yes, the Declaration is compatible with the Treaty of Waitangi.

While it can be argued that the Treaty, if it were to be fully honoured, would result in a situation where hapu and iwi would be exercising considerably more authority and rights than the Declaration is likely to ever deliver, Article 37:2¹³ states: "Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements". Thus the possibility of any incompatibility between the Treaty and the Declaration is covered in its provisions.

5) Is the Declaration compatible with domestic human rights legislation?

Yes, the Declaration is compatible with domestic human right legislation.

The provisions of the New Zealand Bill of Rights Act 1990 and the Human Rights Act 2001 are designed to give effect to some of New Zealand's obligations under international human rights instruments, in particular, the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the International Covenant on Civil and Political Rights - these international instruments are among the sources of rights elaborated in the Declaration.

6) Is the Declaration compatible with New Zealand's obligations under international law?

Yes, the Declaration is compatible with New Zealand's obligations under international law.

However, there is an incompatibility in relation to New Zealand's continued opposition to the Declaration, as this is not compatible with the binding obligation on all UN member states to promote and encourage respect for human rights and fundamental freedoms for all without distinction.¹⁴

It should also be noted in this context that New Zealand already has legally binding obligations through the international human rights instruments which it has signed and ratified, and these include all of the provisions in the Declaration.

As but one example, New Zealand is a state party to the International Convention on the Elimination of All Forms of Racial Discrimination, which is monitored by the Committee on the Elimination of Racial Discrimination. In common with the other human rights treaty monitoring bodies, the Committee has developed a number of General Recommendations to provide more detailed information on specific topics, and these are taken into account when assessing whether or not a state party is complying with its binding obligations under the Convention.

In 1997, the Committee adopted a General Recommendation on Indigenous Peoples (GR 23) which calls on state parties to the Convention:

"to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is

for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories."¹⁵ And to:

*"Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent".*¹⁶ [our emphasis]

In New Zealand's Explanation of Vote¹⁷ on the Declaration, there were four specific provisions listed as being of particular concern, those on: lands and resources (Article 26), redress (Article 28), and the need for states to consult and cooperate in good faith in order to obtain the free, prior and informed consent of indigenous peoples on matters affecting them (Articles 19 and 32).

Yet, as outlined by the example above, these provisions are already used as a standard by which New Zealand's compliance with its international human rights obligations are measured. More examples of this are provided in the article by C. Charters, New Zealand Law Journal (NZLJ), attached as Annex B.¹⁸

7) How was New Zealand's position on the Declaration developed, and is it valid?

While we are not privy to the precise means by which New Zealand's position on the Declaration was developed, we assume that the previous government's position was to some extent determined by advice from Ministry of Foreign Affairs and Trade (MFAT) officials, which is cause for considerable concern.

From our experience, MFAT officials were, and are, not particularly well informed on the content of the Declaration, nor the sources of international law of the rights which it elaborates. We have had staff and members present at NGO briefings with officials from MFAT's United Nations, Human Rights and Commonwealth Division, and at public meetings where officials have spoken about the Declaration, where this was clearly evident.

There are two areas of particular concern about what MFAT officials have been saying: their tendency to emphasise provisions of the Declaration in isolation rather than looking at the document as a whole; and a tendency to make misleading and inaccurate statements about the consequences of New Zealand supporting the Declaration.

Statements made by MFAT officials - such as the Declaration would give Maori a right of veto that others do not have, that it is discriminatory, and that if New Zealand were to support the Declaration that would enable Maori to claim the whole country - are patently absurd in reality and also contrary to what the Declaration actually says:

*"2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected ... 3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith."*¹⁹

The human rights of all are clearly protected in the Declaration. Moreover, Article 46 also expressly provides for indigenous peoples' rights to be balanced with the rights of others:

*"The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."*²⁰

More detailed responses to New Zealand's position on the Declaration are in the NZLJ article, attached as Annex B.²¹

Quite frankly, if the statements MFAT officials have made in public forums are indicative of the quality of advice they were providing to the previous government, then it is perhaps not surprising that New Zealand voted against the Declaration in 2007.

Furthermore, New Zealand's position on the Declaration was developed without any consultation with hapu and iwi, and a refusal to consult with Maori at all during the last five years of negotiations.²² The failure to properly consult was inexcusable, and if it had been done, may very likely have resulted in a very different outcome.

The Foreign Affairs, Defence and Trade Select Committee now has the chance to correct this unfortunate situation - to have a balanced and informed discussion on what the Declaration actually says, and to ensure that the views of Maori are heard and acted on.

New Zealand's position on the Declaration is not valid and there is no justification for it. The Declaration is compatible with the Treaty of Waitangi, with domestic human rights legislation and with New Zealand's existing obligations under international law.

The Declaration is a reflection of the overwhelming majority opinion of the international community, and it will assist with addressing the widespread human rights violations against indigenous peoples around the world. There is no good reason why the government should continue to oppose it.

Conclusion

The adoption of the Declaration in 2007 was described by the UN High Commissioner for Human Rights as:

"a triumph for justice and human dignity",²³

and by the UN General Assembly President as a:

"major step forward towards the promotion and protection of human rights and fundamental freedoms for all".²⁴

Their words indicate the importance of the Declaration as another positive marker of progress towards global recognition and respect for all human rights, without exception. What message is New Zealand sending to the world if it continues to oppose the Declaration?

In closing, we leave you with an extract from the Australian government's announcement of support for the Declaration:

"Today, Australia joins the international community to affirm the aspirations of all Indigenous peoples. We show our respect for Indigenous peoples. We show our faith in a new era of relations between states and Indigenous peoples grounded in good faith, goodwill and mutual respect."

We trust that New Zealand too will soon join the international community in this regard.

Thank you for your consideration of our submission.

20 April 2009

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References:

¹ Statement on the United Nations Declaration on the Rights of Indigenous Peoples, Parliament House, Canberra, 3 April 2009 at

www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm

² Along with Canada and the United States. With regard to Canada, the Canadian House of Commons has supported the Declaration although the Canadian government has not yet amended its position. A motion

presented to the House of Commons on 7 April 2008 - "That the government endorse the United Nations Declaration on the Rights of Indigenous Peoples as adopted by the United Nations General Assembly on 13 September 2007 and that Parliament and Government of Canada fully implement the standards contained therein." (Third report of the Standing Committee on Status of Women) - was carried by a majority vote on 8 April 2008, see Hansard at

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=2&DocId=3394873> and

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=2&DocId=3400639#OOB-2407095> respectively.

³ See, for example, "New Zealand has a strong record in international human rights", in *NZ withdraws Human Rights Council bid*, Murray McCully, 1 April 2009 at

www.beehive.govt.nz/release/nz+withdraws+human+rights+council+bid and the Ministry of Foreign Affairs and Trade human rights web page at www.mfat.govt.nz/Foreign-Relations/1-Global-Issues/Human-Rights/index.php

⁴ Secretary-General's Message on the International Day of the World's Indigenous People, 9 August 2008 - <http://www.un.org/events/indigenous/2008/sgmessage.shtml>

⁵ United Nations Declaration on the Rights of Indigenous Peoples, Preamble, para 18

⁶ United Nations Declaration on the Rights of Indigenous Peoples, Article 43

⁷ United Nations Declaration on the Rights of Indigenous Peoples, Preamble, para 24

⁸ See, for example, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, S. James Anaya, UN Human Rights Council, 11 August 2008 (A/HRC/9/9), at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/9session/A-HRC-9-9AEV.doc>

⁹ Referred to in, for example, 'UN Experts welcome Canadian House of Commons endorsement of the Declaration on the Rights of Indigenous Peoples', 18 April 2008, at [www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/0DF2B67C18A6B662C125742F00321882?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/0DF2B67C18A6B662C125742F00321882?OpenDocument)

¹⁰ See, for example, 'IPLP Program Helps Lead Maya Communities to Victory in the Supreme Court of Belize', October 2007, at

http://www.law.arizona.edu/depts/iplp/advocacy/maya_belize/index.cfm?page=advoc

¹¹ See, for example, Annual Report of the United Nations High Commissioner for Human Rights: The rights of indigenous peoples, 3 September 2008 (A/HRC/9/11), at

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/9session/A.HRC.9.11.doc>

¹² Guidelines on Indigenous Peoples' Issues, United Nations Development Group, February 2008, at <http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf>

¹³ United Nations Declaration on the Rights of Indigenous Peoples

¹⁴ United Nations Charter, Article 1 and elsewhere

¹⁵ General Recommendation No 23: Indigenous Peoples, Committee on the Elimination of Racial Discrimination, 1997:5

¹⁶ General Recommendation No 23: 4(d)

¹⁷ Declaration on the Rights of Indigenous Peoples: Explanation of Vote, Rosemary Banks, New Zealand Permanent Representative to the United Nations, 13 September 2007

¹⁸ 'The Rights of Indigenous Peoples', Claire Charters, *New Zealand Law Journal*, October 2006 (note: while this was published before the UN General Assembly adopted the Declaration, the points of law remain valid)

¹⁹ United Nations Declaration on the Rights of Indigenous Peoples, Article 46:2 and 3

²⁰ United Nations Declaration on the Rights of Indigenous Peoples, Article 46:2

²¹ See reference and note at 18 above

²² See, for example, Joint submission to the Universal Periodic Review of New Zealand, Aotearoa Indigenous Rights Trust et al, November 2008 at <http://www.converge.org.nz/pma/towupr09.pdf> and Shadow Report to the United Nations Committee on the Elimination of Racial Discrimination, Aotearoa Indigenous Rights Trust, June 2007, at <http://www.converge.org.nz/pma/CERD71-AIRT.pdf>

²³ 'High Commissioner for Human Rights hails adoption on Declaration on Indigenous Rights', 13 September 2007, at

www.unhchr.ch/hurricane/hurricane.nsf/view01/B8C805CF07C5ED86C125735500612DEA?opendocument

²⁴ 'General Assembly adopts Declaration on Rights of Indigenous Peoples; 'major step forward' towards human rights for all, says President', 13 September 2007, at

www.un.org/News/Press/docs/2007/ga10612.doc.htm