

A Pakeha Perspective on Indigenous Peoples' Rights

International Day of the World's Indigenous People, 9 August 2006
Human Rights Commission Symposium, Wellington

I am speaking today from the perspective of a Pakeha organisation that works in support of indigenous peoples' rights. Peace Movement Aotearoa is the national networking peace organisation - we work on issues at the intersection of peace, social justice and human rights because we are of the view that the realisation of human rights is integral to the creation and maintenance of peaceful societies.

For us, supporting indigenous peoples' rights is a matter of basic justice - in the same way that we support all human rights, collective and individual. It is a mystery to us how the New Zealand government can refer to itself as a "principled defender of human rights", yet apparently finds itself unable to support indigenous peoples' rights. This can be seen domestically by their failure to honour the Treaty of Waitangi, and at the international level, over recent years, particularly by their behaviour at the United Nations (UN) forums discussing the draft Declaration on the Rights of Indigenous Peoples.

There has been a persistent pattern of government actions, policies and practices which discriminate against Maori - historically and in the present day. Underlying these has been the denial of the inherent and inalienable right of self-determination - of the self-determination that was exercised by Maori prior to the arrival of non-Maori, which was proclaimed in the Declaration of Independence, the continuance of which was guaranteed in the Treaty of Waitangi, and, in more recent years, was confirmed as a right for all peoples in the international human rights covenants.

I'm going to comment briefly on some recent examples of government behaviour that have been of concern to us, on five topics: the foreshore and seabed legislation, the government's response to the Committee on the Elimination of Racial Discrimination's decision on the legislation, their response to the Special Rapporteur's Report, their draft periodic report to the Committee on the Elimination of Racial Discrimination, and their position on the Declaration on the Rights of Indigenous Peoples. I have chosen these particular areas because they illustrate some of our concerns about how far the government is prepared to go in denying Maori the full expression of their rights.

The first topic is the government's response to the 2003 Court of Appeal ruling on the foreshore and seabed. As you will all be aware, from the first government announcement it was obvious that what they intended to do would be a substantive breach of the Treaty, and would violate basic human rights including the right of access to, and protection of, the law; the right to own property and not be arbitrarily deprived of it; the right to freedom from racial discrimination; the right to enjoy one's own culture; the right to development; and the right of self-determination.

The eventual passage of the foreshore and seabed legislation provided an unambiguous example of how the overlapping layers of protection for the human rights of Maori can be disregarded by a government intent on doing what they want - the primary protection, the Treaty, was ignored; as were domestic human rights legislation, and the international human

rights covenants and conventions. The constitutional arrangements that have arisen from the notion of parliamentary supremacy were again clearly exposed for all to see - legislation which contains multiple Treaty and other human rights breaches can be enacted by a simple majority in parliament. Essentially there is no 'effective remedy' available for human rights violations by an Act of parliament - that of course applies to everyone, not only to Maori; but equally, it is Maori whose human rights are more vulnerable because hapu and iwi are minority populations within an often ill-informed majority.

Which leads me to the next point - what the government was doing around the foreshore and seabed was bad enough, but equally disturbing was the way they went about it, creating a climate of deception and misinformation in an attempt to gain popular support for their actions. Rather than setting a tone which ensured public debate was conducted in an informed manner which emphasised the importance of human rights, instead the government's public utterances were designed to diminish respect for Maori and for their human rights.

While there were numerous examples of this over the eighteen months following the Court of Appeal ruling, perhaps the most startling was when the Prime Minister stated her preference for meeting a sheep, rather than the thousands of people who came on the foreshore and seabed hikoi to protest peacefully at parliament.

Less inflammatory, but nevertheless contributing to the climate of diminished respect for Maori and their human rights, was the way Ministers of the Crown attempted to create the impression that there was united Pakeha pressure on the government to act the way they did. This was of particular interest to us, as a Pakeha organisation opposed to the foreshore and seabed confiscation.

In October 2005, the Deputy Prime Minister gave a speech in which he stated: "The Government could not have left foreshore and seabed issues to the Maori Land Court because of "the depth of Pakeha anger and alarm."

I refer to this quote for three reasons. Firstly, as was common during the period when the foreshore and seabed was subject to public discussion, there is silence around the profound distress and justified anger of Maori. This acted to invisibilise and minimise what was being done to them. Similarly, there was silence around the non-discriminatory alternatives offered by iwi and hapu representatives as a way forward. Furthermore, there is no hint in that statement that Ministers of the Crown were themselves largely responsible for attempting to manufacture Pakeha anger and alarm, so that they could then use it to as an excuse to defend what they were doing.

Secondly, the implication of united Pakeha support for the government's response to the Court of Appeal ruling is simply not an accurate portrayal of the situation. This can be demonstrated by reference to the government's own publication (in December 2003) analysing the submissions on the initial proposals, which includes statements such as:

"Almost all Maori and many non-Maori considered that the principles and related proposals constituted a major breach of the Treaty of Waitangi" and "Many were concerned that the principles and related proposals had been developed without the

participation of Maori and accordingly represented a very mono-cultural perspective on the issues and possible solutions."

Pakeha lawyers, historians, academics and church leaders, as well as human rights, social justice and peace organisations, were vocal in their opposition to the government's proposals and later to the Foreshore and Seabed Bill.

Thirdly, and most importantly, even if there had been united Pakeha support for the legislation, which there was not, that would not in any way have justified what the government was doing.

When the UN Committee on the Elimination of Racial Discrimination, known as CERD, released their decision on the foreshore and seabed legislation in March 2005, statements intended to diminish respect for Maori and their human rights were again apparent. The Prime Minister derided both the Committee itself and those who had utilised its Early Warning Procedure. She described CERD as "a committee that sits on the outer edge of the UN", and said, "This isn't a statement that NZ is a terrible country in breach of international conventions that those who went trotting off to it wanted to hear".

In fact, as a human rights treaty monitoring body, CERD does not sit on the outer edge of the UN; rather it is an integral part of the UN system. Furthermore, there is an implication in Ms Clark's remarks that those who went to CERD were a few disgruntled individuals. On the contrary, they included the Treaty Tribes Coalition and Te Runanga o Ngai Tahu - together they represent hapu and iwi with authority over more than half of the coastline. Clearly, facts are not to stand in the way of prejudice.

Similarly, when the report of Professor Stavenhagen, the UN Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples, was released earlier this year the same pattern of behaviour was evident. The Deputy Prime Minister said, amongst other things, that the report was full of errors of fact and interpretation, and "probably underlines the fact that the committee it comes from is being wrapped up and reformed".

Special Rapporteurs are independent experts employed by the United Nations because of their particular specialised knowledge of human rights - in Professor Stavenhagen's case, of the rights of indigenous peoples under international law. It is therefore reasonable to conclude that he is in fact better placed than Michael Cullen to assess whether or not those rights are being respected.

While here, Professor Stavenhagen met with a range of government Ministers, and chief executives and senior officials of various Ministries and Departments¹ - certainly government representatives had every opportunity to present facts, and their interpretation of those facts, to him. That the Special Rapporteur's conclusions, based on the evidence presented to him, were different from those of the government does not mean his report was full of errors.

As for Michael Cullen's dismissive statement that the report "probably underlines the fact that the committee it comes from is being wrapped up and reformed" - while there may have been some problems with the Commission on Human Rights, allegedly inaccurate reports

by this Special Rapporteur was not one of those problems. In addition, the Commission has been wound up and transformed into the Human Rights Council, with a higher status within the UN system, precisely to give increased emphasis to the importance of human rights.

To move now to the government's periodic report to the Committee on the Elimination of Racial Discrimination, or CERD - this is one of the regular reports they are required to submit to the various human rights treaty monitoring bodies, in this case, a report on their compliance with the International Convention on the Elimination of All Forms of Racial Discrimination. A draft of the current report was released for comment by the Ministry of Foreign Affairs and Trade earlier this year - we were extremely disturbed by its contents, to put it mildly, and sent comments to the Ministry focusing on three areas within it.

The first covered the sections on the foreshore and seabed legislation; in effect the government's response to the CERD decision. The draft report does not substantively address any of the concerns raised in the CERD decision². While it states that eight 'groups' have 'engaged' with the government on the foreshore and seabed through the Maori Land Court or in direct negotiation, it does not mention that the vast majority of hapu and iwi - more than ninety - have not 'engaged'.

The second area is the wording and content of the sections titled 'Responses to Maori offending' which we found to be not only misleading, but also offensive and racist - particularly in the repeated references to Maori being over-represented as "offenders". The report states: "Maori are particularly exposed to risk factors associated with anti-social and criminal behaviour including: limited social ties, having family problems, poor achievement at school, poor self management, demonstrating anti-social attitudes" and so on. There is no reference to the historical and ongoing processes of colonisation, to the imposition of an alien legal system, nor to the structural racism inherent in the criminal justice system.

The third area was the lack of any reference as to how the government's position on the Draft Declaration on the Rights of Indigenous Peoples was formulated, and how Maori had been involved in this process. We suggested that a section be added to provide that information - we imagine that would be a very short section were it to be included, given the government's lack of consultation, never mind of actual negotiation, with Maori around this.

And that brings me to the final area I am going to comment on - the draft, or as it has now become, the Declaration on the Rights of Indigenous Peoples. The Declaration was intended to provide minimum standards of protection for the rights and well-being of indigenous peoples around the world - the rights included in it are those taken for granted in dominant societies and are, generally speaking, already articulated in international law. I am not going to talk about the Declaration at length, as I'm hoping that Claire will do that, but I do have some points to make about the process whereby the draft Declaration has now become the Declaration, and also about the government's position on it.

The first point is about the lengthy path the Declaration has followed through the UN system since its drafting began in 1985, twenty-one years ago. The draft Declaration text was adopted by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1994; and since 1995 has been discussed at meetings of the

Working Group on the Draft Declaration which followed a process of consensus until earlier this year when the Sub-Commission text rather abruptly became the Chair's text.

During a Forum at the Commission on Human Rights in 2005³, Professor Stavenhagen contrasted this extraordinarily slow progress with the period of time it took to agree the text of the Universal Declaration of Human Rights. He said:

" ... it is, of course, frustrating and surprising that [you can say that] while the discussions on the draft Declaration on the Rights of Indigenous Peoples have now been going on for over ten years, the Universal Declaration of Human Rights, the foundational document of the modern, post-war human rights system was approved in much less time back in 1946-47. So we rightly ask ourselves, well what does this mean? What's been happening? How come that a small group of highly motivated and committed people over fifty years ago were able to sit together in an apartment in Paris ... people from the Socialist camp, and from the Islamic world, and from Asia, and from Latin America and from North America and Europe, and they brought forth the Universal Declaration of Human Rights. And yet here we've been sitting for ten years, and we haven't been able to make this small addition to international human rights, which would be the Declaration on the Rights of Indigenous Peoples."

The primary reason for the delay is of course the obstructive behaviour of a handful of governments, New Zealand among them, who refuse to acknowledge that indigenous peoples have the same rights as other peoples - in particular, that all peoples have the right of self-determination as articulated in Article 1⁴ of both international human rights covenants. Article 1 of the covenants also requires governments to respect and promote the realization of the right of self-determination; not to oppose it and attempt to redefine it according to their narrow self-serving domestic political agenda, as the New Zealand government attempted to do with the draft Declaration.

Their opposition to the full expression of indigenous peoples' rights in the Declaration has been expressed in a number of ways, often along 'one law for all' lines. Linked to this, has been their promotion of the notion that recognition and realisation of indigenous peoples' rights will somehow discriminate against others. There are several flaws in this way of thinking - it implies that there are a restricted number of human rights, and if some people are to have their rights respected then there will somehow be fewer rights for others. That is clearly not the case - there may be occasions where intersecting rights need to be negotiated to ensure the maximum recognition of different rights; but negotiation is the only positive way forward when that occurs, not a blanket denial of the rights of some. Additionally, it ignores the fact that the rights of particular groups are already articulated and protected in international law, and by the New Zealand government, without discriminating against others - the rights of children and of women, for example, or the rights of disabled persons which the government is enthusiastically supporting in UN forums right now. It also does not take into account the fact that the failure to articulate and realise indigenous peoples' rights is fundamentally discriminatory against them.

If any of you are in doubt as to the current position of the government on the Declaration, perhaps hoping that their opposition to it might have lessened following its adoption by the

Human Rights Council in June⁵, we received a copy of a⁶ letter from the Minister of Foreign Affairs, written on 17 July, that makes their stance very clear:

"New Zealand will not be in a position to support the text of the declaration, which was adopted by a less than decisive vote by the members of the Human Rights Council recently in Geneva. We worked hard to get a text that all countries could support and implement. Unfortunately, the text that has been adopted is not consistent with international law, is potentially discriminatory and is not capable of being implemented by States because many of its provisions are unworkable. This was not the outcome New Zealand and other countries such as Canada, Australia and the United States wanted."

That paragraph, with its interesting mix of deceptive and misleading statements is fairly typical of the rest of the letter. Of the various points he makes, probably only two are entirely correct - that the government's position has been stated on many occasions, and that the Declaration was not the outcome New Zealand, Canada, Australia and the US wanted.

So, where does that somewhat grim outline of some recent and current concerns leave us? It is sometimes difficult to feel at all positive about the future when it comes to the realisation of indigenous peoples' rights internationally, and of the human rights of Maori here in Aotearoa New Zealand. With regard to the latter, it is clear that those rights will not, and indeed cannot, be fully realised while the existing constitutional arrangements continue.

Maori control of their political status and of their economic, social and cultural development is the only way to ensure the full and effective enjoyment by Maori of their human rights. Furthermore, that will only be realised when the constitutional arrangements of this country reflect the constitutional arrangements laid out in the Treaty of Waitangi.

For more than a century and a half now, Maori have expressed their desire and willingness to negotiate those arrangements, but successive governments have ignored this.

All that is required to begin the process of negotiation for constitutional change is the imagination to see the potential beyond the current constitutional arrangements, the ability to move beyond a monocultural understanding of the world, good will, and preparedness to recognise Maori authority and control of resources. The realisation of this positive vision for our future would enhance the full and effective enjoyment of human rights for everyone in Aotearoa New Zealand.

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Footnotes

¹ He met, among others, with the Deputy Prime Minister, Michael Cullen; the Minister of Maori Affairs, Parekura Horomia; and the Minister of Customs and Youth Affairs, Nanaia Mahuta. He held talks with a number of chief executives and senior officials of the Ministry of Maori Development, the Department of the Prime Minister and Cabinet, the Treasury, the Ministry of Foreign Affairs and Trade, the Ministry of Justice, the Ministry of Economic Development, the Ministry of Health, the Ministry of Education, the New Zealand Corporation, the State Service Commission, the Office of Treaty Settlements and the Crown Law Office".

Mission to New Zealand: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen. E/CN.4/2006/78/Add.3 13 March 2006, p4

² "The Committee ... urges the State party, in a spirit of goodwill and in accordance with the ideals of the Waitangi Treaty, to resume dialogue with the Maori community with regard to the legislation, in order to seek ways of mitigating its discriminatory effects, including through legislative amendment, where necessary. The Committee requests the State party to monitor closely the implementation of the Foreshore and Seabed Act, its impact on the Maori population and the developing state of race relations in New Zealand, and to take steps to minimize any negative effects, especially by way of a flexible application of the legislation and by broadening the scope of redress available to the Maori." Decision 1 (66): New Zealand CERD/C/DEC/NZL/1 11 March 2005

³ 'Advancing the Human Rights of Indigenous Peoples: A Critical Challenge for the International Community', Voices from a Forum at the 61st Session of the United Nations Commission on Human Rights, 13 April 2005

⁴ Article 1: 1. All 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. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

⁵ The Chair's text was adopted as the Declaration on the Rights of Indigenous Peoples by the Human Rights Council on 29 June by a vote of 30 in favour, 2 against, 12 abstentions, with three state representatives absent. In favour (30): Azerbaijan, Brazil, Cameroon, China, Cuba, Czech Republic, Ecuador, Finland, France, Germany, Guatemala, India, Indonesia, Japan, Malaysia, Mauritius, Mexico, Netherlands, Pakistan, Peru, Poland, Republic of Korea, Romania, Saudi Arabia, South Africa, Sri Lanka, Switzerland, United Kingdom of Great Britain and Northern Ireland, Uruguay, Zambia. Against (2): Canada, Russian Federation. Abstentions (12): Algeria, Argentina, Bahrain, Bangladesh, Ghana, Jordan, Morocco, Nigeria, Philippines, Senegal, Tunisia, Ukraine. Absent (3): Djibouti, Gabon, Mali.

⁶ "New Zealand's position on the text for the declaration has been articulated on many occasions. It has not changed during the eleven years of the negotiations in Geneva. Furthermore, the government has engaged with interested Maori and others on the Declaration repeatedly during that time. Feedback from these discussions informed the development of the government's policy which was determined by Cabinet.

The fact that the small number of those who have been interested in this issue in New Zealand have tended to support a position of no change to the original and unacceptable text has limited the opportunities for a meaningful or constructive engagement.

New Zealand will not be in a position to support the text of the declaration, which was adopted by a less than decisive vote by the members of the Human Rights Council recently in Geneva. We worked hard to get a text that all countries could support and implement. Unfortunately, the text that has been adopted is not consistent with international law, is potentially discriminatory and is not capable of being implemented by States because many of its provisions are unworkable.

This was not the outcome New Zealand and other countries such as Canada, Australia and the United States wanted. It is deeply disappointing that the world's indigenous peoples have been delivered a second rate outcome and one that does not enjoy consensus internationally." Winston Peters, Minister of Foreign Affairs, 17 July 2006

The documents referred to above are available at <http://www.converge.org.nz/pma/indig.htm>