

NZCPL and NZ Institute of International Affairs

Celebrating 60 Years of the Universal Declaration of Human Rights Conference

Current Human Rights Issues and Future Challenges for Human Rights and New Zealand: A Maori Perspective

10 December 2008

Claire Charters*

Greetings, and apologies for non attendance.

Introduction

In 2005, the then Prime Minister had this to say about the UN Committee on the Elimination of Racial Discrimination when it found New Zealand's Foreshore and Seabed Act to be discriminatory against Maori:

“I know that those who went off to this committee on the outer edges of the UN system are spinning it their way but I have to say there is nothing in that decision that finds that New Zealand was in breach of any international convention at all.”

“This is a committee on the outer edges of the UN system. It is not a court. It did not follow any rigorous process as we would understand one. In fact, the process itself would not withstand scrutiny at all. And frankly, we don't think that those who went to it got what they wanted for [phon] anyway.”

“The other thing is I don't think we should elevate this to any statement that this is the UN making a finding against New Zealand. This is a Committee pursuant to a convention that sits on the outer edge of the UN system – this is not the UN

* Ngati Whakaue, Nga Puhi, Ngati Tuwharetoa and Tainui. Senior Lecturer in Law, Victoria University of Wellington and PhD Candidate University of Cambridge.

Security Council with an open and transparent process. In fact the process really had quite a lot of shortcomings.”

In response to a critical report by the UN Special Rapporteur on the Rights of Indigenous Peoples, National Party member and then Maori Affairs spokesman Gerry Brownlee said today New Zealanders did not need to be told by the UN what it meant to be a Kiwi. “Fair-minded Kiwis will reject these statements outright, because they know them to be untrue.”

The Deputy Prime Minister said “His raft of recommendations is an attempt to tell us how to manage our political system. This may be fine in countries without a proud democratic tradition, but not in New Zealand where we prefer to debate and find solutions to these issues ourselves.”

New Zealand was one of only four states that voted against the Declaration on the Rights of Indigenous Peoples in September 2007. 143 voted for and 11 abstained.

At the same time, walk into the Ministry of Foreign Affairs and Trade and you will be struck by the Maori art on the walls and that the only book on the coffee table celebrates Maori carving. And, the brochure for New Zealand’s candidature for the Human Rights Council includes a nice photo of a old koro in a cloak, and the comment that indigenous rights are integral to the New Zealand identity. The hypocrisy jars.

The hope is that the new Government will express, and act on, a greater respect for international law on the rights of indigenous peoples, although it is sad to note that it has yet to detail its policy on human rights. Nonetheless, we can expect the Maori Party improve New Zealand’s stance on indigenous peoples’ rights.

Current Issues

Today I would simply like to comment on three issues and future challenges for human rights in New Zealand as they relate to Maori.

Here I am highlighting, I guess, areas which I see as unsettling New Zealand's ability to conform to its international human rights obligations. The first is New Zealand's approach to indigenous land rights, the second is New Zealand's approach to the Declaration and the third is the on-going UN censure of New Zealand for its non-compliance with human rights as they relate to Maori.

I am not endeavoring to defend a central thesis here. In fact my presentation here is informed more from walking the UN halls and advocacy from Maori groups than my academic work, and glosses over many more complex and stimulating issues raised by indigenous peoples' rights under international law, such as the institutional battles currently underway in the UN as to which institution has primary authority for the UN Declaration and the vexed issue of who counts as indigenous.

If anything, my central message is simply that:

Until New Zealand takes its international human rights obligations seriously in the context of Maori rights, international censure and the demands for greater constitutional change will only increase.

Only in the finish will I venture to say something about what I think might drive New Zealand's particular stance to indigenous peoples' rights.

Land Rights: the Right to Property

Here we see New Zealand moving in a direction which brings it in direct conflict with international human rights law.

Article 17 of the UDHR states:

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

The right to property as expressed in the UDHR was not included in the ICCPR nor the ICESCR. However, it has been included in the American Convention on Human Rights.

Article 21. Right to Property

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

The right to property, coupled with the right to freedom from discrimination, has been the juridical basis of considerable international recognition of the rights of indigenous peoples to their traditional territories and demarcation of those lands. This includes the jurisprudence of the Inter-American Court of Human Rights, starting with its decision in *Amas Tingni* in 2001, where the Court has held that the right to property extends to indigenous peoples' customary and communal property interests. The Court required Nicaragua to demarcate such lands.

Similarly, the Committee on the Elimination of Racial Discrimination has interpreted the right to freedom from discrimination in relation to the right to own property as a secure basis for the legal protection of indigenous peoples' land interests. Its comment on states' reports reflects this, not least in its decision on the foreshore and seabed issue mentioned earlier and in the Committee's 2007 observations on New Zealand.

In contrast, New Zealand fought hard against recognition of Maori land rights interests in the negotiations on the Declaration on the Rights of Indigenous Peoples, specifically citing 2 of the land rights provisions in its explanation of vote against the Declaration. It takes a somewhat alarmist interpretation that seems driven more by political perception than sound legal analysis. It interprets the Declaration as requiring that all of New Zealand be returned to Maori. However, the Declaration is, of course, subject to existing international human rights law, including higher ranking conventions and treaties guaranteeing the rights of all. Most significantly, however, the Declaration

expressly allows for limitations on the Declaration's rights and freedoms "for the purpose of securing limitations in the interests of due recognition and respect for the rights and freedoms of others."

Until New Zealand's position on indigenous land rights changes, it will remain on a collision course with international human rights monitoring bodies.

Declaration on the Rights of Indigenous Peoples

The second current issue on which I would like to comment is New Zealand's continuing rejection of the Declaration.

The first point here is that New Zealand risks being the only state to continue to reject the Declaration. Of the four states that voted against, Australia has said it will now support, the Canadian Parliament has called on the Executive to support, and the changing political dynamics in Canada suggests that if the Government changes, this could well be likely. Finally, while we are yet to hear the official policy of President-elect Barack Obama, we must take into account that he has become a member of the Crow Nation, with the honorary name of Barack Black Eagle, and has appointed some Native Americans to high-powered positions.

Second, an indigenous peoples' right to self-determination need not be threatening for New Zealand. There are two relevant comments here. First, an indigenous peoples' right to self-determination does not legally entitle all indigenous peoples to secede. The right to self-determination does not only mean secession – it extends to arrangements for autonomy to democratic participation and so on. In the context of indigenous peoples, the right to self-determination will only translate into a legal right to secession where established criteria for secession have been met. Second, politically, it seems to me that the more New Zealand rejects an indigenous peoples' right to self-determination, the greater the demands for self-determination will be. In any event, comparative analysis suggests that it is not scary. For example, Canada and the United States have had official policies recognising Indigenous self-determination for decades now, and the state has not collapsed. Instead American Indians' enjoy legal recognition of their inherent sovereignty within the US borders and the Canadians are negotiating creative regimes to give effect to First Nations' autonomy and jurisdiction.

Further, in both countries, treaties have constitutional force, something which the Treaty of Waitangi lacks.

Third, New Zealand's continuing rejection of the Declaration is embarrassing. It cannot be swept under the carpet. Maori are well aware of it. So are states and institutions active in the human rights arena such as the Human Rights Council. New Zealand's position hinders its ability to legitimately and convincingly promote the protection of human rights globally: I have no doubt that it will be an issue that New Zealand will have to address when reviewed under the Human Rights Council's Universal Periodic Review and making pledges on its accession to that body.

International Legal Avenues will be used until New Zealand's Constitution better Accommodates Maori

Maori have utilized international institutions more than most New Zealanders, having first turned up in Geneva in the 1920s. Of late, Maori have, as mentioned, petitioned the CERD Committee on the foreshore and seabed and lobbied for the visit of the UN Special Rapporteur on the Rights of Indigenous Peoples. Further, Maori and representatives constantly present submissions to the various human rights treaty bodies in relation to New Zealand's reporting requirements and, more recently, to the Human Rights Council for its periodic review of New Zealand next year. Maori are almost always visible and active in the various UN fora such as the UN Expert Mechanism on the Rights of Indigenous Peoples and before the Permanent Forum on Indigenous Issues. I posit that this interaction will continue, at least until New Zealand takes a more constructive approach to indigenous rights on the international plane. It will also result in on-going censure of New Zealand.

There is another reason for all this Maori-UN interaction and it relates to New Zealand's Constitution. While the Treaty remains legally unenforceable until incorporated and legislation cannot be overturned for non-compliance with rights, Maori *need* international fora as a place where they can seek at least moral vindication of their rights. In this sense, the international framework is essential for continuing relations between Maori and the state: without it, there would not be an adequate legal vent for Maori dissatisfaction. In saying that, I might also question whether the international

framework can continue in this role for long, especially when the considered opinions of international jurists are treated with such disdain by the powers that be here in Aotearoa.

Final Comment

It is interesting to note that the Declaration on the Rights of Indigenous Peoples went through at the same time as the Convention on Persons with Disabilities, and the stark contrast in the position taken to human rights by New Zealand at the time. It was simultaneously criticized for its position in relation to Indigenous and celebrated for its position on the Convention. I think it is fitting that we have 2 presentations, one on each issue, here today.

I would like to hypothesize about why New Zealand has been so hypocritical on Indigenous issues, considering the comments I mentioned initially and its approach to the Declaration. Reminded by a presentation from one of my masters students yesterday, of the work of Will Kymlicka and James Tully, I would suggest that New Zealanders have a strong commitment to equality; but it is an especially formalistic and liberal version of equality that has become somewhat outdated and discredited. It is a version of equality that is blind to difference: that wants to make us all the same irrespective of cultural difference, especially where that difference is Maori and is related to the collective shame of the impact of colonization and Treaty breaches. This approach is also one that can only lead, in the end, to an assimilationist agenda. It also explains why New Zealand seems more concerned with the rights of others when considering indigenous peoples rights rather than indigenous.

Conclusion

I have commented on three areas of contention in New Zealand's approach to human rights in the context of indigenous issues: land rights, the Declaration on the Rights of Indigenous Peoples and the important role played by international human rights monitoring bodies in continuing to apply pressure on New Zealand to better address Maori concerns.

In closing, I would simply suggest that these areas of contention would be greatly appeased by an approach to international law that is less dismissive and less driven by political fear. New Zealand needs to take a more constructive approach to indigenous peoples' rights. Until that time, international censure, and demands for constitutional change, will only increase and we continue to fail to live up to the expectations and promises made in the UDHR.