

**INTERNATIONAL DEVELOPMENTS CONCERNING INDIGENOUS PEOPLES AND THEIR  
RELATION TO NATIONAL LAWS, POLICIES AND ACTION: MAORI IN  
AOTEAROA/NEW ZEALAND**

Paper for the United Nations Expert Seminar on Implementation of National  
Legislation and Jurisprudence Concerning Indigenous Peoples' Rights: Experiences  
from the Americas, 12-14 October 2005

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***I INTRODUCTION***

This paper focuses on the implementation of national legislation and jurisprudence concerning indigenous peoples' rights, which is the subject matter of the United Nations Expert Seminar for which it is prepared (the Expert Seminar). I address, as I have been asked to do, the situation of Maori under Aotearoa/New Zealand's legal system.

At the same time, I hope to provide information useful to the United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (the Special Rapporteur) for his work on the current state of domestic legislation and jurisprudence in various countries concerning the rights of indigenous peoples. I understand that he will report on constitutional reform, legislation and implementation of laws regarding the protection of rights of indigenous peoples and the effectiveness of their application. I have also written this paper with the Special Rapporteur's upcoming visit to Aotearoa/New Zealand in mind: I hope that it provides useful background material.

As the above suggests, this paper is principally descriptive although my perspective is no doubt influenced by my work as an advocate for Maori tribes.<sup>1</sup> More precisely, I cover the following:

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<sup>1</sup> Much of the content of this paper mirrors, in some cases word for word, other papers I have written for other conferences and journals including C Charters and A Erueti "A Report from the Inside: The CERD's Review of the Foreshore and Seabed Act 2004" (forthcoming in the Victoria University of Wellington Law Review); C Charters "Developments in International Law on Indigenous Peoples' Rights and their Domestic Implications" (forthcoming); C Charters "You Can Draw a Horse to Water But You Can't Make it Drink: Parliament's Compliance with International Human Rights Norms" (Presented at the New Zealand Center for Public Law Conference entitled "Parliament", Wellington, October 2004); C Charters "A Report on the Treaty of Waitangi 1840 between Maori and the British Crown" (Presented at the United Nations Expert Seminar on Treaties, Agreements and Other Constructive Arrangements between Indigenous Peoples and States, Geneva, December 2003) and available at the Office of the High Commissioner for Human Rights <<http://www.unhchr.ch/indigenous/treaties.htm>> (last accessed 6 September 2005).

- Aotearoa/New Zealand’s basic constitutional structure including features relevant to the protection of Maori rights;
- international developments in human rights and indigenous peoples’ rights relevant to Aotearoa/New Zealand legislation, policy and action; and
- implementation of international and domestic law providing some protection of indigenous peoples’ and Maori rights.

I use Aotearoa/New Zealand’s Foreshore and Seabed Act 2004 (FSA) to illustrate some of the points made in this paper. There are numerous other Acts that deal with Maori rights and Maori. However, the FSA is particularly relevant because: it is recent, being in force for less than a year; was enacted despite almost universal rejection by Maori; deals with Maori land rights; and has been found to discriminate against Maori (the FSA Decision) by the United Nations Committee on the Elimination of Racial Discrimination (the CERD Committee),<sup>2</sup> much like the recent cases litigated before the Inter-American Court and Commission on Human Rights from the Americas (a focus of this Expert Seminar) . Finally, it also constitutes a ‘development’ in international law on indigenous peoples’ rights.

If there is an overarching theme to this paper, it is this: one of the greatest impediments to the protection of human rights and indigenous peoples’ rights under international and domestic law in Aotearoa/New Zealand is that the Aotearoa/New Zealand Parliament retains absolute and indivisible sovereignty. Aotearoa/New Zealand remains one of the only countries in the world where legislation cannot be overturned for inconsistency with human rights. This inherited and colonial legal principle means that the Aotearoa/New Zealand Parliament can, and does, override both domestic and international human rights and indigenous peoples’ rights, to Maori detriment, as is illustrated by the FSA.

## **II BACKGROUND: AOTEAROA/NEW ZEALAND’S CONSTITUTION**

Here I provide background information about Aotearoa/New Zealand’s Constitution. It is based on, and is similar to, the English Constitution.

### **A. *The Basics***

Aotearoa/New Zealand does not have a singular written constitution. It is, instead, contained in a number of sources including, but not confined to, legislation (such as the Constitution Act 1986 and the New Zealand Bill of Rights Act 1990 (BORA)), constitutional conventions, international law and the Treaty of Waitangi. It is fluid and can be changed relatively easily.<sup>3</sup>

As stated above, Parliament is supreme in Aotearoa/New Zealand. It is not constrained by any higher law (although some argue that there are limitations on

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<sup>2</sup> United Nations Committee on the Elimination of All Forms of Racial Discrimination “Decision 1(66): New Zealand Foreshore and Seabed Act 2004” (11 March 2005) CERD/C/66/NZL/Dec.1.

<sup>3</sup> For more comprehensive description of Aotearoa/New Zealand’s Constitution see P Joseph *Constitutional and Administrative Law in New Zealand* (2 ed) (Brookers, Wellington, 2001) and Geoffrey Palmer and Matthew Palmer *Bridled Power* (4ed) (Oxford University Press, Melbourne, 2004).

Parliament, the legal reality is somewhat different).<sup>4</sup> Parliament consists of the House of Representatives, made up of Members of Parliament, who are democratically elected. The Executive consists of selected members of the governing parties in Parliament.

Formally, the Queen of England remains Aotearoa/New Zealand's head of state. She is represented in Aotearoa/New Zealand by the Governor-General, who usually acts only on advice.

The BORA partially incorporates the International Covenant on Civil and Political Rights (the ICCPR), including the article 27 ICCPR minorities' right to culture.<sup>5</sup> However, the BORA is explicitly secondary legislation in that legislation inconsistent with the rights and freedoms contained in the BORA takes precedence (though must be interpreted consistently with BORA, if possible). The Human Rights Act 1993 (HRA) partially incorporates the International Convention on the Elimination of All Forms of Discrimination (ICERD).<sup>6</sup> Aotearoa/New Zealand courts only have the explicit power to make declarations that legislation is inconsistent with the right to freedom from discrimination under the HRA. Declarations of inconsistency are not binding on Parliament and do not automatically result in a change of offending legislation. Aotearoa/New Zealand courts do not have express statutory powers to make declarations of inconsistency with other human rights and freedoms.

## *B. Maori Rights under Aotearoa/New Zealand's Constitution*

### *1. The Treaty of Waitangi*

The Treaty of Waitangi is considered by many to be Aotearoa/New Zealand's founding constitutional document (the Treaty). It was signed by representatives of the British Crown and some Maori in 1840. The English and Maori texts of the Treaty differ, which is a source of much controversy. The English text speaks explicitly of a cession of sovereignty to the Queen of England and the protection of Maori lands and properties.<sup>7</sup> In contrast, the Maori text speaks of a transferral of, loosely translated, governor powers to the English Crown and the retention by Maori of their chieftainship over all their treasures.

Under orthodox legal principle, the Treaty is not enforceable under Aotearoa/New Zealand law unless it has been explicitly incorporated into legislation. This was the effect, in particular, of the Privy Council decision in *Hoani Te Heu Heu Tukino v Aotea District Maori Land Board* from 1941.<sup>8</sup> The principles of the Treaty have been incorporated into some legislation, and have had an impact on the

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<sup>4</sup> See, for example, the arguments made in P Joseph *Constitutional and Administrative Law in New Zealand* (2 ed) (Brookers, Wellington, 2001).

<sup>5</sup> International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.

<sup>6</sup> International Convention on the Elimination of All Forms of Racial Discrimination (4 January 1969) 660 UNTS 195.

<sup>7</sup> For an excellent description of the Treaty of Waitangi and its interpretation by the courts and the Waitangi Tribunal see Te Puni Kokiri *He Tirohanga o Kawa ki te Tiriti o Waitangi* (Wellington, 2001).

<sup>8</sup> *Hoani Te Heu Heu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC).

interpretation of legislation to the benefit of Maori, discussed below.<sup>9</sup> There is some precedent, however, for the argument that legislation, especially legislation that impacts on Maori, should be interpreted consistently with the Treaty irrespective of whether the Treaty principles are incorporated into relevant legislation.<sup>10</sup> The Treaty also has a political resonance that is difficult to explain. It is frequently the document around which Maori claims coalesce, and is referred to in Aotearoa/New Zealand policy.<sup>11</sup>

Views are divergent on whether the Treaty is a convention under international law. However, as the above description suggests, the Treaty has certainly been treated as a domestic rather than as an international issue by government.<sup>12</sup> For example, the Aotearoa/New Zealand Government's negotiating brief on the draft Declaration on the Rights of Indigenous Peoples states that "the Treaty of Waitangi is not recognised as an international Treaty in law". Many Maori claim that the Treaty is an international instrument signed by two equal and sovereign entities.

## 2. The relationship between the Treaty and international and domestic human rights

While there remains little judicial comment on the matter, there has been some suggestion by scholars and the New Zealand Human Rights Commission that there are overlaps between the Treaty and international and domestic human rights, together with emerging international law on indigenous peoples' rights.<sup>13</sup> This is especially true given some international human rights treaty bodies, including the Committee on the Elimination of Racial Discrimination (CERD) and the Inter-American bodies, have interpreted human rights to protect indigenous peoples' rights to land, which is protected under the Treaty (and is discussed in greater depth below).

## 3. The Waitangi Tribunal<sup>14</sup>

The Waitangi Tribunal was established in 1975 in response to Maori protests throughout the 1960s and 1970s against the loss of land and rangatiratanga (self-determination/chieftainship). It initially had the mandate to inquire into contemporary Crown breaches of the Treaty principles (not the text of the Treaty itself) only. The mandate of the Waitangi Tribunal was extended in 1985 to cover historical Crown breaches of the principles of the Treaty.<sup>15</sup>

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<sup>9</sup> One of the most important cases is *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA).

<sup>10</sup> *Barton Prescott v Director General of Social Welfare* [1997] 3 NZLR 179 and *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188.

<sup>11</sup> For more on this see P G McHugh *The Maori Magna Carta. New Zealand Law and the Treaty of Waitangi* (OUP, 1991); and Ken S Coates and Paul McHugh *Living Relationships. The Treaty of Waitangi in the New Millennium* (VUW Press, Wellington, 1998).

<sup>12</sup> Miguel Alfonso Martínez, *Special Rapporteur: Study on treaties, agreements and other constructive arrangements between States and indigenous populations. Final Report*. E/CN.4/Sub.2/1999/20 (1999) paras 115 and 116.

<sup>13</sup> Human Rights Commission *Discussion Paper on the Relationship between Human Rights and the Treaty of Waitangi* (Human Rights Commission, Wellington, 2004).

<sup>14</sup> This section mirrors my report entitled "Report on the Treaty of Waitangi 1840 between Maori and the British Crown" Office of the High Commissioner for Human Rights <<http://www.unhchr.ch/indigenous/charters-BP15.doc>> (last accessed 5 September 2005).

<sup>15</sup> Under the Treaty of Waitangi Amendment Act 1985.

The Waitangi Tribunal has considered numerous claims by Maori since 1975. Its reports are generally very comprehensive, especially given that it is common for claimants to present far-reaching historical evidence to the Waitangi Tribunal hearings. There are up to 16 Waitangi Tribunal members and a Chairperson, currently the Chief Judge of the Maori Land Court. The make-up of the Waitangi Tribunal is roughly half Pakeha and half Maori. The Waitangi Tribunal's procedures incorporate tikanga Maori (Maori custom).

The Waitangi Tribunal is under-funded, which is one of the principal reasons why literally hundreds of claims remain to be heard. It is expected to take decades for the Waitangi Tribunal to complete its analysis of historical claims. The Waitangi Tribunal findings are not automatically enforceable (with one minor exception in relation to land transferred by the Crown to state-owned enterprises). Instead, they are recommendations to the Crown only. In recent years the Crown has rejected a number of Waitangi Tribunal reports including one that found that some Taranaki tribes have a Treaty interest in oil and gas in their territory. It also rejected most of the Waitangi Tribunal's Foreshore and Seabed Report.

#### 4. Treaty settlements

Governments have established a Treaty settlement process over the past 15 years. The objective is to settle Crown historical breaches of the Treaty. The process is managed by a body within the Ministry of Justice, the Office of Treaty Settlements (OTS). The Treaty settlement process can begin with a Waitangi Tribunal report but need not.

There are four stages to the Treaty settlement process, which include: an agreement to negotiate; the development of the terms of negotiation (including funding); negotiations; and ratification and implementation, usually requiring legislation.<sup>16</sup> The final agreements commonly include an historical account and a Crown apology, some form of cultural redress and financial and commercial redress.<sup>17</sup>

As part of the Treaty settlement, claimants must accept that the settlement is fair and final and settles all of their historical claims. The Crown starts from the position that it is not possible to fully compensate claimants for their grievances. According to governmental information, redress instead focuses on providing recognition of the claimant group's historical grievances, on restoring the relationship between the claimant group and the Crown, and on contributing to a claimant group's economic development. The negotiating principles have been summarised as: good faith, restoration of relationship, just redress, fairness between claims, transparency and that they are government negotiated. According to governmental information, 18 settlements have been reached thus far.<sup>18</sup>

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<sup>16</sup> For more information see Office of Treaty Settlements <<http://www.ots.govt.nz/>> (last accessed 7 September 2005).

<sup>17</sup> Cultural redress can include safeguards of the claimant group's access to customary food-gathering sources and mechanisms to guarantee working relationships with central and local governments. Office of Treaty Settlements <<http://www.ots.govt.nz/>> (last accessed 11 December 2003).

<sup>18</sup> Office of Treaty Settlements <<http://www.ots.govt.nz/>> (last accessed 6 September 2005).

## 6. Guaranteed political representation

Maori have guaranteed representation in Parliament in the form of Maori seats. Maori seats currently number 7 out of a total of 120. Maori can choose to enrol on the Maori electoral roll. While the seats guarantee a Maori voice in Parliament, Maori MPs elected under these seats were usually part of a mainstream party and beholden, at least to some degree, to party policies. In 2004, largely in response to the foreshore and seabed issue, the Maori Party was established, which has as one of its principal objectives to make the Treaty the foundation of Aotearoa/New Zealand's Constitution.<sup>19</sup> The Maori Party won 4 seats in the September 2005 elections.

It is important to bear in mind the initial racist rationale for the establishment of the Maori seats in the 1860s. Colonisers feared that Maori, due to their numbers, would constitute the majority in some electorates and override the Pakeha vote. Therefore, separate electorates were established.

Some local governments also have guaranteed places for Maori on their councils.

## 7. Self-Government

As a result of Aotearoa/New Zealand's strict adherence to a rigid, complete and indivisible model of parliamentary sovereignty, it is taken by many (especially non-Maori) as a legal fact that Maori have not retained any post-colonisation inherent self-government powers. The upshot of this is that under the Aotearoa/New Zealand Constitution, Maori do not have inherent jurisdiction over any territory or persons. Further, there is also no formal political recognition of Maori self-government, as there is in Canada.. Hence, it is unlikely that the Parliament would devolve any sovereignty to Maori, as has also occurred in Canada and is reflected in, for example, the Nisga'a Treaty (in recognition of inherent sovereignty). This is especially true in the current political environment. The Deputy Prime Minister has stated in response to concerns with perceived 'judicial activism' that "in my view, we are approaching the point where Parliament may need to be more assertive in defence of its own sovereignty, not just for its own sake but also for the sake of good order and government."<sup>20</sup> That the Government believes there can be no room for pluralism in Aotearoa/New Zealand is equally illustrated by its submission to the CERD Committee on the FSA that "the recognition of equal rights for Maori and special protection for Māori interests on the one hand and the creation of a single legal system on the other are at the heart of the commitments exchanged under Treaty of Waitangi of 1840."<sup>21</sup>

Leading academic Jock Brookfield has argued that the taking of Crown's complete taking of sovereignty is a political fact but that it is at least partially illegitimate as Maori never ceded complete sovereignty under the Treaty. He calls,

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<sup>19</sup> See the Maori Party <<http://www.maoriparty.com/>> (last accessed 6 September 2005).

<sup>20</sup> M Cullen "Address to Her Excellency the Governor-General" (150<sup>th</sup> Anniversary Sitting of Parliament, 24 May 2004) Office of the Clerk of the House of Representatives <<http://www.clerk.parliament.govt.nz> > (last accessed 3 December 2004).

<sup>21</sup> Tim Caughley, Aotearoa/New Zealand Permanent Representative to the United Nations, to Mr Yutzis, Chair of the UN Committee on the Elimination of Racial Discrimination (9 March 2005) Letter.

then, Parliament's taking of absolute power a revolution. He goes on to suggest that, amongst other measures, Maori should be entitled to exercise some self-government powers to legitimate Aotearoa/New Zealand's Constitution.<sup>22</sup>

Despite the above, Maori do in fact exercise some forms of self-government in practice. For example, there are regulations in place that enable Maori groups to control fishing areas for customary fishing activities and, also, include the possibility of guardians acquiring bylaw making power.<sup>23</sup> In addition Maori customary law regulates much marae activity.

## 8. Other legislation

There are numerous Acts that deal with Maori.

Historically, much legislation worked to deprive Maori of rights. These include, but are not limited to, Maori land legislation since 1862 that functioned to individualise Maori land interests to make it available for sale and ultimately loss. Most Maori land in Aotearoa/New Zealand was out of Maori ownership by 1900. That law continues in effect today under the Te Ture Whenua Maori Act 1993 (TTWMA). It can be compared to United States legislation prescribing the allotment of Indian lands. Other legislation depriving Maori of their rights abound and include the Tohunga Suppression Act 1907 forbidding the practice of Maori spiritual rites; the Suppression of Rebellion Act 1863 denying habeas corpus for "rebellious" Maori (so-called for defending their rights); the Aotearoa/New Zealand Settlement Act 1863 confiscating Maori land; and the Maori Prisoners Act 1880, which kept Maori who prevented the surveying of their land for confiscation in prison for an indefinite period without trial.<sup>24</sup>

Legislation dealing with Maori rights today includes: the Treaty of Waitangi Act 1975, establishing the Waitangi Tribunal and mentioned above; legislation giving effect to Treaty settlements; and legislation that includes reference to the principles of the Treaty, including legislation dealing with resource management and conservation.

## 9. Native title

The common law doctrine of native title that has been so significant in both Canada and Australia in the past 2 decades, was recognised early in Aotearoa/New Zealand.<sup>25</sup> However, Aotearoa/New Zealand's jurisprudence remains undeveloped on common law native title as land legislation, now found in the TTWMA, in effect supplanted common law native title. It provided a statutory jurisdiction for the Maori Land Court (initially the Native Land Court) to recognise customary collective Maori land rights and then to convert them into alienable freehold title.

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<sup>22</sup> FM Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999).

<sup>23</sup> See, for example, the Kaimoana Customary Fishing Regulations 1998. Note that these mechanisms have been criticised by the Waitangi Tribunal, however. See Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy: Wai 1071* (Legislation Direct, Wellington, 2004) 116-7.

<sup>24</sup> For more information about legislative breaches of the Treaty of Waitangi and human rights see TWM [http://twm.co.nz/Tr\\_violn.html](http://twm.co.nz/Tr_violn.html)> (last accessed 6 September 2005).

<sup>25</sup> *R v Symonds* (1847) [1840-1932] NZPCC 387.

### C. *Domestic Implementation of International Law in Aotearoa/New Zealand*

The elementary principles regulating the reception of international law domestically are these: international treaties are only enforceable domestically if incorporated into Aotearoa/New Zealand law and customary international law is automatically part of Aotearoa/New Zealand's common law.<sup>26</sup>

As with many elementary principles, however, the waters are significantly murkier than they appear at first glance. The New Zealand Law Commission has isolated five instances where courts may have regard to unincorporated, but ratified, international treaties. The general rule is that legislation should be interpreted consistently with international law.<sup>27</sup> The Court of Appeal in *Tavita v Minister of Immigration* suggested that unincorporated international treaties may be a mandatory consideration in administrative decision-making, which is an altogether different conceptual model of domestic application than that of consistent interpretation.<sup>28</sup> Under the BORA all legislation is to be interpreted as much as possible consistently with the rights and freedoms contained therein, which incorporates some ICCPR rights and freedoms.<sup>29</sup> There may also be conceptual tensions between the application of customary international law directly part as the common law of Aotearoa/New Zealand and/or as an interpretative tool.<sup>30</sup> Also, the Cabinet Minute requires ministers to vet bills for consistency with Aotearoa/New Zealand's international obligations.<sup>31</sup>

### D. *The Current Political Climate in Aotearoa/New Zealand*

The current political environment on Maori and Treaty issues in Aotearoa/New Zealand leaves much to be desired. The foreshore and seabed issue, leading to the FSA, uncovered much resentment in mainstream Aotearoa/New Zealand against perceived advantages enjoyed by Maori. The leading opposition party, the National Party, capitalised on this resentment and in one speech alone, on "one law for all", turned the party's fortunes around, gaining considerably in the polls. Maori and Treaty issues dominated the build-up to the 17 September 2005 elections. The National Party promised to remove Treaty principles for legislation.<sup>32</sup> The Government has similarly illustrated some reluctance to accept critical comment on

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<sup>26</sup> As set out in P Joseph, *Constitutional and Administrative Law in New Zealand* (2ed) (Brookers, Wellington, 2001). On the application of customary international law domestically, see *Marine Steel Ltd v Government of the Marshall Islands* [1981] 2 NZLR 1 (HC) and *Governor of Pitcairn v Sutton* [1995] 1 NZLR 526 (CA).

<sup>27</sup> New Zealand Law Commission *A New Zealand Guide to International Law and Its Sources* (NZLC R 34, Wellington, 1996) para 71. This was the approach taken to international law in *New Zealand Airline Pilots Association Inc v Attorney General* [1997] 3 NZLR 269, 289 (CA).

<sup>28</sup> [1994] 2 NZLR 257 (CA). For an excellent discussion of this, see C Geiringer, "Tavita and all that: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66.

<sup>29</sup> New Zealand Bill of Rights Act 1990.

<sup>30</sup> Treasa Dunworth considers this issue in T Dunworth, "Hidden Anxieties: Customary International Law in Aotearoa/New Zealand" (2004) 2 NZJPIL 67, 71 – 75.

<sup>31</sup> Cabinet Office Manual (2001), para 5.35.

<sup>32</sup> D Brash, "Nationhood" (Orewa Rotary Club, 27 January 2004) 3. National Party Website <<http://www.national.org.nz>> (last accessed 3 December 2004).

race issues. It, for example, denigrated the CERD Committee for its FSA Decision.<sup>33</sup> In contrast, the Maori Party and the Green Party have both stressed the importance of the Treaty and protection of Maori rights. However, they are only minor parties on the Aotearoa/New Zealand political scene.

### ***III DEVELOPMENTS IN INTERNATIONAL LAW RELEVANT TO MAORI RIGHTS IN AOTEAROA/NEW ZEALAND***

As the other Expert Workshop participants have greater expertise in, and knowledge of, developments in international law relevant to indigenous peoples, I do not provide much detail here. However, I attempt to shed some light on these developments as they are relevant to Aotearoa/New Zealand.

#### *A. Aotearoa/New Zealand's Human Rights Treaty Obligations*

Aotearoa/New Zealand has not signed the International Labour Organisation's Convention 169 on Indigenous and Tribal Peoples (ILO Convention 169), the only treaty to exclusively deal with indigenous peoples' rights, and, thus, is not bound by it.<sup>34</sup> There was some governmental consultation with Maori about whether Aotearoa/New Zealand should sign the ILO Convention 169 but from anecdotal accounts I understand the Government took the view that there was insufficient support for ratification.

Aotearoa/New Zealand has signed the six principal United Nations human rights treaties and the Optional Protocols to the ICCPR. Therefore, the United Nations Human Rights Committee (UNHRC) has jurisdiction to hear communications from Aotearoa/New Zealanders.<sup>35</sup> However, Aotearoa/New Zealand has not made an article 14 ICERD declaration meaning that New Zealanders cannot bring individual communications to the CERD Committee. Nevertheless, the CERD Committee has illustrated its willingness to invoke its early warning and urgent action procedure in relation to Aotearoa/New Zealand, as its FSA Decision illustrated. Aotearoa/New Zealand is conscientious in submitting reports to the human rights treaty bodies.

There is no regional human rights treaty or treaty body in the region within which Aotearoa/New Zealand sits. Of course, Aotearoa/New Zealand is not bound by other regional treaties, such as the European Convention on Human Rights, as a matter of international law.<sup>36</sup>

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<sup>33</sup> Interview with Rt Hon Helen Clark, Prime Minister (John Dunne, Breakfast Show TRN 3ZB, 14 March 2005) Transcript provided by Newstel News Agency Ltd.

<sup>34</sup> ILO, Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (27 June 1989). It has also been the subject of some criticism by indigenous peoples as not being sufficiently progressive. Note, however, that Anaya argues that indigenous peoples can find highly useful arguments based on the ILO Convention 169 if it is interpreted purposively rather than formally. See S J Anaya "Indigenous Rights, Local Resources and International Law: Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Towards a Realist Trend" 16 *Colo J Int'l Env'tl L & Policy* 237, 246.

<sup>35</sup> Under the Optional Protocol to the International Covenant on Civil and Political Rights (23 March 1976) 999 UNTS 302.

<sup>36</sup> (3 September 1953) 213 UNTS 222.

B. *International Legal Developments on Indigenous Peoples' Rights Particularly Relevant to Aotearoa/New Zealand*

Aotearoa/New Zealand is impacted upon by numerous developments in international law affecting indigenous peoples, some of which are outlined briefly here.

1. United Nations Treaty Body Jurisprudence

As New Zealand is bound by the United Nations human rights treaties, developments on indigenous rights in relation to those treaties, such as that found in the corresponding human rights treaty bodies' jurisprudence, is probably of most significance for Aotearoa/New Zealand. This is true irrespective of the formal status of United Nations human rights treaty bodies' decisions. Developments in indigenous peoples' rights include the CERD Committee's generous interpretation of the right to freedom from racial discrimination to protect indigenous lands rights in: its 1999 review of the Australian Native Title Act 1993; its FSA Decision; and most, recently, in expressing concern about the United States treatment of Western Shoshone lands.<sup>37</sup> Similarly, the UNHRC's jurisprudence is also particularly relevant to New Zealand, especially as Maori can, and have, brought individual communications to it.<sup>38</sup> Of note is the UNHRC's willingness to refer to the right to self-determination when interpreting the minorities' right to culture under article 27 of the ICCPR and its implicit acceptance that indigenous peoples' rights can develop.<sup>39</sup>

2. Developments in relation to treaties New Zealand is not bound by

It was argued before the CERD Committee that its jurisprudence should not fall below the standards set by other human rights tribunals and treaties, even though the ILO Convention 169 and the Inter-American Human Rights Commission and Court decisions are not technically binding on Aotearoa/New Zealand. The CERD Committee's FSA Decision is silent on the influence of other human rights jurisprudence and treaties but it was similarly clear in the proceedings that the CERD Committee was cognisant of developments in other international fora.<sup>40</sup> Hence, Aotearoa/New Zealand is impacted upon by developments in international law from institutions that have no oversight of Aotearoa/New Zealand's jurisprudence when it

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<sup>37</sup> UN Committee on the Elimination of Racial Discrimination "Decision 2(54) on Australia" (18 March 1999) A/54/18; United Nations Committee on the Elimination of All Forms of Racial Discrimination "Decision 1(66): New Zealand Foreshore and Seabed Act 2004" (11 March 2005) CERD/C/66/NZL/Dec.1.; and, for information about the CERD Committee's recent intervention in relation to Shoshone lands see Indian Treaty Council <[http://www.treatycouncil.org/new\\_page\\_524122421221.htm](http://www.treatycouncil.org/new_page_524122421221.htm)> (last accessed 22 September 2005).

<sup>38</sup> Maori have a history of bringing domestic issues to United Nations human rights treaty bodies. *Mahuika*, supported by others, sought, amongst other claims, a finding that a treaty settlement relating to Maori interests in fishing breached the Maori right to culture under article 27 of the ICCPR: *Apirana Mahuika et al v Aotearoa/New Zealand* Communication No 547/1993 (27 October 2000) Report of the Human Rights Committee Vol II A/56/40.

<sup>39</sup> Both these principles can be found in *Apirana Mahuika et al v Aotearoa/New Zealand* Communication No 547/1993 (27 October 2000) Report of the Human Rights Committee Vol II A/56/40, amongst other decisions.

<sup>40</sup> Comments by Professor Thornberry, Member of the UN Committee on the Elimination of Racial Discrimination, to the Aotearoa/New Zealand Government (Geneva, 25 February 2005) Claire Charters' meeting notes.

comes before United Nations human rights treaty bodies. These include, then, the recent decisions of the Inter-American Commission on Human Rights in the *Dann Sisters Case* and the *Belize Mayan Case*,<sup>41</sup> and by the Inter-American Court of Human Rights in *Mayagna (Suma) Awas Tingni Community v Nicaragua*.<sup>42</sup> These will no doubt be discussed in greater depth at the Expert Seminar. It suffices to note here that the Inter-American institutions have interpreted human rights, such as the right to property and the freedom from discrimination, to protect indigenous peoples' ownership of their traditional lands in accordance with indigenous law.<sup>43</sup>

C. *Aotearoa/New Zealand and the Draft Declaration on the Rights of Indigenous Peoples*

As for all countries, the Draft Declaration on the Rights of Indigenous Peoples' Peoples (the Draft Declaration) will not be binding as a matter of international law on Aotearoa/New Zealand. However, developments in the negotiations on the Draft Declaration could impact on the content of customary international law, which is binding on New Zealand.

D. *Application of Developments in International Law on Indigenous Peoples' Rights by New Zealand Courts*

The application of international law on indigenous peoples' rights by New Zealand courts is dealt with below in the discussion on the effectiveness of New Zealand's implementation of international and domestic norms relating to indigenous peoples. Here, it suffices to note that United Nations human rights treaty body jurisprudence is persuasive. In addition, the courts have illustrated a willingness to interpret human rights consistently with jurisprudence from international human rights institutions that do not have jurisdiction over New Zealand, such as the European Court of Human Rights.

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<sup>41</sup> *Mary and Carrie Dann* Case 11.140 (United States), (27 December 2002) Inter-Am Comm H R, Report 75/02. The Commission wrote: "[Recognition of the collective aspect of indigenous rights] has extended to acknowledgment of a particular connection between communities of indigenous peoples and the lands and resources that they have traditionally owned and used, the preservation of which is fundamental to the effective realisation of human rights of indigenous peoples." Para 128. *Maya Indigenous Communities of the Toledo District v Belize* (Inter-American Commission of Human Rights, Report No 96/03 (12 October 2004). The Inter-American Commission wrote: "[T]he organs of the inter-American human rights system have recognised that the property rights protected by the system are not limited to those property interests that are already recognised by states or that are defined by domestic law, but rather the right to property has an autonomous meaning in international human rights law. In this sense, the jurisprudence of the system has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include the indigenous communal property that arises from and is grounded in indigenous custom and traditions." Para 117.

<sup>42</sup> *Mayagna (Suma) Awas Tingni Community v Nicaragua* R (31 August 2001) Inter-Am Court H (Ser C) No 79 (also published in (2002) 19 Arizona J Int'l and Comp Law 395). For a full description of the proceedings leading to the decision see S J Anaya and C Grossman "The Case of *Awes Tingni v. Nicaragua*: A New Step in the International Law of Indigenous Peoples" (2002) 19 Arizona J Int'l and Comp Law 1.

<sup>43</sup> See, for commentary, S J Anaya and C Grossman "The Case of *Awes Tingni v. Nicaragua*: A New Step in the International Law of Indigenous Peoples" (2002) 19 Arizona J Int'l and Comp Law 1 and S J Anaya "Indigenous Rights, Local Resources and International Law: Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Towards a Realist Trend" 16 Colo. J. Int'l Envtl. L. & Policy 237, 246.

#### IV THE FSA<sup>44</sup>

I outline the background to the CERD Committee's FSA Decision here as it is relevant to the following analysis.

##### A. *Ngati Apa*

The Aotearoa/New Zealand Court of Appeal decision in *Ngati Apa v Attorney General (Ngati Apa)* concerned the jurisdiction of the Maori Land Court.<sup>45</sup> The Maori Land Court was first established in 1865 in Aotearoa/New Zealand to investigate who owned defined areas of tribal land according to tribal custom and then grant freehold titles to those owners.<sup>46</sup> The Maori Land Court converted almost all that remained of customary title to dry land at the Maori Land Court's inception into freehold title by the year 1900.<sup>47</sup> In *Ngati Apa* the principal legal question was whether the Maori Land Court had the authority under its constituent statute, the TTWMA, to exercise that very same jurisdiction in relation to the foreshore and seabed.

Applying well-established principles of native title law, the Court of Appeal held that customary title had survived the Crown's assertion of sovereignty in 1840 (the date of the signing of the Treaty) and that customary title had not been extinguished by general legislation.<sup>48</sup> In addition, the Court of Appeal ruled that its previous decision in *In Re the Ninety Mile Beach* was wrong in law.<sup>49</sup> That decision had effectively shut down Maori claims to customary title in the foreshore by ruling that any customary interests in foreshore and seabed were extinguished, by implication, if the adjoining dry lands were investigated by the Native Land Court, the Maori Land Court's predecessor. This idea of extinguishment of customary title by implication was firmly rejected by the Court of Appeal in *Ngati Apa*.<sup>50</sup>

The Court of Appeal then determined that the Maori Land Court had jurisdiction to inquire whether defined areas of foreshore and seabed had the status of "Maori customary land" (defined in TTWMA as land held by Maori in accordance with Maori customary values and practices).<sup>51</sup> Having obtained such a determination, Maori tribes could then apply under TTWMA for the land to be converted from "Maori customary land" into "Maori freehold land",<sup>52</sup> essentially a common law freehold title that gives titleholders the right to control access to the land and the right, subject to Maori Land Court confirmation, to sell the land.

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<sup>44</sup> This section mirrors description found in C Charters and A Erueti "A Report from the Inside: The CERD's Review of the Foreshore and Seabed Act 2004" (forthcoming in the Victoria University of Wellington Law Review); and C Charters "Developments in International Law on Indigenous Peoples' Rights and their Domestic Implications" (forthcoming).

<sup>45</sup> *Ngati Apa v Attorney General (Ngati Apa)* [2003] 3 NZLR 143 (CA).

<sup>46</sup> The Native Lands Act 1865 established the Native (now Maori) Land Court.

<sup>47</sup> Before, Maori Land Court customary title to dry land had been extinguished by Crown purchase and confiscation policies.

<sup>48</sup> The effect of area-specific statutes was left for consideration by the Maori Land Court when exercising its jurisdiction.

<sup>49</sup> *In Re the Ninety Mile Beach (Ninety Mile Beach)* [1963] NZLR 261 (CA).

<sup>50</sup> Only one judge, Gault P, agreed with the legal rule in *In Re the Ninety Mile Beach*. See *Ngati Apa v Attorney General* 677 Gault P.

<sup>51</sup> See Te Ture Whenua Maori Act 1993, s 129(2)(a) and the definition of "tikanga Maori", s 4.

<sup>52</sup> Te Ture Whenua Maori Act 1992, ss 131-132.

In addition, the Court of Appeal's finding that any customary interests in the foreshore and seabed were not extinguished meant that Maori could claim common law native title interests in the foreshore and seabed before the High Court. Following *Ngati Apa*, then, Maori could advance claims to customary title via two routes: the Maori Land Court under its statutory jurisdiction; and the High Court exercising its inherent common law native title jurisdiction. It is only in respect of the Maori Land Court however, that tribes might have acquired a freehold title. However, under the law of native title the general courts have recognised a right to exclusive occupation of dry land.<sup>53</sup>

Parliament enacted the FSA in response to *Ngati Apa* despite the Waitangi Tribunal's critical report of the foreshore and seabed policy on which it was based, and the well-publicised and almost united Maori protest against it.<sup>54</sup> The FSA:

- vests foreshore and seabed land that is not held privately in fee simple in the Crown, thereby extinguishing extant Maori common law aboriginal title in the foreshore and seabed;<sup>55</sup>
- removes the Maori Land Court's jurisdiction to determine foreshore and seabed Maori customary land under the TTWM Act;<sup>56</sup>
- establishes a 'replacement regime' that allows Maori groups to seek a customary rights order from the Maori Land Court and/or an order from the High Court that but for the legislative extinguishment of extant Maori property rights, the group would have had a territorial right in the foreshore and seabed (TCR Order). The tests to establish both rights are closely prescribed in the FSA and are considered to be comparatively onerous;<sup>57</sup> and
- if the High Court makes a TCR Order, requires the Crown to enter into discussions to negotiate an agreement for redress or the establishment of a foreshore and seabed reserve.<sup>58</sup>

The Taranaki Maori Trust Board, Te Runanga o Ngai Tahu and the Treaty Tribes Coalition (the Claimants) lobbied the CERD Committee for a decision that the Foreshore and Seabed Bill, and subsequently the FSA, discriminated against Maori in breach of the the ICERD.<sup>59</sup> The principal argument was that the FSA unjustifiably

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<sup>53</sup> See *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

<sup>54</sup> Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, Wai 1071 (2004).

<sup>55</sup> Foreshore and Seabed Act 2004, s 13.

<sup>56</sup> Foreshore and Seabed Act 2004, ss 12 and 46.

<sup>57</sup> Foreshore and Seabed Act 2004, ss 32 – 90. See S Dorset, "An Australian Comparison on Native Title to the Foreshore and Seabed" in C Charters and A Erueti (eds) *Foreshore and Seabed: The New Frontier* (forthcoming).

<sup>58</sup> Foreshore and Seabed Act 2004, ss 33, 36 – 38, 40 – 44.

<sup>59</sup> The Te Runanga o Ngai Tahu and Treaty Tribes Coalition brief to the CERD Committee was supported by numerous Maori organisations including the Te Arawa Maori Trust Board, the Federation of Maori Authorities, Nga Puhī and Ngati Kahungunu: Te Runanga o Ngai Tahu and the Treaty Tribes Coalition, "Response to the Aotearoa/New Zealand Government's Reply to the Committee on the

treated Maori property rights differently from non-Maori property rights.<sup>60</sup> The Claimants relied particularly on the ICERD’s prohibition on racial discrimination in relation to rights to equal treatment before tribunals, to own property alone as well as in association with others and to equal participation in cultural activities.<sup>61</sup>

In its FSA Decision, the CERD Committee:

- finds that the FSA appears to contain “discriminatory aspects against Maori, (...) in its extinguishment of the possibility of establishing Maori customary title over the foreshore and seabed and its failure to provide a guaranteed right of redress”;<sup>62</sup> and
- recommends that the Government resume a dialogue with Maori “to seek ways of lessening its discriminatory effects, including where necessary through legislative enactment.”<sup>63</sup>

## ***V EFFECTIVE IMPLEMENTATION OF INTERNATIONAL AND NATIONAL LAWS PROTECTING THE RIGHTS OF INDIGENOUS PEOPLES***

Here, the effectiveness of both international and national laws providing at least minimum protection of Maori rights is examined. Unfortunately, we find that Aotearoa/New Zealand is less than successful in effectively implementing international and domestic laws on Maori rights.

### ***A. Legislative Process***

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Elimination of Racial Discrimination’s Request for More Information on the Foreshore and Seabed Bill” (January 2005) para 1.

<sup>60</sup> Like Aboriginal non-governmental organisations in 1998 and 1999, who successfully obtained a CERD Committee decision that the Australian Native Title Amendment Act 1998 breached the Convention, the Claimants sought to invoke the Committee’s early warning and urgent action procedure. See United Nations Committee on the Elimination of Racial Discrimination “Decision 2(54) on Australia” (18 March 1999) CERD A/54/18. The Claimants initially hoped the CERD Committee would make a decision on the Foreshore and Seabed Bill before it was enacted, during the CERD Committee’s August 2004 meeting. The Claimants thought an adverse decision would have greater impact before the Bill was passed. The CERD Committee decided, however, to give Aotearoa/New Zealand the opportunity to provide more information on the Foreshore and Seabed Bill in its August 2004 meeting, meaning the first time it could assess the merits of the case was in February/March 2005, after the Foreshore and Seabed Act 2004 was enacted (in November 2004). Interestingly, during the February 2005 Committee meeting, when the merits of the FSA were considered, it became clear the CERD Committee was under the impression that the Aotearoa/New Zealand Government had previously indicated it would not pass the FSA before the Committee had a chance to consider it in February 2005.

<sup>61</sup> International Convention on the Elimination of All Forms of Racial Discrimination (4 January 1969) 660 UNTS 195, articles 5(a), 5(d)(v) and 5(e)(iv).

<sup>62</sup> United Nations Committee on the Elimination of All Forms of Racial Discrimination “Decision 1(66): New Zealand Foreshore and Seabed Act 2004” (11 March 2005) CERD/C/66/NZL/Dec.1. para 6.

<sup>63</sup> United Nations Committee on the Elimination of All Forms of Racial Discrimination “Decision 1(66): New Zealand Foreshore and Seabed Act 2004” (11 March 2005) CERD/C/66/NZL/Dec.1., para 7.

This next section illustrates that the parliamentary law-making process in Aotearoa/New Zealand is insufficiently robust to ensure that Aotearoa/New Zealand legislation does not breach international human rights and indigenous peoples' rights standards, nor the rights and freedoms contained in the BORA. The central reason for this is, as mentioned earlier, that Parliament is supreme in Aotearoa/New Zealand. Legislation cannot be overturned for inconsistency with rights. Parliament is free to enact rights breaching legislation. However, the issue requires a little further analysis to examine the effectiveness of mechanisms within Aotearoa/New Zealand's parliamentary process that function to provide at least incentives for Parliament to abide by its human rights obligations (though few, if any, to induce Parliament to take into account existing and emerging norms on indigenous peoples' rights as a distinct body of international law). To demonstrate the points, I refer back to the process followed by Government and Parliament in enacting the FSA.

#### 1. Policy formation and consultation with Maori

Policy is usually written in the first instance within relevant governmental departments. The *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation* (LAC Guidelines) recommend that all relevant governmental departments and agencies be properly consulted before Cabinet approves a policy. It also recommends systematic public consultation in which sufficient time is allowed for a considered response by those being consulted. In particular, "consultation with iwi groups will require an understanding of Maori perspectives and issues."<sup>64</sup> Even if a government department promoting legislation to implement a certain policy does not identify whether human rights guaranteed under international human rights treaties are at stake, consultation with other departments and the public, if robust, certainly can.<sup>65</sup>

The Government did not consult with Maori in its initial development of its foreshore and seabed policy. In fact, it announced its decision to assert Crown ownership over the foreshore and seabed within days of the *Ngati Apa* decision being handed down. Within two months, in August 2003, the Government had developed its policy, which centred around the principles of public access, regulation, protection and certainty (the August Policy). It did not deviate from these principles throughout the law-making process; they underpin the FSA. The extent to which officials considered international or BORA human rights aspects of the foreshore and seabed issue during these formative stages of policy development is unclear.

The Government did consult with Maori and non-Maori on the August Policy. Maori almost universally rejected the August Policy. The Government then released a more comprehensive policy document in December 2003 (the December Policy), which did not appear to take into account Maori rejection of the August Policy, highlighting the ineffectiveness and, possibly, futility of the consultations. The December Policy made it clear that the Government intended, as it had stated in the few days following the *Ngati Apa* decision that it would extinguish any extant native

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<sup>64</sup> Legislation Advisory Committee *Guidelines on Process and Content of Legislation 2001* (including the 2003 Supplement (2001) 1.4.1.

<sup>65</sup> Geoffrey and Matthew Palmer comment that "[b]y the time [a] bill is actually introduced into the House, it has already been widely discussed, negotiated and thought about within the government." G Palmer and M Palmer *Bridled Power* (4ed) (Oxford University Press, Melbourne, 2004) 192.

title and remove the Maori Land Court's jurisdiction to declare foreshore and seabed Maori customary land. It also proposed to vest all areas of the foreshore and seabed, except those held in private fee simple titles, in the public of Aotearoa/New Zealand.

## 2 Waitangi Tribunal

When requested to do so by Maori, the Waitangi Tribunal has the power to evaluate whether governmental policy complies with the principles of the Treaty, as in the December Policy.<sup>66</sup> In the course of submissions, many affected Maori groups also raised concerns about the Bill's compliance with international human rights norms. The Waitangi Tribunal found the December Policy in breach of the Treaty and its principles. It did not shy away from commenting on human rights concerns with the Government's proposals either. In particular, the Waitangi Tribunal found that the December Policy:

- breached the rule of law by taking away Maori rights to seek Maori Land Court and the High Court declarations of their property rights;
- failed to treat like as like by treating Maori customary property rights differently from others' property rights thereby breaching the right to freedom from discrimination;<sup>67</sup>
- was unfair because it was imposed without consent or compensation and the process of consultation did not satisfy legal or Treaty standards.<sup>68</sup>

In short, the Waitangi Tribunal both implicitly and explicitly found that the December Policy breached international human rights norms.

The Government rejected most of the Waitangi Tribunal's Foreshore and Seabed Report, although it subsequently established the TCR Order mechanism as a result of the Report. Bennion, Birdling and Paton describe the Government's rejection of the Waitangi Tribunal's report as follows:<sup>69</sup>

It accused the Waitangi Tribunal of 'implicitly' rejecting the principle of parliamentary sovereignty. It argued that it was merely proposing to change the law "to reflect the meaning that Parliament clearly intended it to have in the first place.

## 3 Ministerial attention to international human rights

Very importantly, the Cabinet Office Manual requires ministers to confirm compliance with legal principles or obligations when bids are made for bills to be included in the legislative programme.<sup>70</sup> They are specifically required to draw attention to any aspects that have implications for, or may be affected by:<sup>71</sup>

- the Treaty of Waitangi;

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<sup>66</sup> Relevant section of the Treaty of Waitangi Act 1975.

<sup>67</sup> Waitangi Tribunal *Foreshore and Seabed Report* (Wellington, March 2004) 123.

<sup>68</sup> Waitangi Tribunal *Foreshore and Seabed Report* (Wellington, March 2004) 124.

<sup>69</sup> Tom Bennion, Malcolm Birdling and Rebecca Paton *Making Sense of the Foreshore and Seabed: Special Edition of the Maori Law Review* (Wellington, Maori Law Review, 2004).

<sup>70</sup> Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) para 5.35.

<sup>71</sup> Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) para 5.35.

- the rights and freedoms contained in the BORA;
- the HRA;
- international obligations; and
- the LAC Guidelines.

Clearly international human rights treaties ratified by Aotearoa/New Zealand would come under international obligations. When a bill is subsequently submitted to the Cabinet Legislation Committee for approval for introduction, the relevant minister is also “required to confirm in a covering submission that the draft Bill complies with the legal principle and obligations” identified above.<sup>72</sup> Presumably the Foreshore and Seabed Bill (the FS Bill) received the requisite ministerial tick-off.

## 5 Attorney General’s vet of bills for consistency with BORA

The most direct means to bring international human rights into the parliamentary process is the requirement that the Attorney General draw the attention of the House of Representatives to any bill that might be inconsistent with the rights and freedoms contained in the BORA.<sup>73</sup> The Cabinet Manual notes that “these issues should be identified at the earliest possible stage.”<sup>74</sup> Usually this is done before the first reading of a bill in Parliament and is thus of use in the subsequent phases in the legislative process. The Attorney General’s report is required to be a legal rather than “a matter of political judgement”, although the Attorney General is a member of Cabinet and a high ranking governmental Member of Parliament.<sup>75</sup> Through this mechanism the legislature is alerted to aspects in a bill that could breach rights enshrined in the ICCPR. However, it must be remembered that Parliament can still push through legislation that the Attorney General recognises as contrary to BORA. Parliament has done so on a number of occasions.<sup>76</sup> Moreover, amendments to a bill made after the first reading do not receive the Attorney General’s scrutiny.<sup>77</sup>

The Attorney General found, in contrast to the Waitangi Tribunal and the concerns expressed by considerable numbers against the August and December Policies, that the FS Bill did not breach BORA rights and freedoms.<sup>78</sup> In relation to the right not to be deprived of the fruits of litigation under section 27(3) of BORA, she states that it does not protect against Parliament deciding the result of pending proceedings, only ensuring procedural, as opposed to substantive, equality.<sup>79</sup> She decided that the right to be “secure against unreasonable search or seizure, whether of

<sup>72</sup> Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) para 5.36.

<sup>73</sup> Section 7 Aotearoa/New Zealand Bill of Rights Act 1990.

<sup>74</sup> Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) para 5.39.

<sup>75</sup> Geoffrey Palmer and Matthew Palmer *Unbridled Power* (Oxford University Press, Melbourne, 2004) 325.

<sup>76</sup> As identified in Geoffrey Palmer and Matthew Palmer *Unbridled Power* (Oxford University Press, Melbourne, 2004) 325 – 326.

<sup>77</sup> Geoffrey Palmer and Matthew Palmer write “[o]ne real problem that remains with the reporting requirement is dealing with provisions that offend the Bill of Rights Act but enter a bill after select committee consideration, particularly by the Committee of the Whole House.” *Unbridled Power* (Oxford University Press, Melbourne, 2004) 326.

<sup>78</sup> Attorney General’ Report on the Compatibility of the Foreshore and Seabed Bill with the NZBORA (6 May 2004).

<sup>79</sup> Section 27(3) of BORA “Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard according to law, in the same way as civil proceedings between individuals.”

the person, property or correspondence or otherwise” under section 21 BORA was not breached based on domestic jurisprudence that section 21 does not protect property rights.<sup>80</sup>

According to the Attorney General, the section 20 right to enjoy culture was not infringed because exclusive title is not necessary for the enjoyment of cultural rights mentioned by Maori. Interestingly, the Attorney General drew on UNHRC jurisprudence to make her finding and noted, in particular, the UNHRC’s comments on justified limitations on the right to enjoy culture.

The Attorney General did find that the FS Bill constituted a prima facie breach of the right to freedom from discrimination, accepting that extant native title interests in land are comparable to freehold interests in land, based on overseas jurisprudence, but are treated differently under the FS Bill. Owners of freehold interests are not deprived of their property rights whereas potential native title holders are. Owners of freehold interests have a right to redress on deprivation of their property rights whereas potential holders of native title do not. However, the Attorney General maintained that the breach is justified because the principal reason for the FS Bill is to clarify the law and it achieves that goal. She also highlighted that customary rights and ancestral connections can be recognised under the FS Bill and, importantly, that if a Maori group could prove that it had a native title interest in the foreshore and seabed but for the FS Bill, there is the possibility of redress through negotiation. Interestingly, she states “I accept that there is a risk a human rights body may regard this aspect of the FS Bill (failure to guarantee redress for the deprivation of a property right) as imposing an unjustifiable limitation on a protected right.”

In short, the Attorney General’s analysis of the FS Bill illustrates that she is prepared to take a generous view of what constitutes a legitimate limitation on BORA rights and freedoms. It is here that her report deviated from the CERD Committee decision on the FSA and it could be argued that she failed to effectively implement international legal protections of indigenous peoples’ and human rights.

## 6. Legislative deliberation

Once a bill is introduced into the Aotearoa/New Zealand House of Representatives it is debated by Members of Parliament. This consists of deliberations during the first, second and third readings, and the Committee of the Whole House phase between the second and third readings. Bills are most commonly sent, also, to a bipartisan select committee after their first reading. The stages that allow Members of Parliament, and especially members in opposition, the greatest opportunity to raise human rights concerns with a bill occur in the Committee of the Whole House and select committee phases.

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<sup>80</sup> Attorney General’ Report on the Compatibility of the Foreshore and Seabed Bill with the NZBORA (6 May 2004) para 21.

a. Select Committee process

Select committees can make, and in the past have made, substantial amendments to bills. The effect of those amendments varies depending on the degree of select committee endorsement of those amendments. Unanimously agreed amendments are usually automatically accepted by the House whereas those “agreed by a majority have to be separately voted on by the House.”<sup>81</sup>

Select committees usually call for written submissions, allowing the public time to consider a bill and respond, and then hears oral submissions. It is this practice that allows the public to raise international human rights and indigenous peoples’ rights concerns with a particular bill and has led to the comment that “select committees are a crucial bastion of democracy in our legislative process.”<sup>82</sup>

Unfortunately, however, the advantages of the select committee process can be lost to politics. The select committee reviewing the FS Bill received just fewer than 4000 submissions, of which over 94 per cent opposed the FS Bill. The opposition generally related either to concerns about denying Maori the right to pursue claims under TTWMA or under common law; or to the Crown's power to alienate the public foreshore and seabed by passing subsequent legislation. Many of the submissions spoke about the Bill's inconsistency with domestic and international human rights law. However, the select committee considering the FS Bill could not agree to any amendments to the FS Bill.<sup>83</sup> It was hamstrung because members split on whether to extend the time for select committee consideration of the FS Bill. Members from parties supporting the FS Bill refused an extension of time. In addition, the Select Committee only had the opportunity to hear approximately 200 of the submitters who requested to be heard, thus defeating some of the democratic benefits of the process.

b. Committee of the Whole House phase

The fine details of a bill are discussed during the Committee of the Whole House. There is some opportunity for members of all parties to comment on the bill and raise human rights issues. Amendments can be made to any of the clauses of a bill by any Member of Parliament. The problems with this phase is that Government has usually bargained the requisite majority to pass a bill at this stage meaning other parties’ concerns, while aired, have no impact on the final content of the bill; this is exactly what happened in Parliamentary debates on the FS Bill. The Green Party, for

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<sup>81</sup> Geoffrey Palmer and Matthew Palmer *Unbridled Power* (Oxford University Press, Melbourne, 2004) 195.

<sup>82</sup> J F Burrows and P A Joseph “Parliamentary Law Making” (1990) NZLJ 306, 307. Walter Iles points out that the advantages of the select committee process include that members of the public are given a specific opportunity to influence the form of legislation and it enables members of parliament to become better informed when they come to debate the bill before the House: Walter Iles “New Zealand Experience of Parliamentary Scrutiny of Legislation (1991) 12 Stat L Rev 166, 178. He also wrote that “[i]n New Zealand, the practice of referring virtually all government bills to select committees enables more bills, in most cases, to be scrutinised carefully in the light of comments both from members of the public and from the Legislation Advisory Committee” in “The Responsibilities of the New Zealand Legislation Advisory Committee” (1992) 13 Stat L Rev 11, 20.

<sup>83</sup> See Report of the Fisheries and other Sea-related Legislation Select Committee “The Foreshore and Seabed Bill 2004 Foreshore and Seabed Bill 2004, no 129-1 (the commentary)” available at Parliament <<http://www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/Final%20FS%20Report.pdf>> (last accessed 6 September 2005).

example, stressed the discrimination against Maori under the FS Bill and proposed numerous amendments to lessen the effects of that discrimination. However, their objections fell on deaf ears; the Government and supporting parties overrode those amendments.

In addition, the Government can also introduce amendments to a bill at the Committee of the Whole House phase. Due to their timing, they are not then subject to the Attorney General's vet of a bill for compliance with the BORA and there may be little, if any, opportunity for people, including the Members of Parliament themselves, to comprehend the content of the amendments and raise human rights concerns if they arise. In the case of the FS Bill, the Government introduced 67 pages of amendments that, for example, tightened the prescribed tests for Maori to establish TCRs. In addition, the Government bargained for the necessary support for Parliament to consider the FS Bill and its amendments under urgency. As a result, the public and Members of Parliament had only hours to consider the amendments before being required to comment on them. The FS Bill was then passed only a few days later. The CERD Committee commented on the unnecessarily speedy enactment of the FSA in its FSA Decision.<sup>84</sup>

#### *B. The Content of Aotearoa/New Zealand Legislation*

As we have seen, not all Aotearoa/New Zealand legislation complies with international and domestic human rights norms, such as the FSA. Obviously, colonial legislation of the last two centuries, such as the Tohunga Suppression Act 1863, raised human rights concerns. Given the inadequacy of checks and balances within the Aotearoa/New Zealand legislative process, this is perhaps not surprising.

While I do not provide a comprehensive list here, there is legislation currently in force that also raises human rights and indigenous peoples' rights concerns. Obviously, the FSA is of utmost concern, outlined above. Other legislation that could raise human rights and indigenous peoples' rights issues includes that which incorporates the principles of the Treaty. Indeed, incorporation of the Treaty principles is better than no incorporation at all. Nonetheless, the following criticisms might be made:<sup>85</sup>

- the courts have not given effect to the words of the Maori version of the Treaty. For example, the courts have not, nor could they as a branch of the sovereign power, give effect to the Treaty article two guarantee of Maori rangatiratanga (self-determination/chieftainship).
- the incorporation of the Treaty principles into legislation depends on the requisite level of political will, which is less than ideal where a minority's rights are at

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<sup>84</sup> United Nations Committee on the Elimination of All Forms of Racial Discrimination "Decision 1(66): New Zealand Foreshore and Seabed Act 2004" (11 March 2005) CERD/C/66/NZL/Dec.1.

<sup>85</sup> I have borrowed these sections from the following paper: C Charters "A Report on the Treaty of Waitangi 1840 between Maori and the British Crown" (Presented at the United Nations Expert Seminar on Treaties, Agreements and Other Constructive Arrangements between Indigenous Peoples and States, Geneva, December 2003) and available at the Office of the High Commissioner for Human Rights <<http://www.unhcr.ch/indigenous/treaties.htm>> (last accessed 6 September 2005).

stake. It is of particular concern that a number of political parties are advocating the removal of Treaty principles from existing legislation, mentioned earlier.<sup>86</sup>

- even where the Treaty principles have been incorporated into legislation, the legislation does not always demand compliance with them. For example, in some cases, the Executive must only “have regard” to the Treaty principles.
- The Aotearoa/New Zealand Parliament has begun to specify in legislation how the Treaty principles are to be complied with, reducing the scope of the courts to interpret the content of Treaty principles.<sup>87</sup> It seems anomalous to have a majoritarian branch of government determining the content of a minority’s rights.

Further, legislation that could fall short of international and domestic human rights and indigenous peoples’ rights obligations include Acts implementing Treaty settlements. As discussed in more detail below, they reflect the outcome of an unequal bargain and do not reflect equal treatment between iwi (tribes) and hapu (sub-tribes). For example, only some Treaty settlements contain clauses entitling iwi to a ‘top-up’ if the total amount of Government monies paid to iwi for historical grievances exceeds NZ\$1 billion.

#### *C Under-implementation of Legislation Protecting Human Rights and Indigenous Peoples’ Rights*

The BORA and the HRA are not adequately enforceable against the legislature given that the rights and freedoms contained within them cannot override other legislation inconsistent with them (as has been raised by, for example, the UNHRC).<sup>88</sup> In addition, as is discussed below, while the BORA has been interpreted relatively widely generally, there remains very little Aotearoa/New Zealand court jurisprudence on the minorities’ right to enjoy culture under section 20 of the BORA. In contrast, the minorities’ right to enjoy culture has been a source of considerable UNHRC evaluation of states’ compliance with indigenous peoples’ rights.

#### *D The Courts’ Protection of Human Rights and Indigenous Peoples’ Rights*

##### 1. Positives

In my view, the Aotearoa/New Zealand courts have given, in some instances at least, some real force to human rights and indigenous peoples’ rights in Aotearoa/New Zealand that could be of benefit for the protection of Maori rights. For example, Aotearoa/New Zealand courts:

- initially took a broad interpretation of the principles of the Treaty, which, they found, included principles of partnership, good faith, a duty of active

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<sup>86</sup>Including the leading opposition party. See National Party <http://www.national.org.nz/Article.aspx?ArticleID=4131#2> (last accessed 6 September 2005).

<sup>87</sup> See, for example, the Aotearoa/New Zealand Public Health and Disability Act 2000.

<sup>88</sup> Concluding Observations of the Human Rights Committee, Aotearoa/New Zealand (7 August 2003) available at University of Minnesota Human Rights Library <<http://www1.umn.edu/humanrts/hrcommittee/newzealand2002-2.html>> (last accessed 6 September 2005).

protection of lands and so on.<sup>89</sup> The practical effect of the Treaty principles has in some cases been significant. For example, the Court of Appeal (Aotearoa/New Zealand's second highest court) ruled that Crown land potentially subject to a Waitangi Tribunal claim could only be devolved to state-owned enterprises if mechanisms were put in place to enable the land to be returned to the relevant iwi if the Waitangi Tribunal recommended as such;

- have generally taken a broad interpretation of human rights and freedoms guaranteed in the BORA;
- have considered unincorporated international human rights treaties in cases where human rights issues are raised by, first, requiring legislation to be interpreted consistently with Aotearoa/New Zealand's international human rights treaty obligations.<sup>90</sup> Secondly, they have also suggested that the Executive may be required to take Aotearoa/New Zealand's international treaty obligations into account in decision-making, even where the treaty is not incorporated into Aotearoa/New Zealand law;<sup>91</sup>
- have suggested that while the exact status of international human rights treaty bodies is uncertain,<sup>92</sup> their jurisprudence is persuasive;<sup>93</sup> and
- have illustrated a willingness to consider the jurisprudence of the European Court of Human Rights in particular, which is not technically binding on Aotearoa/New Zealand. This means that developments in human rights and indigenous peoples' rights jurisprudence from the Inter-American human rights institutions could similarly be persuasive in New Zealand where Maori rights are at stake.<sup>94</sup>

## 2. Negatives

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<sup>89</sup> See *Aotearoa/New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA).

<sup>90</sup> See *New Zealand Air Line Pilots Association v Attorney-General* [1997] 3 NZLR 269.

<sup>91</sup> *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) did not determine conclusively whether Aotearoa/New Zealand's international treaty obligations were a mandatory relevant consideration. See for more discussion, Claudia Geiringer "Tavita and all that: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66.

<sup>92</sup> *Wellington District Legal Aid Committee v Tangiora* [1998] 1 NZLR 139 (CA) and, for the Privy Council's decision, [2000] 1 NZLR 17.

<sup>93</sup> See, for example, comments made in *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA), *Zaoui v Attorney General* [2005] 1 NZLR 577, *R v Goodwin (No 2)* [1990-92] 3 NZBORR 314, 321. Note also the comment by A Butler and P Butler that "the availability of international complaint mechanisms has had an impact. The courts have recognised that (unless domestic law explicitly enacts contrary to international law) there is little point in making decisions contrary to international human rights norms when these are susceptible to challenge on the international plain. Inevitably, this has encouraged counsel to cite, and judges to give effect to, international human rights provisions and jurisprudence." "The Judicial Use of International Human Rights Law in Aotearoa/New Zealand" (1999) 29 VUWLR 173, 190. This is true irrespective of whether international human rights treaty body decisions are binding. For more discussion on that subject, see, for example, J S Davidson "Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee" [2001] NZ Law Review 125.

<sup>94</sup> Just one example is *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

The above list of examples of the courts providing some judicial protection of human rights and indigenous peoples' rights highlights, at the same time, that Aotearoa/New Zealand courts cannot *require* the legislature to protect human rights and indigenous peoples' rights. For example, while they can give some real effect to the principles of the Treaty, this requires Parliament to have first incorporated the Treaty into legislation. The same is true, of course, of rights and freedoms contained in international human rights treaties that Aotearoa/New Zealand has ratified. Even where they have been incorporated, as has the ICCPR in BORA, inconsistent legislation trumps. The courts approach of interpreting legislation consistently with human rights and Treaty rights, while not to be underestimated, does not mean the courts can give effect to them where the legislation in question is clearly in conflict with human rights. Finally, international human rights treaty body jurisprudence is only persuasive, not binding, meaning that the Aotearoa/New Zealand courts can take a different approach to the interpretation of rights and freedoms than, say, the UNHRC or the CERD Committee.

3. A specific issue: the dearth of Aotearoa/New Zealand court decisions involving a minorities' right to culture under section 20 BORA

As we know, the article 27 ICCPR minorities' right to culture has been interpreted to cover some indigenous peoples' rights. It is notable, then, that there has been relatively little judicial attention paid to the section 20 BORA equivalent right in Aotearoa/New Zealand. This might suggest that there is under-enforcement of the minorities' right to culture in Aotearoa/New Zealand. I detail two cases below where section 20 BORA arose.

The central issue in *Ngati Apa ki te Waipounamu v Attorney General (Ngati Apa Boundary Dispute Case)* was whether the Ngai Tahu Settlement Act 1998 "fully and finally" settling Ngai Tahu claims, excluded claims by Ngati Apa relating to lands which were the subject of the Ngai Tahu Settlement Act 1998.<sup>95</sup> Elias CJ considered that the case affected Ngati Apa's right to enjoy culture under section 20 BORA. There is little discussion of the significance of section 20 generally, and it is difficult to evaluate the impact it had on to Elias CJ's decision. However, it remains noteworthy that she interpreted the Ngai Tahu Settlement Act 1988 narrowly, consistently with section 20 BORA. As a result, she held it did not exclude claims made by Ngati Apa over lands that were the subject of the Ngai Tahu settlement.

Another case where Maori argued a breach of their right to enjoy culture under section 20 BORA is *Te Runanga o Whare Kauri Rekoku Inc v Attorney General*.<sup>96</sup> Certain iwi challenged the Dead of Settlement replacing Maori customary fishing rights with a commercial interest in the Sealords fishing company signed by the Crown and some Maori leaders (the Sealords Deal). One of the claimants' arguments was that the Executive, by signing the Sealords Deal, had breached its right to culture because it extinguished customary fishing rights. Heron J of the High Court dismissed the argument quickly concluding that section 20 "is somewhat removed from the circumstances here" and:<sup>97</sup>

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<sup>95</sup> [2004] NZLR 462.

<sup>96</sup> (12 October 1992) HC WN CP 682/92 Heron J.

<sup>97</sup> (12 October 1992) HC WN CP 682/92, Heron J. On appeal the s 20 BORA argument was not examined. Cooke P held that "there us an established principle of non-interference by the courts in

There is not a denial of the right to enjoy culture, but there is some limitation arguably on the right in exchange for a different set of rights more precisely defined. On no basis can it be suggested that the plaintiffs are being individually excluded. Rather they are being treated as Maori and will be treated in that respect in the future under the statutory regime proposed. In my provisional view that would not persuade me of a serious issue that they are being deprived of their cultural entitlement. In any event, they might well be affected by s 5 [justified limitations section] (...).

What is interesting here is that Heron J did not turn to international law or international human rights treaty body jurisprudence to address the question. He focused only on the BORA requirement to interpret legislation consistently with BORA rights and freedoms. However, it was later confirmed that his approach was consistent with international human rights as interpreted by the UNHRC in any event. In *Mahuika*, mentioned earlier, the UNHRC later found that the legislation enacting the Sealords Deal did not breach the ICCPR right to enjoy culture.<sup>98</sup>

#### *E Aotearoa/New Zealand Policy, Human Rights and Indigenous Peoples' Rights*

I understand anecdotely that New Zealand's obligations under the Treaty and international law on human rights and indigenous peoples' rights does inform and impact upon policy in Aotearoa/New Zealand. However, there are a number of instances where New Zealand policy seems to conflict with Treaty rights and human rights, raising concerns that international law relating to indigenous peoples' is not being effectively implemented in New Zealand.

#### 1. FSA and the Government's Response to the CERD Committee's FSA Decision

Perhaps the best illustration of the disjuncture between international law on indigenous peoples' land rights and Aotearoa/New Zealand Government policies on Maori land rights is in the FSA itself: it developed legislation inconsistent with international norms and rejected the CERD Committee's FSA Decision.

The Prime Minister's response to the CERD Committee's FSA Decision also shows that New Zealand's international legal obligations in relation to indigenous peoples are not taken as seriously by our top officials as one would hope. At the centre of the Aotearoa/New Zealand Government's response was a simple "did not".<sup>99</sup> The Prime Minister stated in an interview that "I have to say there is nothing in that decision that finds that New Zealand was in breach of any international convention at all."<sup>100</sup> It was followed shortly after by a "won't change it": "The legislation was

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parliamentary proceedings" and "the proper time for challenging an Act of a representative legislature, if there are any relevant limitations, is after the enactment." See *Te Runanga o Wharekauri Rekohu v Attorney General* [1993] 2 NZLR 301, 307 – 308.

<sup>98</sup> *Apirana Mahuika et al v Aotearoa/New Zealand* Communication No 547/1993 (27 October 2000) Report of the Human Rights Committee Vol II A/56/40.

<sup>99</sup> A number of these phrases are taken from Devika Hovell "The Sovereignty Stratagem: Australia's Response to UN Human Rights Treaty Bodies" (2003) 28 *Alternative Law Journal* 297. They illustrate the similarity between Australia's and New Zealand's responses to UN human rights treaty bodies.

<sup>100</sup> Interview with Rt Hon Helen Clark, Prime Minister (John Dunne, Breakfast Show TRN 3ZB, 14 March 2005) Transcript provided by Newstel News Agency Ltd.

passed, it has good support from the great majority of New Zealand and the legislation stands".<sup>101</sup> The response got particularly nasty when the Prime Minister denigrated the CERD Committee by saying that it is "on the outer edges of the UN system" and implied that the Claimants did not know what they were doing in seeking United Nations censure of the FSA. She stated "[w]ell, I think I have a somewhat better understanding of the UN system than they do."<sup>102</sup>

## 2. Approach to the Draft Declaration

Aotearoa/New Zealand is currently seeking an amendment to the Draft Declaration to delete the states' obligation to provide just and fair compensation where indigenous peoples' land has been taken without their consent. Aotearoa/New Zealand is suggesting that it be replaced with the less onerous duty to "provide effective mechanisms for redress".<sup>103</sup> Underlying Aotearoa/New Zealand's approach to the Draft Declaration is the argument that Aotearoa/New Zealand cannot accept certain rights and freedoms that go further than its understanding of the Treaty of Waitangi and current Aotearoa/New Zealand policy. For example, its aversion to accepting an indigenous peoples' right to restitution and, if that is not possible, compensation is that it is inconsistent with its Treaty of Waitangi settlement policy.<sup>104</sup> It states that full compensation is not possible "because of the various demands on the Government's finances".<sup>105</sup> Clearly, Aotearoa/New Zealand's approach here falls short of emerging international jurisprudence on indigenous peoples' land rights such as that coming from the CERD Committee, the Inter-American Court and Commission on Human Rights and under the ILO Convention 169.

Likewise, the Government does not take heed of international legal developments on the need to consult with indigenous peoples when decisions are made that affect them.<sup>106</sup> A continuing concern with the Aotearoa/New Zealand Government's approach to the Draft Declaration is its almost absolute failure to consult with Maori about its position. For example, the first opportunity Maori had to review the Aotearoa/New Zealand Government's proposed amendments was at the September 2004 Draft Declaration Working Group meeting.

## 3. Treaty settlements

The Government's Treaty settlements policies can be criticised on a number of levels, and it could be argued that they may breach Aotearoa/New Zealand's human rights obligations such as the minorities' right to enjoy culture and the right to freedom from discrimination.

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<sup>101</sup> Interview with Rt Hon Helen Clark Prime Minister (John Dunne, Breakfast Show TRN 3ZB, 14 March 2005) Transcript provided by Newstel News Agency Ltd.

<sup>102</sup> Interview with Rt Hon Helen Clark, Prime Minister (John Dunne, Breakfast Show TRN 3ZB, 14 March 2005) Transcript provided by Newstel News Agency Ltd..

<sup>103</sup> Commission on Human Rights "Information Provided by States" (6 September 2004) UN Doc E/CN4/2004/WG15/CRP.1.

<sup>104</sup> New Zealand Government, "New Zealand Negotiating Brief".

<sup>105</sup> New Zealand Government, "New Zealand Negotiating Brief", 102.

<sup>106</sup> UN Committee on the Elimination of Racial Discrimination "General Recommendation XXIII: Indigenous Peoples" (18 August 1997) A/52/18, annex V, para 5.

Certain rights integral to Maori and guaranteed to Maori under the Treaty are not on the negotiating table. For example, the Government refuses to recognise or negotiate Maori self-government (which is, in any event, a lesser right than rangatiratanga/self-determination guaranteed by the Treaty) and Maori rights to oil and gas reserves.<sup>107</sup> Despite the Government's negotiating principle of "fairness between claims", the level of redress received by iwis differs. Of particular note is the so-called 'relativity clause', mentioned earlier, found in the Ngai Tahu and Tainui settlements under which Ngai Tahu and Tainui receive a percentage of every Crown dollar spent on Treaty settlements over the proposed NZ\$1 billion. The Government now refuses to include relativity clauses in settlements. Arguably, this constitutes clear discrimination between tribes.

The Government also imposes onerous conditions on iwi, hapu and whanau that seek to negotiate a Treaty settlement with the Crown. For example, the Crown will only deal with "large natural groupings". Maori do not necessarily associate in "large natural groupings" but instead in iwi (tribe), hapu (sub-tribe) and whanau (family) groupings. The requirement to form "large natural groupings" is an arbitrary requirement that is inconsistent with Maori practice.

Unlike in British Columbia, Canada, there is no independent body to oversee and monitor Treaty settlements in Aotearoa/New Zealand. Instead, OTS, an arm of the Government is both the Government's negotiator and policy setter. This raises serious questions of conflict of interest. Further, it is unusual to have a party to the Treaty setting the rules for negotiation about Treaty grievances it caused.

As stated earlier, a condition of settlement is that Maori agree that it is full and final and settles all Maori historical grievances, which may be overly onerous.<sup>108</sup>

#### 4. Officials' ignorance of human rights and indigenous peoples' rights concerns as they impact on Maori

There appears to be ignorance on the part of bureaucrats of developments in international law relating to indigenous peoples. For example, the Ministry of Justice's 2004 Guidelines on sections 19 and 20 BORA, the rights to freedom from discrimination and culture respectively, do not address Maori land rights in any way, despite the related jurisprudence from international human rights treaty bodies.<sup>109</sup> The discussion of section 19 does not alert officials to potential problems when Maori land rights are treated differently to non-Maori land rights. Similarly, it does not include Maori land rights in its list of subject matter where section 20 issues may arise. In this way, we can see that Aotearoa/New Zealand's approach to human rights

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<sup>107</sup> As indicated earlier, the current Aotearoa/New Zealand Government recently rejected the Waitangi Tribunal's finding that Maori have a Treaty interest in petroleum. Note that the Special Rapporteur on the Study of Treaties, Agreements and Constructive Arrangements between States and Indigenous Populations has stated that "it remains to be seen to what extent the existence of such "non-negotiables" – if imposed by State negotiators – compromises the validity not only the agreements already reached but also of those to come." Study on treaties, agreements and other constructive arrangements between States and indigenous populations E/CN.4/Sub.2/1999/20 (1999).

<sup>108</sup> The Maori party suggests some settlements need to be revisited because agreed to under duress: see TVNZ <<http://www.tvnz.co.nz/view/page/484445/609021>> (last accessed 6 September 2005).

<sup>109</sup> Ministry of Justice *Guidelines on the Aotearoa/New Zealand Bill of Rights Act 1990: A Guide to Rights and Freedoms in the Bill of Rights for the Public Sector* (November 2004).

and indigenous peoples' peoples rights, and their relationship, is more generally uninformed by developments in international law.

#### *F Constitutional Reform?*

The chances of constitutional reform to provide better protection of Maori rights under international law on human rights and indigenous peoples' rights, or under the Treaty, seem relatively slim at the moment. The August 2005 report of a parliamentary committee set up to consider constitutional review (the Constitutional Review Committee) did not recommend that New Zealand embark on a conscious journey towards constitutional reform.<sup>110</sup> Instead, it recommended, for example, greater understanding of New Zealand's constitutional arrangements.<sup>111</sup> Given the quotes from New Zealand's Deputy Prime Minister, outlined earlier, it also seems unlikely that there will be governmental support for a watering down of Parliament's supreme power in New Zealand.

There seems to be movements pulling in different directions on the status of the Treaty. As mentioned above, the National Party has acquired significant support on a platform that advocates the abolition of references to the Treaty in legislation. On the other hand, the Constitutional Review Committee did note that the Treaty was one of the "core issue[s] at the heart of New Zealand's Constitution".<sup>112</sup>

No doubt Maori views differ on the subject of constitutional review. However, I feel that the foreshore and seabed issue highlighted the need for better protection against legislative infringement of Maori rights.

As New Zealand's Constitution is fluid and unwritten, it can be changed relatively easily. There are no hard and fast rules regulating how constitutional reform should take place.

## **VI CONCLUSION**

New Zealand is not known for egregious breaches of indigenous peoples' rights. Nonetheless, New Zealand's legal system is not particularly effective at implementing international and domestic laws that function to protect the rights of Maori. This has been seen most starkly of late in the FSA. Of particular concern is Parliament's supremacy in New Zealand. Legislation that breaches international and domestic human rights concerns cannot be overturned by the courts: legislative override is required. Further, the checks and balances within the legislative process that provide an incentive for Parliament to comply with human rights under international and domestic law are inadequate. Hence, it is perhaps unsurprising that there are examples of New Zealand legislation that breach human rights and indigenous peoples' rights norms. While New Zealand courts have attempted to provide some robust protection of human rights, their powers are limited by their inability to overturn offending legislation. They may also under-utilise the minorities' right to enjoy culture in their jurisprudence. We also see that New Zealand policy is out-of-step with international legal developments on indigenous peoples' rights, as

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<sup>110</sup> Constitutional Review <[www.constitutional.parliament.govt.nz](http://www.constitutional.parliament.govt.nz)> (last accessed 28 August 2005).

<sup>111</sup> Constitutional Review <[www.constitutional.parliament.govt.nz](http://www.constitutional.parliament.govt.nz)> (last accessed 28 August 2005).

<sup>112</sup> Constitutional Review <[www.constitutional.parliament.govt.nz](http://www.constitutional.parliament.govt.nz)> (last accessed 28 August 2005).

can be seen by the Prime Minister's highly critical response to the CERD Committee's FSA Decision and the New Zealand Government's approach to the Draft Declaration.