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Submission on New Zealand's second Universal Periodic Review Recommendations

1. Thank you for the opportunity to provide input to the Cabinet Briefing Paper on the recommendations made during New Zealand's Second Universal Periodic Review (UPR).

Introduction

2. This submission is made jointly by the Aotearoa Indigenous Rights Trust and Peace Movement Aotearoa. We coordinated the joint NGO Indigenous Peoples' Rights and the Treaty of Waitangi UPR submission², and therefore mainly focus below on key recommendations relating to issues in the joint submission, although we also comment briefly on some other recommendations.

3. This paper has five main sections:

- A) Recommendations relating to international human rights instruments,
- B) Recommendations relating to Indigenous Peoples' Rights and the Treaty of Waitangi
 - i. Constitutional and legal issues relating to the Treaty of Waitangi,
 - ii. UN Declaration on the Rights of Indigenous Peoples,
 - iii. Free, prior and informed consent,
- C) Recommendations relating to incorporation of international human rights instruments,
- D) Recommendations relating to structural discrimination, and
- E) Effective UPR follow up and NGO monitoring.

A) Recommendations relating to international human rights instruments

4. A considerable number of UPR recommendations advise New Zealand to ratify or accede to a range of international instruments³, and to make an Article 14 declaration under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

5. We urge New Zealand to accept and action all of these recommendations in order to ensure more complete protection for human rights. We cannot see any good reason as to why these recommendations should not be accepted, particularly in the light of successive governments' assertions of New Zealand's excellent human rights record⁴.

6. Furthermore, similar recommendations were made during New Zealand's first UPR in relation to the international instruments available for accession or ratification at that time; and UN human rights treaty monitoring bodies and the ILO have repeatedly advised New Zealand in this regard. While the Committee on the Rights of Persons with Disabilities has not as yet considered New Zealand, we anticipate that the Committee will recommend ratification of the Optional Protocol to the Convention on the Rights of Persons with Disabilities when it does.

B) Recommendations relating to Indigenous Peoples' Rights and the Treaty of Waitangi (the Treaty)

7. Overall, we urge acceptance of all of the UPR recommendations relating to the Treaty and Indigenous peoples' rights, collective and individual, and in particular those relating to three critical areas of Indigenous peoples' rights that are not currently adequately addressed.

i. Constitutional and legal issues relating to the Treaty of Waitangi

8. Relevant UPR recommendations include:

128.40. Explore and develop, in consultation with the Maori, means of addressing Maori concerns regarding the Treaty settlement negotiation process (Slovenia),

128.41. Continue strengthening the partnership between the Government and the Maori to reach a just, fair and sustainable settlement to historical claims made in the framework of the Treaty of Waitangi (Angola),

128.73. Continue on the constructive path of promoting equality and non-discrimination, including through advancing the rights of Indigenous peoples (State of Palestine), and

128.38. Continue to address all forms of political, economic and social discrimination against the Maori and Pacific population by meeting their various demands for constitutional and legal reforms and recognition (Somalia).

9. We note that these, and related, recommendations around the status of the Treaty within New Zealand's constitutional arrangements, government accountability to the Waitangi Tribunal and the need for just and fair settlements of historical Treaty breaches are not new - some were raised in the first UPR⁵, and all have been made by UN treaty monitoring bodies and Special Procedures of the Human Rights Council; for example by:

- the Committee on the Elimination of Racial Discrimination (CERD) in 2005⁶, 2007⁷, and again in 2013⁸;
- the Human Rights Committee in 2010⁹, and raised in the List of Issues Prior to Reporting last month¹⁰;
- the Committee on Economic, Social and Cultural Rights (CESCR) in 2012¹¹; and

- the Special Rapporteur on the Rights of Indigenous Peoples (the Special Rapporteur) in 2006 and 2011¹².

10. We recommend that these and related recommendations be accepted.

ii. UN Declaration on the Rights of Indigenous Peoples (UN Declaration)

11. Relevant UPR recommendation:

128.89. Take concrete measures to ensure the implementation and promotion of the UN Declaration on the Rights of Indigenous Peoples (Norway)

12. New Zealand announced support for the UN Declaration in 2010, but has not undertaken any steps to systematically review legislation, policy and practice to ensure they comply with the standards set out therein. The UN Declaration is the most comprehensive, globally supported and legitimate of international legal instruments setting out the rights of Indigenous peoples under international law¹³. It elaborates and clarifies the application of existing human rights under international conventions and international customary law to Indigenous peoples.

13. The rights and fundamental freedoms elaborated in the UN Declaration reflect human rights norms already binding on New Zealand as a matter of international law, in particular those articulated in the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and ICERD - for example, the right of self-determination, the right to freedom from discrimination, and rights to culture and property, among others.

14. State parties' obligations in relation to the rights of Indigenous peoples under ICERD and ICESCR in particular have been clarified by their respective monitoring bodies: prior to the adoption of the UN Declaration, by CERD in General Recommendation 23¹⁴; and subsequently by the CESCR in General Comment 21¹⁵.

15. It should be noted in this regard that one of the five key objectives of the Second International Decade of the World's Indigenous People is:

*Developing strong monitoring mechanisms and enhancing accountability at the international, regional and particularly the national level, regarding the implementation of legal, policy and operational frameworks for the protection of Indigenous peoples and the improvement of their lives.*¹⁶

16. As the Second Decade draws to a close, a plan of action with concrete measures to ensure the implementation and promotion of the UN Declaration would be a noteworthy contribution by New Zealand to this goal. We recommend that this and related recommendations be accepted.

iii. Free, prior and informed consent

17. Relevant recommendation:

128.88. Ensure that the legislation includes a consultation process with Indigenous peoples in all actions concerning them (Mexico).

18. This and related recommendations mirror the recommendations of UN treaty monitoring bodies and Special Procedures¹⁷. Most recently, in its 2012 Concluding Observations, the CESCR (with reference to Article 1, the right of self-determination, and Article 15, cultural rights), referred to the necessity of ensuring free, prior and informed consent thus:

*The Committee calls on the State party to ensure that the inalienable rights of Maori to their lands, territories, waters and marine areas and other resources as well as the respect of the free, prior and informed consent of Maori on any decisions affecting their use are firmly incorporated in the State party's legislation and duly implemented.*¹⁸

19. In its 2013 Concluding Observations, CERD also referred directly to the necessity of securing free, prior and informed consent:

*The Committee recalls its General Recommendation No. 23 (1997) and reiterates the importance of securing the free, prior and informed consent of Indigenous groups regarding activities affecting their rights to land and resources owned or traditionally used, as recognized in the United Nations' Declaration on the Rights of Indigenous Peoples. It urges the State party to enhance appropriate mechanisms for effective consultation with Indigenous people around all policies affecting their ways of living and resources.*¹⁹

20. In the 2014 List of Issues Prior to Reporting, the Human Rights Committee also refers to inconsistent consultation procedures that are not always in accordance with Maori decision-making procedures and to the necessity of ensuring "their effective participation in decision-making processes on issues that affect their rights and to fulfil their right to free, prior and informed consent".²⁰

21. Furthermore, another of the key objectives of the Second Decade refers specifically to this point:

*Promoting full and effective participation of Indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as Indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent.*²¹

22. We recommend that this and related recommendations be accepted.

C) Recommendations relating to incorporation of international human rights instruments

23. Relevant UPR recommendations:

128.31. Within the context of its legislative review process, fully incorporate international human rights instruments, to which it is party, in its domestic legal framework (Nicaragua); and the recommendations relating to incorporation of the rights elaborated in the ICESCR.

24. If New Zealand is serious about its international human rights obligations, then it must accept and action the recommendations relating to the full incorporation of the international human rights instruments, to which it is party, in its domestic legal framework.

D) Recommendations relating to structural discrimination

25. Relevant UPR recommendations:

128.75. Establish strategies across all sectors, in particular health, education and justice, to identify and remedy structural discrimination (Switzerland),

128.76. Take further steps fully to understand the causes of inequality faced by Indigenous people and to minimize their effects (United Kingdom of Great Britain and Northern Ireland), and

128.77. Enhance its efforts in fighting discrimination and institutional biases against Maori and Pacific people (Czech Republic).

26. As with the recommendations covered in previous sections, structural discrimination too has been raised by UN treaty monitoring bodies and Special Procedures. In its 2013 Concluding Observations, CERD included the heading 'Structural discrimination' and recommended:

*that the State party intensify its efforts to improve the outcomes of the Maori and Pasifika in the fields of employment, health and in the administration of criminal justice by, inter alia, addressing the existing structural discrimination in the State party. The Committee also recommends that the State party consider strengthening its special measures to increase the level of educational attainment of Maori and Pasifika children, in particular by focusing its measures at addressing the root causes of absenteeism and high dropout rates in schools.*²²

27. In its 2012 Concluding Observations, the CESCR referred to the need to address structural factors:

*The Committee calls on the State party to strengthen its efforts aimed at eliminating the disadvantages faced by Maori and Pasifika in the enjoyment of economic, social and cultural rights by addressing structural factors and ensuring that relevant measures effectively benefit the most disadvantaged.*²³

28. With regard to Special Procedures, the 2006 Report of the Special Rapporteur refers, among other things, to “underlying institutional and structural discrimination that Maori have long suffered”²⁴.

29. Earlier this week, the Working Group on Arbitrary Detention stated it had “found indications of bias at all levels of the criminal justice process” and recommended:

*that a review be undertaken of the degree of inconsistencies and systemic bias against Maori at all the different levels of the criminal justice system, including the possible impact of recent legislative reforms. Incarceration that is the outcome of such bias constitutes arbitrary detention in violation of international law.*²⁵

30. We recommend that these recommendations be accepted.

E) Effective UPR follow up and NGO monitoring

31. In common with other NGOs involved in promoting and protecting the rights elaborated in ICERD, the ICCPR and ICESCR, we were concerned at the lack of any opportunity to discuss follow-up and implementation of the first UPR recommendations with the government agencies responsible for that work, and that there was no information available about which government agencies were responsible for implementing the recommendations (except for those relating to some international instruments, such as the Convention on the Rights of the Child).

32. In order to ensure more effective NGO input, follow-up and monitoring of the second UPR recommendations, we recommend that the Ministry of Justice convene regular meetings with NGOs and decision-makers from the government agencies responsible for implementing the recommendations at regular intervals - preferably twice a year.

33. We are happy to discuss this proposal further with the Ministry of Justice.

34. Thank you for your attention to our comments.

References

¹ Copied to Alexandra Pierard and Charlotte Darlow, Ministry of Foreign Affairs, and Michael White, Human Rights Commission

² Universal Periodic Review of New Zealand 18th session of the Working Group on the UPR, January 2014: Joint NGO submission on Indigenous Peoples' Rights and the Treaty of Waitangi, 17 June 2013. Submitted by Aotearoa Indigenous Rights Trust and Peace Movement Aotearoa, jointly submitted and supported by an additional 22 NGOs, hapu and iwi organisations

³ Including: the International Convention for the Protection of All Persons from Enforced Disappearance; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; the Optional Protocol to the Convention on the Rights of Persons with Disabilities; the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; the Optional Protocol to Convention on the Rights of the Child on a Communications Procedure; ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries; and the Convention relating to the Status of Stateless Persons.

⁴ See, for example most recently, 'NZ's reputation strong, efforts to continue', Judith Collins, 1 February, 2014

⁵ 20 recommendations related to the Treaty of Waitangi and the collective or individual rights of Maori

⁶ Decision 1 (66): New Zealand, Committee on the Elimination of Racial Discrimination, Sixty-sixth session, 17 February - 11 March 2005 (CERD/C/DEC/NZL/1)

⁷ Concluding Observations of the Committee on the Elimination of Racial Discrimination: New Zealand, 15 August 2007 (CERD/C/NZL/CO/17)

⁸ Concluding Observations of the Committee on the Elimination of Racial Discrimination: New Zealand, 17 April 2013 (CERD/C/NZL/CO/18-20)

⁹ Concluding observations of the Human Rights Committee: New Zealand, 7 April 2010 (CCPR/C/NZL/CO/5)

¹⁰ List of issues prior to submission of the sixth periodic report of New Zealand, Human Rights Committee, March 2014 (CCPR/C/NZL/QPR/6)

¹¹ Concluding Observations of the Committee on Economic, Social and Cultural Rights: New Zealand, 18 May 2012 (E/C.12/NZL/CO/3)

¹² 'Mission to New Zealand', Report of the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People, 13 March 2006 (E/CN.4/2006/78/Add.3) and 'The situation of Maori people in New Zealand', Report of the Special Rapporteur on the Rights of Indigenous Peoples, 31 May 2011 (A/HRC/18/35/Add.4)

¹³ For an analysis of the legal authority of the UN Declaration in international law and the obligations it places on UN member states, see for example, 'Brief of Evidence', Waitangi Tribunal WAI 2417, Dr Claire Charters, 20 January 2014

¹⁴ General Recommendation 23: Indigenous Peoples, Committee on the Elimination of Racial Discrimination, 18 August 1997 (A/52/18, Annex V)

¹⁵ General Comment 21: Right of everyone to take part in cultural life, Committee on Economic, Social and Cultural Rights, 21 December 2009 (E/C.12/GC/21)

¹⁶ Draft Programme of Action for the Second International Decade of the World's Indigenous People, 18 August 2005, adopted by the UN General Assembly on 16 December 2005 (A/60/270)

¹⁷ As at note 12

¹⁸ As at note 11, para 10

¹⁹ As at note 8, para 18

²⁰ As at note 10, para 27

²¹ As at note 16

²² As at note 8, para 15

²³ As at note 11, para 12

²⁴ 'Mission to New Zealand', as at note 12, para 57

²⁵ Statement at the conclusion of its visit to New Zealand (24 March to 7 April 2014), United Nations Working Group on Arbitrary Detention, 7 April 2014