

# BACKGROUND PAPER— UNITED NATIONS SPECIAL RAPPORTEUR

## Summary of Paper

This paper has been prepared for Iwi and hapū to provide background information to the visit of the Special Rapporteur to New Zealand in July 2010.

The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (the Special Rapporteur) is an important role within the United Nations that has special responsibility for promoting and reporting on the human rights situation of indigenous people internationally.

The Special Rapporteur visited New Zealand in 2005 and issued a powerful report on the human rights situation of Māori. This visit is a follow up to that report. While the Special Rapporteur is in New Zealand, he will meet with government, Iwi/hapū, academics and human rights organisations to discuss whether there have been any improvements since 2005 in the human rights situation of Māori.

Some of the issues that the Special Rapporteur will be particularly interested in considering are;

- The findings from the 2005 visit, which included human rights concerns around constitutional issues, Treaty Settlements, Iwi/hapū rights to lands and natural resources, criminal justice issues and social justice issues;
- The foreshore and seabed issue and the governments model for replacing the Foreshore and Seabed Act 2004;
- Issues that have arisen since the 2005 visit, including the raids on Ngāi Tahu, the Auckland Supercity and the spectrum allocation issue; and
- Any matters that Iwi Māori present to him as being human rights issues.

The Special Rapporteur is only in New Zealand for approximately 5 days. The main opportunity for Iwi to make presentations to him is at the hui for the Iwi Chairs Forum.

## THE SPECIAL RAPPORTEUR—BACKGROUND

### *What does the Special Rapporteur do?*

Indigenous peoples across the world experience the consequences of historical colonization and invasion of their territories, and face discrimination because of their distinct cultures, identities and ways of life. In recent decades, the international community has given special attention to the human rights situations of indigenous peoples, including by developing international standards and guidelines (such as the Declaration on the Rights of Indigenous Peoples), as well as by the establishment of institutions and bodies that specifically target indigenous peoples' concerns (such as the Permanent Forum on Indigenous Issues, and the prior Working Group on Indigenous Populations).

In this context, the Commission on Human Rights decided to appoint in 2001 a Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (the Special Rapporteur). The role of the Special Rapporteur is to:

- Promote good practices, including new laws, government programs, and constructive agreements between indigenous peoples and states, to implement international standards concerning the rights of indigenous peoples;
- Report on the overall human rights situations of indigenous peoples in selected countries;
- Address specific cases of alleged violations of the rights of indigenous peoples through communications with Governments and others;
- Conduct or contribute to thematic studies on topics of special importance regarding the promotion and protection of the rights of indigenous peoples;

The full mandate for the Special Rapporteur is included in the Appendix to this document.

### *Who is the Special Rapporteur?*

In 2008 the United Nations Human Rights Council appointed Professor James Anaya to the role of Special Rapporteur. Professor James Anaya is the American James J. Lenoir Professor of Human Rights Law and Policy at the University of Arizona's James E. Rogers College of Law. In March 2008, he was appointed by the United Nations as its Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples. He teaches and writes in the areas of international human rights, constitutional law, and issues concerning indigenous peoples.

Professor Anaya has served as a consultant for organizations and government agencies in numerous countries on matters of human rights and indigenous peoples, and he has represented indigenous groups from many parts of North and Central America in landmark cases before courts and international organizations. He was the lead counsel for the indigenous parties in the case of *Awatitlan v. Nicaragua*, in which the Inter-American Court of Human Rights for the first time upheld indigenous land rights as a matter of international law.<sup>[3]</sup> In addition, he directed the legal team that successfully achieved a judgment by the Supreme Court of Belize affirming the traditional land rights of the Maya people of that country.

He has published a number of important works on the rights of indigenous peoples, including;

- *Indigenous Peoples in International Law* (Oxford Univ. Press, 1996, 2d. ed. 2004).
- *International Human Rights: Problems of Law, Policy, and Practice* (4th ed. 2006) (co-authored with Richard B. Lillich, Hurst Hannun & Dinah L. Shelton)

- *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 Harv. Hum. Rts. J. 33 (2001) (co-author with Robert A. Williams, Jr.).
- *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 Ga. L. Rev. 309 (1994), reprinted in *International Law and Indigenous Peoples* 309 (S. James Anaya ed., 2003).
- *A Contemporary Definition of the International Norm of Self-Determination*, 3 Transnat'l L. & Contemp. Probs. 131 (1993).

### *What will the Special Rapporteur do in New Zealand?*

The Special Rapporteur will meet with government, Iwi/hapū, academics and human rights organisations to discuss whether there have been any improvements since 2005 in the human rights situation of Māori. The Special Rapporteur is only in New Zealand for 5 days, and during that time will meet with;

- The Prime Minister and other senior Ministers;
- The Minister of Māori Affairs;
- The Minister in Charge of Treaty of Waitangi Settlements;
- The Māori Party;
- Ngāi Tuhoe concerning the raids;
- Wai 262 Claimants;
- The Spectrum Claimants;
- Iwi affected by the Auckland Supercity;
- Iwi currently in Settlement negotiations;
- Māori constitutional experts and academics; and
- The Iwi Chairs Forum.

There will also be an open public seminar in Wellington.

### *What Human Rights Issues will the Special Rapporteur Consider?*

The Special Rapporteur will consider any matters that appear to affect the human rights of Māori in New Zealand.

The issues that the Special Rapporteur will be particularly interested in considering are;

- The findings from the 2005 visit, which included human rights concerns around constitutional issues, Treaty Settlements, Iwi/hapū rights to lands and natural resources, criminal justice issues and social justice issues (a summary of that report is set out below);
- The foreshore and seabed issue and the governments model for replacing the Foreshore and Seabed Act 2004;

- Issues that have arisen since the 2005 visit, including the raids on Ngāi Tuhoē, the Auckland Supercity and the spectrum allocation issue; and
- Any matters that Iwi Māori present to him as being human rights issues.

### *How can Iwi/hapū/whānau meet with the Special Rapporteur?*

The main opportunities to meet with the Special Rapporteur will be:

- At the Iwi Chairs Forum hui; and
- At the Public Forum in Wellington.

The Special Rapporteur will also be able to receive written submissions.

## **THE 2006 REPORT OF THE SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS SITUATION OF MĀORI**

The Special Rapporteur visited New Zealand in 2005, and issued his report on the human rights situation of Māori in 2006. At that time, the role of Special Rapporteur was held by Rodolfo Stavenhagen.

The 2006 report is a powerful record of the human rights situation of Māori that contains a number of recommendations for improvements that should be made in New Zealand to ensure that Māori enjoy the full suite of fundamental human rights.

The Special Rapporteur made findings that:

“During the last three decades or so, ethnic relations in New Zealand changed from an assimilationist model (that undermined Maori cultural identity and governance structures) to a new bicultural approach based on the Treaty of Waitangi principles and the partnership between Maori and the Crown. The increasing assertiveness of Maori in demanding their long-denied rights and their claims for redress of past injustices led to inquiries and recommendations by the Waitangi Tribunal, negotiations leading to Treaty Settlements and the enactment of laws by Parliament when such settlements were finalized to the mutual satisfaction of the Government and Maori, with the sympathy and support of the majority of New Zealand society. Yet the legacy of the first 150 years of New Zealand was difficult to overcome, and many inequities continued to plague the relationships between Maori and Pakeha.

The inherent rights of Maori were not constitutionally recognized, nor were their own traditional governance bodies, which allowed Parliament to enact legislation by simple majority that modified this relationship according to the circumstances, a condition that the minority representation of Maori in the political process was unable to reform. Maori have the perception that all along they have been junior partners in this relationship.

Nothing illustrates this situation better than the complex land rights issue. Having been dispossessed of most of their lands and resources by the Crown for the benefit of Pakeha, Maori had to accept sporadic and insufficient redress, only to be faced with

accusations that they were receiving undue privileges, which left in their wake resentments on both sides about perceived social and racial tensions. The latent crisis broke over the controversy concerning the Foreshore and Seabed Act 2004, whereby the Crown extinguished all Maori extant rights to the foreshore and seabed in the name of the public interest and at the same time opened the possibility for the recognition by the Government of customary use and practices through complicated and restrictive judicial and administrative procedures.

Despite social programmes, disparities continue to exist between Maori and non-Maori with regard to employment, income, health, housing, education, as well as in the criminal justice system. Although Maori collectives (*iwi*, *hapu*, *whanau*) are increasingly involved in the strategies designed to reduce these inequalities, as well as in those designed to promote economic development and Maori success in business, actual self-governance mechanisms based on the recognition of the right of indigenous peoples to self-determination have not yet been devised. There appears to be a need for the continuation of specific measures based on ethnicity in order to strengthen the social, economic and cultural rights of Maori as is consistent with the International Convention on the Elimination of All Forms of Racial Discrimination.

A return to the assimilationist model appears increasingly in public discourse, redirecting concern about collective rights and the place of Maori as a people within the wider society, to emphasis on the protection of the individual rights of all New Zealanders, including the rights to equal opportunity, due process of law and freedom from illegal discrimination on any grounds, including ethnicity or race.

These wider constitutional and societal issues need to be debated responsibly and democratically by all social and political actors concerned because their solution will determine the kind of society New Zealand will be in the future.”

The Special Rapporteur made the following recommendations to the government of New Zealand to improve the human rights situation of Māori:

#### *Constitutional issues*

- Building upon continuing debates concerning constitutional issues, a convention should be convened to design a constitutional reform in order to clearly regulate the relationship between the Government and the Maori people on the basis of the Treaty of Waitangi and the internationally recognized right of all peoples to self-determination.
- The Treaty of Waitangi should be entrenched constitutionally in a form that respects the pluralism of New Zealand society, creating positive recognition and meaningful provision for Maori as a distinct people, possessing an alternative system of knowledge, philosophy and law.
- The MMP electoral system should be constitutionally entrenched to guarantee adequate representation of Maori in the legislature and at the regional and local governance levels.
- *Iwi* and *hapu* should be considered as likely units for strengthening the customary self-governance of Maori, in conjunction with local and regional councils and the functional bodies created to manage treaty settlements and other arrangements involving relations between Maori and the Crown.
- The Legal Services Act should be amended to ensure that legal aid is available to Maori *iwi* and *hapu* as bodies of persons so as to afford them access to the protection mechanisms of human rights, and in order to eliminate discrimination against Maori collectives.

### *Human rights and the Waitangi Tribunal.*

- The Waitangi Tribunal should be granted legally binding and enforceable powers to adjudicate Treaty matters with the force of law.
- The Waitangi Tribunal should be allocated more resources to enable it to carry out its work more efficiently and complete its inquiries within a foreseeable time frame.
- The New Zealand Bill of Rights should be entrenched to better protect the human rights of all citizens regardless of ethnicity or race.
- The Foreshore and Seabed Act should be repealed or amended by Parliament and the Crown should engage in treaty settlement negotiation with Maori that would recognize the inherent rights of Maori in the foreshore and seabed and establish regulatory mechanisms allowing for the free and full access by the general public to the country's beaches and coastal area without discrimination of any kind.

### *Treaty settlements*

- In all Treaty settlements, the right of Maori to participate in the management of their cultural sites according to customary precepts should be specifically acknowledged, thereby enabling greater expression of Maori cultural and spiritual relationships.
- Existing settlement acts should be amended, and other such acts in the future should be framed, so as to enable iwi and hapu to self-determine an appropriate corporate structure for receipt and management of assets.
- The Crown should engage in negotiations with Maori to reach agreement on a more fair and equitable settlement policy and process.

### *Environment*

- The Crown should take an active interest in supervising the compliance of the paper company in cleaning up the waste site at Kawerau and the waste disposal build-up at Maketu.

### *Education and culture*

- More resources should be put at the disposal of Maori education at all levels, including teacher training programmes and the development of culturally appropriate teaching materials.
- Student fees should be lowered and allowances increased so as to stimulate the passage of more Maori students from certificate and diploma to degree level programmes in tertiary education.
- Maori sacred sites and other places of particular cultural significance to Maori should be incorporated permanently into the national cultural heritage of New Zealand.
- The Maori cultural revival involving language, customs, knowledge systems, philosophy, values and arts should continue to be recognized and respected as part of the bicultural heritage of all New Zealanders through the appropriate cultural and educational channels.
- *Social policy*
- Social delivery services, particularly health and housing, should continue to be specifically targeted and tailored to the needs of Maori, requiring more targeted research, evaluation and statistical data bases.

### *International indigenous rights*

- The Government of New Zealand should continue to support efforts to achieve a United Nations declaration on the rights of indigenous peoples by consensus, including the right to self-determination.
- The Government of New Zealand should ratify ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries

## APPENDIX ONE—MANDATE OF THE SPECIAL RAPPORTEUR

Below is the full text of the resolution which sets out the mandate of the Special Rapporteur.

### **Human Rights Council**

#### **Resolution 6/12. Human rights and indigenous peoples: mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people**

*The Human Rights Council,*

*Bearing in mind* paragraph 6 of General Assembly resolution 60/251 of 15 March 2006,

*Recalling* the resolutions 5/1 “Institution-building of the United Nations Human Rights Council” and 5/2 “Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council” of 18 June 2007 and stressing that the mandate-holder shall discharge his/her duties in accordance with these resolutions and their annexes,

*Recalling also* resolutions 2001/57 of 24 April 2001, 2002/65 of 25 April 2002, 2003/56 of 24 April 2003, 2004/62 of 21 April 2004 and 2005/51 of 20 April 2005 of the Commission on Human Rights entitled “Human rights and indigenous issues”,

1. *Decides* to extend the mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people for a period of three years:

(a) To examine ways and means of overcoming existing obstacles to the full and effective protection of the human rights and fundamental freedoms of indigenous people, in conformity with his/her mandate, and to identify, exchange and promote best practices;

(b) To gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous people and their communities and organizations, on alleged violations of their human rights and fundamental freedoms;

(c) To formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous people;

(d) To work in close cooperation, while avoiding unnecessary duplication, with other special procedures and subsidiary organs of the Human Rights Council, relevant United Nations bodies, the treaty bodies, and human rights regional organizations;

(e) To work in close cooperation with the Permanent Forum on Indigenous Issues and to participate in its annual session;

(f) To develop a regular cooperative dialogue with all relevant actors, including Governments, relevant United Nations bodies, specialized agencies and programmes, as well as indigenous peoples, non-governmental organizations and other regional or subregional international institutions, including on possibilities for technical cooperation at the request of Governments;

(g) To promote the United Nations Declaration on the Rights of Indigenous Peoples and international instruments relevant to the advancement of the rights of indigenous peoples, where appropriate;

(h) To pay special attention to the human rights and fundamental freedoms of indigenous children and women, and to take into account a gender perspective in the performance of his/her mandate;

(i) To consider relevant recommendations of the world conferences, summits and other United Nations meetings, as well as the recommendations, observations and conclusions of the treaty bodies on matters regarding his/her mandate;

(j) To submit a report on the implementation of his/her mandate to the Council in accordance with its annual programme of work;

2. *Requests* all Governments to cooperate fully with the Special Rapporteur in the performance of the tasks and duties mandated, to furnish all information requested in his/her communications and to react promptly to his/her urgent appeals;

3. *Encourages* all Governments to give serious consideration to the possibility of inviting the Special Rapporteur to visit their countries so as to enable him/her to fulfil the mandate effectively;

4. *Requests* the Secretary-General and the United Nations High Commissioner for Human Rights to provide all the necessary human, technical and financial assistance to the Special Rapporteur for the effective fulfilment of his/her mandate;

5. *Decides* to continue consideration of this question in conformity with the Human Rights Council's programme of work.

*[Adopted without a vote]  
21st meeting 28 September 2007*

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