

**THE UNITED NATIONS ON THE FORESHORE: A SUMMARY OF
THE REPORT OF THE SPECIAL RAPPORTEUR.**

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A PRIMER ON THE REPORT OF THE UNITED NATIONS SPECIAL RAPPORTEUR.

Introduction:

The United Nations has just released the Report of its Special Rapporteur based on a visit to New Zealand in November last year.

The Report focuses specifically on the foreshore issue but also canvasses a range of other topics. It thus reflects the Rapporteur's broad mandate and provides an independent overview of general human rights matters as they relate to race relations and the constitutional context within which the foreshore and seabed issue has been played out.

The matters it considers are political representation, the Treaty settlements process, Maori justice, language and education issues, social and economic inequalities, and the particular human rights implications of the Foreshore and Seabed Act.

What is the Special Rapporteur?

Special Rapporteurs are independent experts selected by government members of the United Nations to regularly report on issues which they think are of major importance.

The Rapporteur on the 'human rights and fundamental freedoms of Indigenous Peoples' is Professor Stavenhagen of Mexico. He was appointed to monitor indigenous issues for the United Nations Commission on Human Rights and had already compiled Reports on a number of other countries before arriving in New Zealand.

Had the United Nations considered the Foreshore issue before?

Yes. Iwi made an initial approach to the UN Permanent Forum for Indigenous Peoples when it became clear in 2004 that the government was going to proceed with the foreshore legislation in spite of Maori opposition.

A substantive claim was then made to the CERD Committee that hears complaints about breaches of the Convention on the Elimination of all Forms of Racial Discrimination.

What did the Committee Decide?

The Committee is made up of independent jurists and decided in essence that the foreshore legislation was in breach of the Convention.

It found in particular that 'the (foreshore) legislation appears...on balance to contain discriminatory aspects against the Maori, in particular in its extinguishment of the possibility of establishing Maori title to the foreshore and seabed and in its failure to provide a guaranteed right of redress'.

What was the government Response?

The government (and most other political parties) dismissed the Report and belittled the Committee by suggesting it was unimportant and did not really understand the complexity of the issue.

It also suggested that even if there were some 'discriminatory aspects' in the legislation it was not in itself in breach of the Convention when in fact any evidence of discrimination is a breach of international law.

Why did the Special Rapporteur come to New Zealand?

The concerns raised by the CERD Committee Report indicated that fundamental human rights breaches may have occurred and needed to be investigated further.

Also the government had a long standing invitation for the Rapporteur to visit.

Who did he meet with?

Most of his meetings were with the Crown or various Crown agencies. He actually met with officials and/or the Chief Executives of twelve different agencies including the Office of Prime Minister and Cabinet, Te Puni Kokiri, and the Office of Treaty Settlements.

He also had briefings with the Deputy Prime Minister, the Minister of Maori Affairs, and the Human Rights Commission.

He also attended a national Maori hui at Parihaka as well as meetings in Hauraki, Te Arawa, Ngati Tuwharetoa, Ngai Tahu, and Ngati Whatua.

What findings did the Rapporteur make about the foreshore and seabed issue?

In keeping with the human rights mandate of the special Rapporteur the Report defines the passage of the foreshore and seabed legislation as 'an important human rights issue for Maori and all New Zealanders'. (Para 43).

It quotes extensively from and agrees with the CERD Committee decision.

Para 55 states 'the (foreshore and seabed) Act can be seen as a backward step for Maori,' and Para 79 concludes that the Crown has 'extinguished all Maori extant rights to the foreshore and seabed'.

It recommends (Para 92) that the Act 'should be repealed or amended...and the Crown should engage in treaty settlement negotiations...that would recognise the inherent rights of Maori...and establish regulatory mechanisms allowing for the full and free access by the general public... without discrimination'.

What other findings did the Rapporteur make?

The Report also makes a number of general findings including

1. Maori political representation –

Para 21 notes that through a continuing constitutional debate Maori ‘emphasise their aspirations to retain or reclaim their decision-making capacity over certain intrinsic matters including social and political organisation, lands and resources, wider way of life, and their relationships...with the Crown and the wider cultural polity’.

It recommends that this issue be addressed through a constitutional convention and a process of constitutional reform ‘in order to clearly regulate the relationship between the government and Maori people on the basis of the Treaty...and the internationally recognised right of all peoples to self determination’. (Para 84).

It also recommends that the Treaty should be constitutionally entrenched and that Iwi and hapu should be the units for strengthening the customary governance of Maori. (Paras 85 and 87).

2. Land rights, claims and settlements –

The Report finds that the land returned through the settlements process is only ‘a small percentage of the land claims, and cash paid out is usually less than one percent of the current value of the land’. (Para 27).

It recommends (Para 95) that the Crown should engage in negotiations with Maori to reach agreement on a more fair and equitable settlement policy and process.

It also recommends in Para 89 that the Waitangi Tribunal should be granted legally binding and enforceable powers to adjudicate Treaty matters.

3. International indigenous rights -

The Report recommends that the government should ‘support efforts to achieve a United Nations declaration on the rights of Indigenous Peoples, including the right to self determination’. (Para 102).

It also recommends ratification of ILO Convention 169 on indigenous rights. (Para 103).

What other issues does the Report address?

The Report tries very hard to put the foreshore issue in a broad context that covers historical material as well as current social and economic indicators.

It thus acknowledges that in spite of the progress made in recent years in relation to the settlement of Treaty grievances and various social initiatives ‘disparities continue to exist between Maori and non-Maori with regard to employment, income, health, housing, education [and] the criminal justice system’. (Para 80).

It also directly addresses the question of whether Maori have special ‘privileges’ as Dr. Brash and others have alleged and concludes that ‘he had not been presented with any evidence to that effect, but that, on the contrary, he had received plenty of evidence concerning the historical and institutional discrimination suffered by the Maori people, evidence that he is concerned with in the present Report’. (Para 54).

He also noted that the whole discourse around supposed Maori privileges and recent shifts in government policy appeared to be unwelcome evidence of a return to ‘the assimilationist model’ of race relations. (Para 81).

What has been the government Response?

The government (and the National Party) has dismissed the Report and belittled it by suggesting it is unimportant and does not really address the complexity of the issue.

The Deputy Prime Minister has claimed that the report is unbalanced without providing any evidence as to what that means. He has also issued a brief ‘response document’ which raises some dubious arguments about errors in law in the Report. Meanwhile the deputy leader of the National Party has suggested that the UN has no business telling New Zealand what to do.

Unfortunately the government and the National Party display an uncomfortable hypocrisy because they each promote respect for the UN as a human rights advocacy body but then attempt to discredit it when it brings its independent analysis to the human rights of Maori. To repeatedly reject UN findings is unhelpful and does no credit to the country’s international reputation.

The Report is the product of the most important international human rights institution there is. It was established by governments and for the New Zealand government to now belittle its work is to belittle the very notion of human rights.

What is the next step?

The power of international embarrassment should not be underestimated. The Report is not binding but its considered views and recommendations will be tabled at the UN and hopefully used by Maori and other fair-minded people as another tool to hold the government to account.