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Promoción y protección de todos los derechos humanos, civiles, políticos, económicos, sociales y culturales, incluido el derecho al desarrollo

Informe del Relator Especial sobre los derechos de los indígenas, James Anaya

Adición

La situación de los maoríes en Nueva Zelanda*

Resumen

En el presente informe, que es una actualización de la versión anticipada sin editar publicada el 17 de febrero de 2011, el Relator Especial sobre los derechos de los indígenas examina la situación de los maoríes de Nueva Zelanda basándose en la información que recibió durante su visita al país, realizada del 18 al 23 de julio de 2010, y en investigaciones independientes. La misión al país se efectuó para dar seguimiento a la visita llevada a cabo en 2005 por el anterior Relator Especial, Rodolfo Stavenhagen. El informe se centra principalmente en el proceso de solución de las reclamaciones históricas y contemporáneas con arreglo al Tratado de Waitangi, aunque también se tratan otras cuestiones fundamentales.

Nueva Zelanda, especialmente en los últimos años, ha hecho progresos importantes en la promoción de los derechos de los maoríes y la respuesta a los motivos de preocupación planteados por el anterior Relator Especial. Al respecto cabe señalar la expresión de apoyo de Nueva Zelanda a la Declaración de las Naciones Unidas sobre los derechos de los pueblos indígenas, las medidas que ha adoptado para derogar y reformar la Ley de la zona costera bañada por la marea y de los fondos marinos de 2004, y sus esfuerzos por llevar a cabo un proceso de revisión constitucional respecto de las cuestiones relacionadas con los maoríes.

Las nuevas iniciativas para promover los derechos de los maoríes deben consolidarse y reforzarse, y el Relator Especial seguirá de cerca los avances a este respecto.

* El resumen se distribuye en todos los idiomas oficiales. El informe, que figura en el anexo del resumen, se distribuye únicamente en el idioma en que se presentó.

El Relator Especial recalca la necesidad de que los principios consagrados en el Tratado de Waitangi y los derechos humanos conexos protegidos por la normativa internacional encuentren amparo en el ordenamiento jurídico interno de Nueva Zelanda, a fin de que esos derechos no queden a merced de la discrecionalidad política. Asimismo, es preciso que la reciente Ley de zonas marinas y costeras, aprobada el 31 de marzo de 2011, se aplique de conformidad con las normas internacionales sobre los derechos de los pueblos indígenas a sus tierras y recursos tradicionales.

Además, deben intensificarse los esfuerzos para asegurar la participación política de los maoríes a nivel nacional, y el Estado debe prestar especial atención a esta cuestión y promover una mayor participación de los maoríes en la gobernanza local. Nueva Zelanda también debe velar por que se consulte sistemáticamente a los maoríes en los asuntos que les afecten, en consonancia con las normas internacionales y los procedimientos de adopción de decisiones tradicionales de los maoríes.

El proceso de solución de las reclamaciones puesto en marcha en Nueva Zelanda en virtud del Tratado, pese a tener claras deficiencias, es uno de los ejemplos más importantes del mundo de un esfuerzo encaminado a subsanar los agravios históricos y presentes de los pueblos indígenas, y las soluciones ya logradas han reportado importantes beneficios en varios casos. Sin embargo, es preciso tomar medidas para fortalecer ese proceso. Debe garantizarse la financiación del Tribunal de Waitangi, para que pueda resolver de forma eficiente y oportuna los casos de agravios históricos que aún están pendientes.

Además, con respecto a las negociaciones para resolver las reclamaciones con arreglo al Tratado, el Gobierno debería hacer todo lo posible por hacer participar a todos los grupos que estén interesados en las cuestiones examinadas. Asimismo, el Relator Especial alienta al Gobierno a que se muestre flexible en las posiciones que adopte en esas negociaciones. En consulta con los maoríes, el Gobierno debería estudiar y elaborar medios para dar respuesta a las preocupaciones de los maoríes respecto del proceso de negociación, especialmente en lo que concierne al desequilibrio de poder que se observa entre los negociadores maoríes y los del Gobierno.

Por último, el Relator Especial no puede dejar de destacar la situación de extrema desventaja social y económica en que vive en pueblo maorí en comparación con el resto de la sociedad neozelandesa. Aunque se han logrado avances desde la visita del anterior Relator Especial, aún queda mucho por hacer para alcanzar la mayor paridad social y económica que se precisa para que en el futuro maoríes y no maoríes neozelandeses puedan avanzar como verdaderos aliados, tal como se previó en el Tratado de Waitangi.

Annex

Report of the Special Rapporteur on the rights of indigenous peoples on the situation of Maori people in New Zealand

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I. Introduction

1. The present report examines the situation of Maori people in New Zealand on the basis of information received during the visit of the Special Rapporteur on the rights of indigenous peoples to the country from 18 to 23 July 2010 and independent research. The visit was carried out in follow-up to the 2005 visit of the previous Special Rapporteur, Rodolfo Stavenhagen. It should be noted that the Special Rapporteur does not purport to address in the present report all issues related to Maori people in New Zealand, or even all of the issues covered by the previous Special Rapporteur in his 2006 report (E/CN.4/2006/78/Add.3). The principal focus of the report is an examination of the process for settling historical and contemporary claims based on the Treaty of Waitangi, although other key issues that were raised by both Maori and Government representatives are also addressed.

2. During his visit, the Special Rapporteur travelled to Auckland, Wellington, Waitangi, Hamilton and Whanganui, and met with the Prime Minister, the Minister of Maori Affairs, and the Minister of Justice, the Minister of Corrections and the Minister of Treaty of Waitangi Negotiations, as well as with members of Parliament, the Waitangi Tribunal, the Maori Land Court, and the Human Rights Commission. Additionally, the Special Rapporteur spoke with representatives of Maori groups, including Whanganui, Ngai Tahu, Tainui and Nga Puhī. Finally, the Special Rapporteur met with members of the Maori Party, the Iwi Chairs Forum and the Maori Economic Taskforce, and with King Tuheitia, about issues affecting Maori people across New Zealand. The Special Rapporteur would like to express his appreciation to the Government for its support and to the indigenous individuals and organizations for their indispensable assistance in the planning and coordination of the visit.

3. Many of the concerns raised by the former Special Rapporteur have been the subject of concerted efforts by the Government, which are discussed throughout the present report. The Special Rapporteur makes particular note of the expression of support by New Zealand of the United Nations Declaration on the Rights of Indigenous Peoples during the annual session of the Permanent Forum on Indigenous Issues in April 2010. Reversing New Zealand's earlier position on the Declaration, the country's Minister of Maori Affairs issued a public statement pledging Government support for the Declaration, which it cited as "both an affirmation of fundamental rights and an expression of new and widely supported aspirations" (see www.un.org/News/Press/docs/2010/hr5012.doc.htm). In the statement, the Minister also acknowledged that Maori held a distinct and special status as the indigenous people of New Zealand and affirmed that the Treaty of Waitangi establishes a foundation of partnership, mutual respect, cooperation and good faith between Maori and the Government.

II. Maori people

4. Maori are the original inhabitants of New Zealand (Aotearoa). They are believed to have arrived on the islands as early as A.D. 800, with a large mass arrival from East Polynesia in around 1300. The Maori population dropped significantly in the years following colonization, and by 1901, it had fallen to 45,000. Today, Maori comprise approximately 15 per cent (575,000) of New Zealand's population of 4.25 million. Nearly one quarter of the Maori population lives in the greater Auckland area. The smallest unit of Maori social organization is the extended family or *whanau*, and several *whanau* make up a clan or *hapu*, and several *hapu* make up a tribe, or *iwi*.

5. Maori tradition encompasses the concept of *turangawaewae* ("a place to stand"), which indicates a close connection between land, tribal and personal identity. Traditionally,

Maori livelihood was based heavily on fishing and hunting, as well as on cultivating plants, with agricultural areas located near good fishing and birding locations. Under the traditional Maori land tenure system, land was held by tribal groups, but an individual or a family could claim the right to use an area for a garden, catching birds or fish, cutting down a tree or building a house.

6. The colonization of New Zealand by the British and the subsequent policies adopted by the colonial and New Zealand Governments led to the widespread loss and alienation of Maori land, and assaulted the social and cultural fabric of Maori communities. This history is reflected in the disadvantage currently faced by Maori people in relation to the non-indigenous population, across a range of indicators, as discussed further in section IV below. Despite this, Maori continue to possess a strong and vibrant culture, enriching New Zealand society as a whole.

III. The Treaty of Waitangi

A. Background

7. Relationships between Maori and the New Zealand Government are grounded in and guided by the Treaty of Waitangi of 1840, which is understood to be one of the country's founding instruments. While the constitutional status of the Treaty of Waitangi is the subject of ongoing debate in New Zealand, as discussed further in section IV below, the Treaty of Waitangi has an important place in the legal framework of New Zealand and has been described as part of the fabric of New Zealand society.

8. The Treaty was written in both English and Maori, and there are important differences in some of its core provisions in the two versions. Most significantly, in the English version, Maori conveyed "sovereignty" to the British Crown (art. 1); but in the Maori version, they conveyed "*kawanatanga*" (governorship), but retained "*tino rangatiratanga*" (chieftainship, a concept somewhat analogous to self-determination) over their lands, villages and *taonga* (treasures). Thus, many Maori believe that they retained sovereignty and gave away only limited rights of government to the Crown.

9. In part due to the differences in interpretation in the two texts, most contemporary legislative references to the Treaty of Waitangi refer to the principles of the Treaty, rather than the Treaty provisions themselves. The dominant principles articulated by New Zealand courts, though understood to be evolving, are: partnership, which includes a duty of both parties to act reasonably, honourably and in good faith; active protection, which requires the Government to protect Maori interests, although the degree of the obligation of the Government to protect depends on the circumstances of the situation and on the vulnerability of the *taonga* involved in the situation; and redress, which requires the Government to take active and positive steps to redress breaches of the Treaty of Waitangi and to provide fair and reasonable compensation for breaches.

10. Despite the significant protections for Maori rights enshrined in the provisions and principles of the Treaty of Waitangi, during most of the nineteenth and part of the twentieth century, the British colonial and successor New Zealand Governments carried out a series of acts and omissions that resulted in loss by Maori of nearly all of the lands that they held at the time of the signing of the Treaty of Waitangi in 1840. These acts and omissions are now widely recognized as breaches of the Treaty.

B. Opportunity for real partnership

1. Maori participation in political decision-making

11. The Treaty of Waitangi has been interpreted as establishing a relationship “akin to partnership” between the Government and the Maori;¹ the preamble of the United Nations Declaration on the Rights of Indigenous Peoples similarly recognizes that “treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States”.

(a) Participation at the national level

12. Many see the partnership framework contemplated under the Treaty of Waitangi as having been advanced, to varying degrees over time, by Maori participation in the national Parliament, through various electoral arrangements, though mostly by setting aside separate seats in the Parliament for Maori. Most recently, the Electoral Act of 1993 makes the number of reserved seats proportional to the number of Maori registered on the Maori electoral roll. After the 2008 election, 16 per cent (20 members) of the 122 members of Parliament identified themselves as Maori, a number proportional to the percentage of Maori in the New Zealand population. The Maori Party, created in 2004, holds 5 of the 20 seats held by Maori in Parliament.

13. This guaranteed representation has provided Maori people with a significant opportunity to influence decision-making at the national level, and it is an important step towards advancing the partnership relationship between Maori and the State. This system was commended by the former Special Rapporteur in his 2006 report, when he noted that it “has broadened democracy in New Zealand and should continue governing the electoral process in the country to ensure a solid Maori voice in Parliament and guarantee democratic pluralism” (E/CN.4/2006/78/Add.3, para. 17).

14. Yet, in practice, the New Zealand Parliament is still ruled by majority. Because Maori do not constitute a majority in the country, Maori decision-making at the national level is consistently vulnerable to overriding majority interests. Also, while the provisions of the Electoral Act of 1993 regulating the general electorate seats are entrenched, those provisions of the act concerning Maori seats are not entrenched, meaning that they may be revoked by a simple act of Parliament.

(b) Participation at the local level

15. While Maori representation at the national level provides an important opportunity for Maori people to participate in decision-making, in what may be seen as the type of partnership contemplated by the Treaty of Waitangi, for the most part, this same opportunity does not exist at the local government level. The number of Maori elected to local government is not proportional to their percentage of the population, with less than 5 per cent of local government positions held by Maori prior to the 2007 local government elections.²

16. The Local Government Act of 2002 (No. 84) allows for local governments to adopt measures to facilitate participation of Maori, “in order to recognise and respect the Crown’s responsibility to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Māori to contribute to local government decision-

¹ *New Zealand Maori Council v. Attorney General* [1987] NZLR 641.

² New Zealand, Te Puni Kokiri (Ministry of Maori Development), *Whaiwāhi ki ngā Poti ā-rohe: Participate in Local Elections*, (July 2007), p. 1. Available from www.tpk.govt.nz/en/in-print/our-publications/fact-sheets/localelections/download/tpk-localelections-2007-en.pdf.

making processes” (sect. 4). However, no local councils have established special electoral arrangements for Maori under the Act since it came into force, even though a number have considered the option.

17. A major concern communicated to the Special Rapporteur is the decision by the Government to not guarantee Maori electoral seats in the Auckland “Supercity” Council. In its report on Auckland governance, the Royal Commission on Auckland Governance—a body formed by the Government to provide recommendations on the formation of the Auckland City Council—recognized that “Maori constitute a unique community of interest with special status as a partner under the Treaty of Waitangi”³ and recommended that Maori be guaranteed seats on the Auckland City Council. However, in the Local Government (Auckland Council) Amendment Act of 2010 (No. 36), the Government chose not to adopt the Royal Commission’s recommendation, opting instead to establish a Maori Advisory Board with a non-binding consultative role before the council. The Government has emphasized that the Local Government Act of 2002 can be used to ensure specific Maori seats on the new Auckland Council if the council chooses to do so, although this is not guaranteed.

18. The Bay of Plenty, a region where Maori people make up 28 per cent of the population, presents a contrasting unique arrangement for Maori participation at the local level. In 2001, following a bill advanced by the Maori Regional Representation Committee, an advisory body to the Bay of Plenty Regional Council, Parliament passed the Bay of Plenty Regional Council (Maori Constituency Empowering) Act (No. 1), establishing a system under which Maori in the region may register on a separate Maori electoral roll and the number of Maori councillors is determined by the number of Maori registered on that roll. Of the 13 councillors currently elected to the Bay of Plenty, 3 are from Maori constituencies.

2. Consultation with Maori in decisions that affect them

19. The duty to consult with Maori people has been described as inherent in the Treaty of Waitangi, and as part of the overarching principles of partnership and active protection.⁴ However, the duty to consult is not regarded as absolute; the New Zealand Court of Appeal has stated that “in truth the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty”.⁵ According to the Court, the duty to consult with Maori will vary according to the circumstances of the case, and “in some [cases] extensive consultation and co-operation will be necessary. In others ... [the State] may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation”.⁶

20. In this connection, consultations with Maori have taken place or are required in the following contexts, among others:

(a) At the local level, under the Local Government Act, councils have the general obligation to “establish and maintain processes to provide opportunities for Māori to contribute to the decision-making processes of the local authority” (sect. 81 (a));

(b) Various laws and policies in New Zealand require the Government to consult with Maori, to varying degrees, in relation to decision-making about lands, resources,

³ Royal Commission on Auckland Governance, report on Auckland governance (Auckland, 2009), chap. 22, para. 22.2.

⁴ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 687.

⁵ *Ibid.*, p. 683.

⁶ *Ibid.*

fisheries, and conservation, among other matters. Most notably, the Resource Management Act of 1991 (No. 69)⁷ requires that regional councils consult with iwi authorities at various stages under the Act, including during the development of resource management plans.

(c) The Government holds nationwide or regional public consultation procedures to collect Maori views on various initiatives, as it did with the review of the Foreshore and Seabed Act and on the issue of Maori participation on the Auckland City Council.

(d) Maori consultative or advisory bodies have been formed to assist in policy development on certain issues. For example, working groups of iwi leaders, which operate under the purview of the Iwi Leaders Forum, have been formed to engage in negotiations with the Government on strategic issues including climate change, freshwater management, the foreshore and seabed, and the Whanau Ora programme (discussed in para. 65 below).

(e) As part of some Treaty settlements, the State and Maori share management and decision-making responsibilities in relation to natural resources. For example, as part of the Waikato-Tainui settlement, the State and iwi share responsibilities for governing and managing the Waikato River.⁸ Also, in relation to the Te Arawa Lakes, consent of both the Te Arawa iwi and the State is required before persons may build or modify structures on the lakebeds.⁹

21. Despite these arrangements, even when the State has a duty to consult under a specific law or policy, consultation procedures appear to be applied inconsistently, and are not always in accordance with traditional Maori decision-making procedures, which tend to involve extensive discussion focused on consensus-building. Finally, there are complaints of several barriers to the effective participation of Maori in decision-making, including inadequate technical capacity at times, the costs affiliated with ongoing negotiations, and often, the lack of political will to implement what are perceived as “special measures” for Maori people.

C. Remedies for breaches of the Treaty of Waitangi

22. The settlement of grievances for breaches of the Treaty of Waitangi is carried out through two principal, complementary mechanisms: the Waitangi Tribunal and Treaty settlement negotiations with the Government. Although not addressed in detail in the present report, New Zealand courts can also provide remedies for breaches of the Treaty of Waitangi by directly applying the Treaty provisions where these have been incorporated in legislation, by using the Treaty to interpret legislation and, in theory, by applying the doctrine of aboriginal title to protect rights to land and resources, though this has not yet happened in practice.

1. The Waitangi Tribunal

23. The Waitangi Tribunal was established under the Treaty of Waitangi Act of 1975 (No. 114) with the mandate to hear claims brought by Maori against the Government alleging breaches of the Treaty of Waitangi. The Tribunal is charged with determining the validity of such claims and making recommendations to the Government for redress of valid claims (sect. 5). Initially, the Tribunal was established to inquire into complaints made only about current and future actions by the State, but in 1985 Parliament expanded

⁷ As at 1 November 2010.

⁸ New Zealand, Office of Treaty Settlements, “Background reports for the United Nations Special Rapporteur” (12 July 2010), p. 12.

⁹ Contribution of New Zealand to the Study of the Expert Mechanism on the Rights of Indigenous Peoples and the Right to Participate in Decision-Making, para. 14.

the Tribunal's jurisdiction to also inquire into complaints about historical grievances dating back to 1840.¹⁰ The Waitangi Tribunal also has an urgency procedure for claimants who can demonstrate immediate prejudice and no alternative for redress.

24. Since the visit of the former Special Rapporteur, the Treaty of Waitangi Act was amended to set 1 September 2008 as a cut-off date for the submission of historical claims¹¹ to the Waitangi Tribunal.¹² According to the Government, this was linked to the Government's aim to settle historical claims by 2020, a goal date that has since been pushed forward to 2014 and was set at least in part in response to Maori concerns regarding the length of the Treaty settlement process. At the same time, many Maori have criticized the Government for unilaterally and, according to some, arbitrarily, setting this date, and have expressed concern that claims will be too hastily pushed through the settlement process, potentially resulting in unfair settlements. According to the Waitangi Tribunal, a total of 1,834 new claims were lodged in the final four weeks leading up to 1 September 2008, more than the entire total of 1,579 claims registered over the previous 32 years since the Tribunal's foundation in 1976. As of mid-2010, the total case load before the Waitangi Tribunal was 3,490 claims.¹³

25. Waitangi Tribunal proceedings in each case generally take between three and four years, though many settlements have taken much longer, and culminate in the issuance of a public report by the Tribunal. The report sets out whether the claims are well-founded and may make recommendations on how relief might be provided, including through negotiated settlement with the Government. At any time during the procedure the claimants may choose to negotiate directly with the Government in advance or in the absence of a Tribunal decision, which has allowed some Maori groups to enter into agreements with the Crown more quickly than they might through completing the Waitangi Tribunal process. However, avoiding the Waitangi Tribunal process also means that a detailed public report on the case documenting the history of the claim will not be issued.

26. The principal concern with respect to the Waitangi Tribunal communicated to the Special Rapporteur, both by Maori representatives and by members of the Waitangi Tribunal, is that it is significantly under-resourced. This has resulted in a huge backlog of claims and significant delays in the processing of claims. Many Maori also complained that the Waitangi Tribunal procedures are too slow and that the Government further exacerbates delays in the process by taking an adversarial approach in most cases. In this connection, the Special Rapporteur notes information from the Government that an increase of 25 per cent in resources was made in 2007 in order to assist the timely resolution of claims.

27. Another concern expressed to the Special Rapporteur is that the Waitangi Tribunal's recommendations are generally not binding on the executive or the legislature¹⁴ and are frequently ignored or criticized by the Government, as was initially the case with the Tribunal's report in the case of the Foreshore and Seabed Act, which is discussed in paras. 52-56 below. However, some have expressed that making the Waitangi Tribunal's reports legally binding would significantly change the nature of the Tribunal's work and may prompt the Government to restrict its mandate. Also, given the complexity and difficulty of Treaty settlement, some have argued that it is preferable that Maori leaders

¹⁰ Treaty of Waitangi Act, sect. 6, para. 1, as amended by the Treaty of Waitangi Amendment Act 1985 (No. 148).

¹¹ Historical claims are statutorily defined as claims relating to acts or omissions by the Crown prior to 21 September 1992.

¹² Treaty of Waitangi Act 1975 (No. 114) (as at 5 August 2009), section 6AA.

¹³ As of April 2010. Waitangi Tribunal, Current Status of the Waitangi Tribunal's Inquiry Programme (July 2010).

¹⁴ With two exceptions: the Tribunal can direct that State-owned enterprise lands and Crown forest lands be returned to Maori, although this is rarely done.

themselves make judgments about settlements and these decisions should not be imposed by the Tribunal.

28. In any case, the Special Rapporteur observes that the Government's adherence with the recommendations of the Waitangi Tribunal should be part of its obligations to cooperate in good faith with the Maori and is an important confidence-building gesture. Further, if the Government chooses not to follow the Tribunal's recommendations in a specific situation, it should provide a justification for this decision and still act in accordance with Treaty principles and international human rights standards.

29. Despite these issues, overall, the Waitangi Tribunal has provided enormous benefits for all of New Zealand by helping to provide redress for Maori grievances. The Waitangi Tribunal has facilitated significant reparations for Maori grievances in relation to both current and historical breaches of the Treaty of Waitangi. The reports themselves represent an impressive documentation of the history of breaches of the Treaty of Waitangi and offer an important analysis of the path forward for redress and reconciliation. Finally, the role of the Waitangi Tribunal in providing a forum for Maori to present their issues in detail to the Government and to receive a response plays an important role in the reconciliation between Maori, the wider New Zealand society, and the State.

30. Given that the cut-off date for the submission of Maori historical claims expired on 1 September 2008, the future role of the Waitangi Tribunal is uncertain. It is unclear whether, after working through its current caseload, the Waitangi Tribunal will concentrate only on modern grievances, or whether its role will evolve to address other issues connected with Treaty of Waitangi.

2. Negotiated Treaty settlement with the Crown

31. Proceedings before the Waitangi Tribunal and a decision validating a claim typically are precursors to settlement negotiations with the Government. Although Maori groups may choose to enter into settlement negotiations at any time after a claim is registered with the Waitangi Tribunal, the process generally starts after the Tribunal issues its report in the case. Participation in negotiations is voluntary and all groups are free to withdraw at any time.

(a) Positive developments

32. Since the Treaty settlement process was developed in the 1990s, numerous Maori groups have negotiated settlements to their historical grievances with the Government. As of July 2010, the Government has reached a full or partial Treaty settlement with 27 iwi, and 35 iwi have yet to reach a settlement, although most of these are currently engaged in pre-negotiations or intensive negotiations with the Government.¹⁵ To date, over NZ\$1 billion has been committed to final and comprehensive settlements and several partial settlements.¹⁶ Treaty settlements cover 61 per cent of the total land area of New Zealand. The Crown assists claimant groups by providing funds for all stages of settlement negotiations in addition to whatever financial redress settlement is ultimately agreed upon.

33. Since the visit of the previous Special Rapporteur, the Government has taken several steps to improve the Treaty settlement process. For example, the Government has hired an increased number of high-level negotiators, so that the negotiations can take place at the "*rangatira to rangatira*" ("chief to chief") level, in accordance with Maori cultural practices. In addition, the Office of Treaty Settlements is, in most cases, drafting the deeds

¹⁵ New Zealand, Office of Treaty Settlements, "Background report" (note 8 above), p. 10.

¹⁶ New Zealand, Office of Treaty Settlements, "Four Monthly Report: November 2009-February 2010", p. 4.

of settlements and enacting legislation at the same time, in order to reduce the time between the signing of the settlements and the settlement legislation being introduced into Parliament.¹⁷ The Government is also developing a programme to provide iwi leaders with assistance to boost their capacity in the Treaty settlement process.¹⁸ Furthermore, as noted above, the Government has committed to settle all outstanding agreements with iwi by 2014, six years earlier than the previous Government's deadline, and has committed increased funding of NZ\$22.4 million over the period from 2010 to 2014 to assist in meeting this goal.¹⁹

34. The Government has also taken some measures to open up more issues to the negotiation process, one example being the Crown's policy with respect to conservation sites. Under the Crown's 1994 policy, the transfer of ownership of Crown-owned conservation land was limited to "small and discrete sites". However, recognizing that the former policy did not adequately recognize the dislocation of Maori from ancestral sites, the Government amended its policy to provide negotiators with more flexibility to bear in mind the connection of iwi to certain public conservation land, to allow for settlement packages that include participation of iwi in conservation management, transfer of ownership of lands and sites, and to allow statutory acknowledgement of iwi connections to particular sites.

(b) *Ongoing concerns*

35. While it is evident that numerous iwi have benefitted from the Treaty settlement process in important respects, the Special Rapporteur heard numerous concerns about it. An overarching concern is that the negotiation procedure is flawed from the outset because the party responsible for the breaches of the Treaty of Waitangi—the Government—is wholly responsible for determining the framework policies and procedures for redress for those breaches, resulting in a situation that is inherently imbalanced and unfair to Maori.

36. Among the more specific concerns is that the Government determines the group with which it will negotiate, and that it has a policy to negotiate claims with "large natural groupings" rather than individual whanau and hapu. According to the Government, "this makes the process of settlement easier to manage and work through, and helps deal with overlapping interests" as well as helps reduce costs for both the Government and claimants.²⁰ Further, the Government points out that some specific agreements can be made as to individual whanau or hapu within the framework of the larger agreement, although this is not very common.

37. However, Maori groups communicated that the Government's approach often overlooks the specific claims of smaller groups. The Special Rapporteur received information about the particular situation of members of the Ruawaipu, Ngati Uepohatu and Te Aitanga-a-Hauiti iwi, who have grievances in the East Coast District, but who do not consider themselves to be represented by the group the Government is negotiating with to settle grievances in that area. This has reportedly resulted in the "serious likelihood that redress for [their] grievances will be given to others, and their claims will be disposed of without being heard or adjudicated when legislation is introduced to implement the settlement".²¹

¹⁷ New Zealand, Office of Treaty Settlements, "Background report" (note 8 above), p. 11.

¹⁸ Ibid.

¹⁹ Human Rights Commission, *Treaty of Waitangi: 2009 in Review*, p. 11.

²⁰ New Zealand, Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to the Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd edition (Wellington, 2002), p. 44.

²¹ Linda Thornton, Tamaki Legal Barristers and Solicitors, letter to the Special Rapporteur on the situation of human rights and indigenous people, 19 July 2010.

38. Maori groups have also reported that the Government's settlement policy redefines existing culturally based traditional hapu and iwi structures and traditional leadership structures, which in some instances has caused conflict or division among Maori groups. In this connection, the Waitangi Tribunal has expressed concern over the approach of the Government in negotiating with Maori groups during the settlement process, noting that in the particular case of the Te Arawa, "Te Arawa is now in a state of turmoil as a result [of the Treaty settlement negotiations]. Hapu are in contest with other hapu and the preservation of tribal relationships has been adversely affected. We are left fearing for the customary future of the Te Arawa Waka as a result".²² In another case, the Waitangi Tribunal made the troubling observation that although the Treaty settlement process is supposed to improve Maori-State relationships, "what we are seeing ... is that the process of settling is damaging more relationships than it is improving".²³

39. Another concern is that the Government wholly defines what and how much redress is available to settle historical claims. Government policy clarifies that "the Crown has to set limits on what and how much redress is available to settle historical claims. Redress must be fair, affordable, and practicable in today's circumstances".²⁴ Most settlement packages have included an apology by the Crown, and some form of cultural redress and financial compensation.²⁵

40. However, Maori have expressed concern that the value of the settlements is grossly out of proportion to the value of what has been taken from them, amounting only to an estimated 1 to 3 per cent of the value of their total loss. Further, the Government will not consider rights over certain resources, including oil and gas, as the basis of redress packages. (In this connection, the Waitangi Tribunal has clearly found that "it is in breach of Treaty principle for the Crown to exclude petroleum-based remedies from settlements".²⁶) While, as noted in paragraph 34 above, the Government has recently shown more flexibility in considering remedies for the loss of certain resources, such as culturally significant sites within conservation areas, it is evident that much more needs to be done in this regard to satisfy Maori claimants.

41. Finally, under the Government settlement policy, all settlements of historical grievances, that is, those arising from acts or omissions by the Government before 21 September 1992, are final; in exchange for the settlement redress, the settlement legislation will prevent the courts, the Waitangi Tribunal, or any other judicial body or tribunal from re-opening the historical claims. According to the Government, the lack of review promotes the finality of settlement agreements, making the procedure as effective and efficient as possible, and helping achieve the sense of final resolution that the settlement process is designed to facilitate. The Government has also pointed out that nothing precludes the claimant group or one of its members from pursuing modern claims against the Crown. However, Maori express serious concern about the lack of independent and impartial oversight of the settlement outcomes. This lack of independent review contributes to a feeling on the part of Maori of an imbalance of power in the settlement process, as well as a feeling that the settlement process is at times unfair.

²² Waitangi Tribunal, *Report on the Impact of the Crown's Treaty Settlement Policy on Te Arawa Waka*, Wai 1353 (2007), p. 195.

²³ Waitangi Tribunal, *The Tamaki Makaurau Settlement Process Report*, Wai 1362 (Wellington, Legislation Direct, 2007), p. 1.

²⁴ New Zealand, Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to the Treaty of Waitangi Claims and Negotiations with the Crown*, summary edition (Wellington), p. 15.

²⁵ *Ibid.*, p. 43.

²⁶ Waitangi Tribunal, "The petroleum report, Wai 796" (Wellington, Legislation Direct, 2003), p. 79.

42. The Special Rapporteur understands that there are many difficulties and complexities involved in the Government's laudable effort to provide redress for historical grievances through negotiated Treaty settlement. Nevertheless, the aforementioned concerns have fomented an uneasiness and mistrust by Maori of the Treaty settlement process, which may have negative implications for achieving the important goals of redress and reconciliation that the process is designed to advance. The Special Rapporteur observes that increasing Maori participation in and influence over settlement policies, procedures, and outcomes could go a long way in alleviating the apparent discontent in the Treaty settlement process felt by Maori groups.

D. Settlements and outstanding cases

43. There have been several noteworthy settlements reached by specific iwi groups as well as pan-Maori settlements. Among these is the fisheries case, which took years to settle and followed a 1992 report by the Waitangi Tribunal in the Ngai Tahu fisheries claim.²⁷ The settlement provides Maori with an interest in half of New Zealand's largest fishing company and allocates Maori with 23 per cent of the existing fishing quota, plus 20 per cent of all fishing quota issued in the future. Another example is the Commercial Aquaculture Claims Settlement Act of 2004 (No. 107), under which the Crown will provide Maori with the equivalent of 20 per cent of aquaculture space in the coastal marine area. While there have been some controversial aspects of these settlements, most notably that all present and future claims to commercial fishing and commercial aquaculture sites are considered fully settled, overall, these settlements have already provided significant benefits to the Maori as a whole and are expected to continue to do so in the future.

44. The Special Rapporteur was also informed about several cases that are pending before the Waitangi Tribunal or the subject of settlement negotiations with the Crown. Many of these pending cases entail difficult challenges to settlement that are yet to be overcome, as exemplified by the following cases:

(a) **Whanganui iwi.** In 1999, following a claim lodged by the Whanganui iwi, the Waitangi Tribunal issued the Whanganui River Report, recommending to the Government that "the authority of [the iwi] in the Whanganui River should be recognized in appropriate legislation. It should include recognition of the [iwi] right of ownership of the Whanganui River, as an entity and as a resource, without reference to the English legal conception of river ownership in terms of riverbeds".²⁸ In September 2009, the Whanganui entered into settlement negotiations with the Government over the Whanganui River. The iwi are seeking to co-manage the river in partnership with local councils and government agencies, in a way that benefits the cultural, environmental, social, political, and economic development of the iwi;

(b) **Ngati Tuhoe.** Tuhoe is one of the largest iwis, comprising some 32,670 people, and is also one of the poorest iwi communities in New Zealand, scoring at the lowest level of the Government's development index.²⁹ A two-part report by the Waitangi Tribunal, part 1 published in 2009 and part 2 in 2010, documents the continued confiscations of land within the Te Urewera region from 1860 to around the 1950s. The Waitangi Tribunal determined that these acts resulted in breaches of the Treaty of Waitangi, but refrained from making recommendations for redress. For more than two years, Tuhoe have been involved in negotiations with the Government for redress of their historical grievances. Tuhoe were very close to reaching a settlement that included the return of

²⁷ "Ngai Tahu Sea fisheries report, Wai-27" (Wellington, Brooker and Friend, 1992).

²⁸ *Wai 167, The Whanganui River Report*, p. 343.

²⁹ New Zealand, Office of Treaty Settlement, "Background report" (note 8 above), p. 16.

ownership of land within the Te Urewera National Park, but in May 2010 the Government changed course and announced that it would not transfer ownership of the national park, a last-minute decision that was met with extreme disappointment on the part of Tuhoe.

45. Additionally, two cases currently pending assert claims on behalf of all Maori and pose particular challenges to the Treaty settlement process. One of the longest-standing cases before the Waitangi Tribunal is the Flora and Fauna case (Wai 262), which involves a claim by Maori to property rights related to Maori knowledge and indigenous flora and fauna, which they argue are guaranteed under the Treaty of Waitangi. The rights involved are described as falling under four main categories: *matauranga* Maori (traditional knowledge); Maori cultural property (tangible manifestation of *matauranga* Maori); Maori intellectual and cultural property rights; and rights to environmental, resource and conservation management—including bio-prospecting and access to flora and fauna. Another pan-Maori case currently pending settlement is the so-called Radio Spectrum case. In this case, Maori claim to have a right to a fair and equitable share in the radio spectrum resource. Maori are asking for reservation of a portion of the spectrum and a portion of the future benefits that derive therefrom, although the specific allocations of spectrum and benefits are expected to be settled through negotiations with the Government, as recommended by the Waitangi Tribunal.³⁰

IV. Constitutional security of Maori rights

A. Lack of constitutional security of Maori rights

46. The concerns identified above relating to Maori participation in decision-making and the Treaty settlement process lend support to the repeated call by Maori that the principles enshrined in the Treaty of Waitangi and related internationally protected human rights be provided with constitutional security. For years, Maori representatives have expressed that their rights are too vulnerable to political discretion, resulting in their perpetual insecurity and instability. This vulnerability has been underscored in recent actions by the Parliament, including the passage of the Foreshore and Seabed Act in 2004, and the Government's support of a bill in Parliament in 2006, as part of an agreement with a minority political party, which proposed to delete the principles of the Treaty of Waitangi from all legislation—though this bill was defeated by the Parliament's Select Committee at its second reading.

47. In particular, there has been a persistent call by Maori for constitutional change to give greater security to the Treaty of Waitangi and Maori rights. While the Treaty is judicially enforceable to the extent that it has been incorporated in various pieces of legislation, it cannot be used to repeal or invalidate legislation. The lack of constitutional security of the provisions and principles of the Treaty of Waitangi was a principle focus of the report of the former Special Rapporteur.³¹ Likewise, the Committee on the Elimination of Racial Discrimination recommended in its concluding observations that New Zealand “continue the public discussion over the status of the Treaty of Waitangi, with a view to its possible entrenchment as a constitutional norm” (CERD/C/NZL/CO/17, para. 13).

48. Other rights, specifically those enshrined in the Bill of Rights Act of 1990 (No. 109) (which guarantees mostly civil and political rights, including the rights of minorities) and in the Human Rights Act of 1993 (No. 82) (which guarantees the right to non-discrimination

³⁰ Wai 2224.

³¹ See, for example, E/CN.4/2006/78/Add.3, para. 10.

on the grounds of race), are similarly not enforceable as against the legislature. Further, both these Acts can be amended by a simple majority of Parliament.

49. However, the Bill of Rights Act and the Human Rights Act do include a few safeguards to provide some security to the rights contained in those instruments. Under the Bill of Rights Act, courts are required to construe enactments as consistent with the Act, where possible (sect. 6). Also under the Bill of Rights Act, the Attorney General may bring to the attention of the House of Representatives any provision of draft legislation that appears to be inconsistent with any of the rights guaranteed under the Act (sect. 7). In addition, the Human Rights Act allows for a declaration by the Human Rights Review Tribunal that legislation is inconsistent with the right to freedom from discrimination. The Special Rapporteur notes that, at a minimum, the development of similar checks would be important in the context of the Treaty of Waitangi.

50. Yet even if legislation is found to be inconsistent with the Bill of Rights or Human Rights Act there is no requirement for the Government to modify or repeal the inconsistent legislation. In this connection, the Human Rights Committee, in its concluding observations, noted with concern that “it is possible, under the terms of the Bill of Rights, to enact legislation that is incompatible with the provisions of the [International Covenant on Civil and Political Rights]”, and regretted that “this appears to have been done in a few cases, thereby depriving victims of any remedy under domestic law” (CCPR/CO/75/NZL, para. 8). The Human Rights Committee recommended that New Zealand “take appropriate measures to implement all the Covenant rights in domestic law and to ensure that every victim of a violation of Covenant rights has a remedy in accordance with article 2 of the Covenant” (ibid.).

51. In order to address concerns related to the lack of domestic legal security for Maori rights, among other reasons, the Government is planning to undertake a constitutional review process, which will include a review of “Maori representation, the role of the Treaty of Waitangi and whether New Zealand needs a written constitution,” among other issues.³² The Special Rapporteur will continue to follow this constitutional review process with great interest and hopes that it continues to be the subject of concerted action on the part of the Government.

B. The Foreshore and Seabed Act

52. A notable example of the lack of security of Maori rights is the passage of the Foreshore and Seabed Act in 2004. The Act vested the ownership of the public foreshore and seabed in the Government, thereby extinguishing any Maori customary title over that area, while private fee simple title over the foreshore and seabed remained unaffected. Also of particular concern was that Maori people were not adequately consulted about the Act and there was no avenue for redress by the courts for the extinguishment of Maori customary rights to the foreshore and seabed.

53. In his report, the previous Special Rapporteur recommended the repeal or amendment of the Foreshore and Seabed Act and that the Government engage in Treaty settlement negotiations with Maori regarding their customary rights and interests in the foreshore and seabed (E/CN.4/2006/78/Add.3, para. 92). The Act was also the subject of criticism by United Nations treaty bodies, including the Committee on the Elimination of Racial Discrimination.³³

³² See www.beehive.govt.nz/release/govt-begins-cross-party-constitutional-review.

³³ Committee on the Elimination of Racial Discrimination, decision 1 (66) on Foreshore and Seabed Act 2004 (CERD/C/DEC/NZL/1), para. 7.

54. In November 2009, the Prime Minister announced that the Government would repeal the Act providing that a suitable replacement regime could be developed. Various actions have been taken to address the concerns brought forth by this law, including a nationwide consultation by an independent Ministerial Review Panel in 2009 which concluded that the law was unfair, discriminatory and needed to be repealed. The Marine and Coastal Area (Takutai Moana) Bill was introduced into the House of Representatives in late 2010 to replace the Foreshore and Seabed Act. The bill was passed into law in March 2011.

55. According to information received, the new bill is meant to restore the customary interests extinguished by the Foreshore and Seabed Act. In order to obtain customary marine title, a Maori group must prove it has used and occupied the area claimed according to custom (*tikanga*), without substantial interruption from 1840 to the present day, and to the exclusion of others. Also, the bill contains a burden of proof clause that states that a customary interest will be deemed to not have been extinguished, in the absence of proof to the contrary.

56. In this connection, the Special Rapporteur emphasizes the need for the law to be in line with international standards regarding the rights of indigenous peoples to their traditional lands and resources. It is of note that the bill is the first legislation to be introduced into Parliament that affects indigenous rights since New Zealand's expression of support for the United Nations Declaration on the Rights of Indigenous Peoples. The Special Rapporteur notes that the bill still allows for certain past acts of extinguishment of Maori rights to have effect, and he reminds the Government that the extinguishment of indigenous rights by unilateral, uncompensated acts is inconsistent with the Declaration. In addition, concern has been expressed that the bill only requires the Government to "acknowledge"³⁴ rather than "give effect" to the Treaty of Waitangi, the latter being understood to establish a stronger, positive obligation on the part of the Government to promote the Treaty and its principles, as required in some other legislation.³⁵ Also of concern for some Maori representatives is that the limit of six years to assert customary interest claims (sect. 98, clause 2) may have the effect of barring some legitimate claims.

V. Maori development

57. The Special Rapporteur cannot help but note the extreme disadvantage in the social and economic conditions of Maori people in comparison to the rest of New Zealand society. This disadvantage, which manifests itself across a range of indicators, including education, health and income, is certainly detrimental to Maori people's ability to act in partnership with the Crown, as contemplated under the Treaty of Waitangi. The Special Rapporteur notes that this disadvantage especially manifests itself among Maori living in urban areas.

A. Positive developments and ongoing challenges in priority areas

1. Language and education

58. Since the visit of the previous Special Rapporteur, Government initiatives related to Maori education have incorporated the involvement of Maori communities, including whanau and iwi, in education programmes. New Zealand's revised school curriculum of 2007 was developed alongside a companion document, *Te Marautanga o Aotearoa*, which sets out the curriculum for schools that conduct classes in the Maori language and

³⁴ Sect. 4, clause (1)(d).

³⁵ See, for example, sect. 4 of the Conservation Act 1987 (No. 65).

emphasizes the importance of these schools working within whanau, iwi and hapu. Also, Ka Hikitia - Managing for Success: The Māori Education Strategy 2008-2012, includes among its main focus areas increasing the learning and capacity of teachers, placing resourcing and priorities in Maori language in education, and increasing whanau and iwi authority and involvement in education.³⁶

59. There have been many key improvements in Maori education since the 2006 report of the previous Special Rapporteur. For example, from 2006 to 2009, Maori participation in early childhood education increased from 89.9 per cent to 91.4 per cent; the percentage of Maori students qualified to attend university after leaving secondary education increased from 14.8 per cent to 20.8 per cent; and the percentage of Maori students staying in school until the age of at least 17 and a half increased from 38.9 per cent to 45.8 per cent.³⁷ However, the education achievement of Maori children still lags behind that of other New Zealanders, particularly in early childhood education and in secondary school retention.

60. The vibrancy of the Maori language has also showed signs of significant improvement over the past few decades, in significant part due to Maori-run and Government revitalization initiatives, as discussed in some detail in the report of the former Special Rapporteur (E/CN.4/2006/78/Add.3, paras. 60-65). One notable example of such an effective initiative is Maori Television, which was created in 2004 following years of efforts by Maori representatives and litigation before the Waitangi Tribunal. Maori Television currently has an average monthly audience of over 1.6 million viewers, a figure that is steadily climbing.³⁸ Still, according to a 2006 study on the health of the Maori language, despite significant improvements in the last couple of decades, only 23 per cent of Maori and 4 per cent of all New Zealanders have conversational Maori language abilities.³⁹ Therefore, “although there is evidence of the re-emergence of intergenerational Māori language transmission, this is only at the initial budding stage and is not the norm in Māori society. Accordingly, if the Māori language is to flourish, conscious effort at all levels ... remains a necessary requirement”.⁴⁰

2. Health

61. Since the visit of the previous Special Rapporteur, the Government has rolled out Whakatataka Tuarua: Maori Health Action Plan (2006-2011) and He Korowai Oranga: Maori Health Strategy, which provides a framework for the public sector to support the health of Maori whanau. Yet, according to all available indicators, Maori continue to experience higher levels of many health problems than non-Maori, including disproportionate levels of cancer, diabetes, heart failure and communicable diseases. From 2005 to 2007, male life expectancy at birth was 79.0 years for non-Maori, but 70.4 years for Maori.⁴¹ Female life expectancy at birth was 83.0 years for non-Maori and 75.1 years for Maori.⁴² Infant mortality rates are higher for Maori than Asian or European New

³⁶ For an overview of the Strategy, see www.minedu.govt.nz/theMinistry/PolicyAndStrategy/KaHikitia/StrategyOverview/HowThingsWillChange.aspx.

³⁷ All statistics from New Zealand, Ministry of Education, “Progress against Māori Education Plan targets: Ka Hikitia - Managing for Success”. Available from www.educationcounts.govt.nz/themes/maori-education/31351/36805.

³⁸ 2008-09 data.

³⁹ New Zealand, Te Puni Kokiri (Ministry of Maori Development), *The Health of the Māori Language in 2006* (2008), p. 35.

⁴⁰ Ibid.

⁴¹ New Zealand, Ministry of Social Development, *2010 The Social Report* (Wellington, 2010), p. 26. Available from www.socialreport.msd.govt.nz/documents/the-social-report-2010.pdf www.moh.govt.nz/moh.nsf/indexmh/an-indication-nz-health-2007.

⁴² Ibid.

Zealanders, and rates of childhood vaccination are lower among Maori.⁴³ Maori also continue to experience higher levels of drug and alcohol abuse,⁴⁴ suicide (20 per cent of national suicides in 2007), smoking (more than twice the national rate at 46 per cent) and obesity (nearly twice the national rate at 43 per cent).⁴⁵ Maori are also nearly three times as likely as non-Maori to die as the result of an assault, with nearly 20 per cent of Maori women reporting being assaulted or threatened by an intimate partner, three times the national average.⁴⁶

3. Administration of justice

62. Regrettably, there has been little change in the incarceration rate of Maori since the previous Special Rapporteur's visit. As of February 2010, Maori comprised just over 51 per cent of the prison population of New Zealand, despite the fact that Maori make up only about 14 per cent of the total population.⁴⁷ Maori youth also make up around 50 per cent of all youth offenders despite Maori being only about a quarter of the New Zealand population under 17 years of age. This figure is even higher for women; Maori women make up nearly 60 per cent of the female prison population, although it should be noted that the total female prison population is still quite low.⁴⁸ In addition to the negative impacts on individual incarcerated individuals and their families, high incarceration rates have a potentially significant impact on Maori political participation, as the New Zealand electoral law specifies that citizens who have been sentenced and imprisoned lose their voting rights.

63. The Special Rapporteur is encouraged to learn that the Government is taking targeted action to address this distressing situation. In January 2009, the Department of Corrections established the Rehabilitation and Reintegration Service, which provides a number of programmes and services specifically aimed at reducing the rate at which Maori re-offend through the use of *tikanga Maori* (customary Maori) concepts and values, including therapeutic programmes and programmes that aim to establish links between prisoners, their whanau, hapu and iwi, and the local Maori community prior to release. Still, given the severity of the situation, it is evident that more remains to be done.

4. Economic Development

64. Maori own significant commercial assets that provide economic benefits for iwi and for all of New Zealand. The Treaty settlement process has been instrumental in helping provide Maori groups with an economic base for their future economic development. Still, there are numerous obstacles to Maori economic development, exacerbated by the recent global economic downturn. In the year to September 2010, the unemployment rate for Maori in 2010 was 14 per cent (compared with 6.6 per cent in New Zealand overall), 2.8 per cent higher than the previous year and 5.1 per cent higher than its level five years ago.⁴⁹ Also, among 15-24 year olds, 20 per cent of Maori males and 16.1 per cent of Maori

⁴³ New Zealand, Ministry of Health, *An Indication of New Zealanders' Health 2007* (Wellington, 2007), p. 11.

⁴⁴ *Ibid.*, p. 10.

⁴⁵ New Zealand, Ministry of Social Development, *2010 The Social Report* (note 41 above), pp. 29, 30 and 33.

⁴⁶ *Ibid.*, pp. 103-105.

⁴⁷ New Zealand, "Visit of the United Nations Special Rapporteur to Aotearoa New Zealand, 18-23 July 2010, pre-visit/background reading", p. 9.

⁴⁸ *Ibid.*

⁴⁹ New Zealand, Department of Labour, *Māori Labour Market Factsheet – September 2010*. Available from www.dol.govt.nz/publications/lmr/archive/quick-facts-sep-10/maori.asp.

females were not employed, in education or in training, compared with 11.1 per cent of all males and 9.6 per cent of females in New Zealand overall in this age group.⁵⁰

B. Whanau Ora

65. A promising new initiative for reducing the Maori disadvantage is the Whanau Ora programme. Whanau means extended family, and Whanau Ora is designed to use family as the basic unit of intervention to tackle social problems experienced by the Maori in an integrated and holistic way. The programme brings together service providers in the areas of employment, child, youth and family, health, education, and social development, as well as law enforcement and Maori extended families to effectively deliver whanau-centred services. New Zealand has committed NZ\$134.3 million over four years to the establishment of the programme. Importantly, Maori will be closely involved in the management of the programme. The Government created the Whanau Integration, Innovation and Engagement Fund, with dedicated resources to administer whanau-centred service delivery, which will be governed by Maori.

VI. Conclusions and recommendations

66. **Especially in recent years, New Zealand has made significant strides to advance the rights of Maori people and to address concerns raised by the former Special Rapporteur in his 2006 report (E/CN.4/2006/78/Add.3). These include New Zealand's expression of support for the United Nations Declaration on the Rights of Indigenous Peoples, its steps to repeal and reform the Foreshore and Seabed Act of 2004 and its efforts to carry out a constitutional review process with respect to constitutional issues including Maori representation and the role of the Treaty of Waitangi.**

67. **Additionally, the Treaty settlement process in New Zealand, despite evident shortcomings, is one of the most important examples in the world of an effort to address historical and ongoing grievances of indigenous peoples, and settlements already achieved have provided significant benefits in several cases.**

A. Issues related to the Treaty of Waitangi

1. Partnership and participation

68. **The Special Rapporteur welcomes New Zealand's efforts to secure Maori political participation at the national level. However, these efforts should be strengthened, and the State should focus special attention on increasing Maori participation in local governance. The Government should consider reversing its decision to reject the findings of the Royal Commission on Auckland Governance and guarantee Maori seats on the Auckland City Council.**

69. **New Zealand should ensure that consultations with Maori on matters affecting them are applied consistently, and in accordance with relevant international standards and traditional Maori decision-making procedures. Efforts should be made to reduce barriers to the effective participation of Maori in decision-making, including by increasing the technical capacity of Maori people and the funding necessary to ensure Maori participation in consultations.**

⁵⁰ Ibid.

2. The Waitangi Tribunal

70. The Government should ensure the funding necessary for the Waitangi Tribunal to resolve its pending caseload of historical grievances in an efficient and timely manner and should consult with Maori people to determine the future role of the Tribunal.

71. New Zealand should take steps to ensure that the 2008 deadline for the submission of historical claims does not have the effect of barring legitimate claims and that the 2014 goal for settlement of all historical claims does not compromise any settlement processes that could benefit from more negotiating time.

72. Any decision by the Government to act against the recommendations of the Waitangi Tribunal in a particular case should be accompanied by a written justification and be in accordance with the principles of the Treaty and international human rights standards.

3. Negotiated Treaty settlement

73. The Government should make every effort during Treaty settlement negotiations to involve all groups that have an interest in the issues under consideration. In order to address any conflicts regarding participation or representation in settlement negotiations, the Government, in consultation with Maori, should strengthen available mediation or other alternative dispute resolution mechanisms. The Government should take special measures to address the concerns of the Ruawaihu, Ngati Uepohatu and Te Aitanga-a-Hauiti iwi, in relation to the East Coast District settlement case.

74. The Special Rapporteur encourages the Government to show flexibility in its positions during settlement negotiations and to strive, as appropriate, for creative solutions that provide adequate redress to Maori claims in accordance with the Treaty of Waitangi and international standards. In settlement negotiations the Government should give greater consideration to the connection that Maori have with traditional lands and resources.

75. In consultation with Maori, the Government should explore and develop means of addressing Maori concerns regarding the Treaty settlement negotiation process, especially the perceived imbalance of power between Maori and Government negotiators. In this regard, consideration should be given to the formation of an independent and impartial commission or tribunal that would be available to review Treaty settlements.

76. The Special Rapporteur notes with concern the Government's position not to return to Ngati Tuhoe their traditional lands within the Te Urewera National Park. He urges the Government to reconsider this position in the light of the merits of the Tuhoe claim and considerations of restorative justice, and to not rule out the possibility of return of these lands to Tuhoe in the future even if it is not included in a near-term settlement.

B. Domestic legal security for Maori rights

77. The principles enshrined in the Treaty of Waitangi and related internationally protected human rights should be provided security within the domestic legal system of New Zealand so that these rights are not vulnerable to political discretion. At a minimum, the development of safeguards similar to those under the Bill of Rights Act would be important in the context of the Treaty of Waitangi. The Special Rapporteur

encourages the Government to open up discussions with Maori as soon as possible regarding the constitutional review process.

78. The Special Rapporteur is pleased to hear of recent legislative developments aimed at addressing the concerns raised by Maori regarding the Foreshore and Seabed Act of 2004. The Marine and Coastal Area Act represents a notable effort to reverse some of the principal areas of concern of the Foreshore and Seabed Act.

79. The Government should ensure that the provisions of the Marine and Coastal Area Act, in particular those on customary rights, natural resource management, protection of cultural objects and practices, and access to judicial or other remedies for any actions that affect their customary rights, are implemented in a way that is consistent with the principles of the Treaty of Waitangi and international standards.

C. Maori development

80. The Special Rapporteur applauds the availability of Maori language instruction and acknowledges the continued support and resources made available by the Ministry of Education for this effort. The Special Rapporteur urges the Government to work to overcome the shortage of teachers fluent in the Maori language and to continue to develop Maori language programmes.

81. New Zealand should continue to support Maori Television, and ensure that it does not become dependent on unpredictable advertising revenue, which could have negative impacts on its ability to continue to provide essential programming.

82. Available health statistics raise serious concerns that Maori are not receiving the standard of health services received by other groups in New Zealand. The Special Rapporteur encourages the Government to continue work with whanau, iwi and Maori leaders to assess the causes of the discrepancy in health conditions and identify possible culturally appropriate solutions.

83. In consultation with Maori leaders, the Government should redouble efforts to address the problem of high rates of incarceration among Maori. Specific attention should be given to the disproportionate negative impacts on Maori of any criminal justice initiatives that extend incarceration periods, reduce opportunities for probation or parole, use social status as an aggravating factor in sentencing, or otherwise increase the likelihood of incarceration.

84. The Whanau Ora programme is a positive initiative for Maori development that should receive ongoing support.

85. When addressing the issue of Maori social and economic disadvantage, special attention should be placed on the situation of Maori who live in urban areas, and the State should work closely with urban Maori to address their particular concerns.