

Mandate of the Special Rapporteur on the rights of indigenous peoples.

REFERENCE: AL Indigenous (2001-8)
NZL 1/2012

16 August 2012

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the rights of indigenous peoples pursuant to Human Rights Council resolution 15/14.

In this connection, I would like to bring to the urgent attention of your Excellency's Government the information regarding the **alleged exclusion of the Mangakahia Whanau from the Treaty of Waitangi settlement process**. As your Excellency's Government is aware, the issue of Maori representation in the Treaty of Waitangi settlement process was a specific concern raised in my report on the Situation of Maori people in New Zealand (A/HRC/18/35/Add.4). In particular, I noted how the Government's official policy of negotiating with larger Maori groupings of *iwi* rather than with smaller Maori groupings, like *whanau* and *hapu*, has resulted in a situation in which the claims and grievances of some smaller groups are inadequately addressed, leaving them with no avenue for proper redress of their historical claims, and creating or aggravating existing divisions among Maori.¹

According to the information received:

The Waitangi Tribunal's assessment of the Mangakahia Whanau's claim

The Te Whanau O Hamiora Mangakahia ("Mangakahia Whanau") is a Maori *iwi* (tribe) numbering over one thousand people whose ancestral territory is located in the Whangapoua basin of the Coromandel peninsula, in the Hauraki District. In the 1990s, the Mangakahia Whanau brought a claim before the Waitangi Tribunal seeking redress for the loss of their ancestral lands. The Waitangi Tribunal evaluated this claim in the framework of its analysis of Maori land claims coming from the "Hauraki Inquiry District" which comprises the Hauraki Gulf and its islands, the lower Waihou and Piako Valleys and the Coromandel Peninsula.

The principal representative body of Maori claimants before the Waitangi Tribunal representing the Hauraki Inquiry District was the Hauraki Maori Trust

¹ A/HRC/18/35/Add.4, paras. 35-38.

Board (“Trust Board”). The Trust Board is a body corporate created by a parliamentary act in 1988, which holds the assets earned from resources in the area. The Trust Board designated as beneficiaries the descendants of 12 iwi in that district, which are: Ngati Hako, Ngati Hei, Ngati Maru, Ngati Paoa, Patukirikiri, Ngati Porou ki Harataunga ki Mataora, Ngati Pukenga ki Waiiau, Ngati Rahiri-Tumutumu, Ngai Tai, Ngati Tamatera, Ngati Tara Tokanui, and Ngati Whanaunga. The Trust Board lodged its initial set of claims with the Waitangi Tribunal in 1987. According to the Waitangi Tribunal’s extensive 2006 report on the Hauraki district claims, only 3600 out of a total of 6995 Maori individuals who identified as being of Hauraki descent were registered as beneficiaries of the Trust Board.² The Mangakahia Whanau was one of the iwi that was excluded as a beneficiary.

In its report, the Waitangi Tribunal acknowledged that other iwis in the Hauraki district who are not listed as Trust Board beneficiaries also lodged their own separate claims, including Mangakahia Whanau. According to the Tribunal’s report, the non-Trust Board claimants “agree that they are closely connected by intermarriage and whakapapa [ancestry or lineage] with people of the 12 groups named in the Act [that created the Trust Board]... That being so (and since the Act provides that the beneficiaries of the Trust Board shall be ‘the descendants of the 12 named groups’), it was not strictly necessary that each and every hapu be listed separately in the Act or that they lodge a separate claim with the Tribunal. But clearly they wished to reassert their identity and lodge claims relating to their particular interests.”³

In its description of the Mangakahia Whanau’s specific claim, the Tribunal deemed that the evidence presented by the claimants showed substantial prejudice caused by actions of the Crown that affected their land and natural resource rights. It also considered that the Mangakahia Whanau’s claim was representative of the types of land and natural resource losses suffered by iwi in that Hauraki district since the 19th century. The Tribunal went on to state that “[h]owever, by the claimant’s own evidence, they are closely inter-related with Ngati Hei, Patukirikiri and other Hauraki iwi, in Whangapoua particularly, and we are unable to determine any particular proportion of injury suffered by the [Mangakahia Whanau] claimants, relative to that of other groups who had interests in the same land.”⁴

Notwithstanding the above, the information received indicates that members of the Mangakahia Whanau iwi consider themselves distinct from the iwi that make up the Hauraki Maori Trust Board, that they do not feel their rights and interests are adequately represented by the Trust Board, and that they wish to pursue their own separate claim for reparations.

² Waitangi Tribunal Report 2006, The Hauraki Report: Vol. I (Wai 686), p. 6.

³ Ibid., at p. 7.

⁴ Ibid., (Vol. III) at p. 1244.

The Mangakahia Whanau's claim within the Treaty of Waitangi settlement process

According to the allegations received, due to the Crown's policy of negotiating treaty settlements with large Maori groupings or collectives, reparations for the claims brought by iwis in the Hauraki district have been negotiated by the Crown only with what is referred to as the "Hauraki Collective". The Hauraki Collective is an entity formed under an agreement between the Crown and the Trust Board, following the report of the Waitangi Tribunal, for purposes of negotiating settlements with the iwis in the Hauraki district. The Hauraki Collective is composed of the same iwis that make up the Trust Board.

It is alleged that the Mangakahia Whanau's claim were included in the claims of the Hauraki Collective, even though Mangakahia Whanau's rights and interests are not adequately represented by the Collective. Furthermore, the Hauraki Collective purports to act on behalf of Mangakahia Whanau, without its authorization or consent. This is of concern since the Hauraki Collective reportedly intends to claim reparations that would otherwise be due to the Mangakahia Whanau under the treaty settlement process, to which none of its 12 members are entitled to under Maori customary law.

It is also alleged that the Mangakahia Whanau has been excluded from membership in the Hauraki Collective, and it therefore cannot participate in the treaty settlement process in order to negotiate on its own behalf for redress of its land claims. The Hauraki Collective decides to include a group into its membership based on whether it descends from one of the 12 iwi that originally made up the Trust Board. However, according to the information, the Mangakahia Whanau considers its ancestral lineage to predate that of the iwis that constitute the Trust Board and is therefore excluded from membership to the Collective.

Furthermore, the Crown has reportedly facilitated the unfair exclusion of the Mangakahia Whanau and other similarly situated iwi by providing financial and technical assistance to the Hauraki Collective. On the other hand, the Crown has allegedly for several months not paid the fees of legal practitioners that normally provide legal aid to smaller individual iwis, like the Mangakahia Whanau.

While I do not wish to prejudge the accuracy of the above allegations, I would like to refer your Excellency's Government to relevant provisions of the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on 13 September 2007 and endorsed by New Zealand.

As stated in article 37, "Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements." Relevant to the discussion of reparations for historical wrongs, article 28 provides for indigenous peoples' "right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have

traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.”

Article 18 establishes the right of indigenous peoples to “participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions”. Under article 19, indigenous peoples shall be consulted “through their own representative institutions in order to obtain their free, prior and informed consent” before States adopt legislative or administrative measures that may affect them. Furthermore, article 33 provides for the right of indigenous peoples to “determine their own identity or membership in accordance with their customs and traditions... [and] to determine the structures and to select the membership of their institutions in accordance with their own procedures.” In addition, article 39 states the right of “access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.”

In addition, I would also like to refer to the recommendation previously made in my country report on New Zealand that “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.”⁵

In light of the information and allegations contained in this communication, I would be interested in knowing your Excellency’s Government’s views on the accuracy of the information contained in this letter, and I would be grateful to receive any additional information your Government may deem relevant. In particular, I would like to know further information about:

1. Whether a settlement has been or will be reached with the Hauraki Collective which will include reparations for the claims originally presented by the Mangakahia Whanau before the Waitangi Tribunal. If so, provide information on how the concerns related to the adequate representation and adequate compensation of the claims of the Mangakahia Whanau have been or will be addressed through this particular settlement process;
2. The measures adopted to consult with members of the Mangakahia Whanau regarding the inclusion of their land claim within the group claims negotiated between the Crown and the Hauraki Collective. In this regard, provide information on any opportunity that the members of the Mangakahia Whanau have had to agree or consent to the incorporation of their claim into the claims that the Hauraki Collective has been negotiating with the Crown;

⁵ A/HRC/18/35/Add.4, para. 73.

3. Provide information on what options for reparations are available to those Maori groups that do not wish their claims to be adjudicated as part of a larger collective grouping under the Waitangi Treaty settlement process;
4. Provide a description of the sources of financial and technical assistance available to the different Maori iwi, whanau and hapu who wish to bring forth a claim as part of the Waitangi Treaty settlement process, both on an individual group basis and as part of a collective grouping;

I would appreciate a response from your Excellency's Government within 60 days. I undertake to ensure that your Excellency's Government's response will be taken into account in my assessment of this situation and in developing any recommendations that I make for your Excellency's Government's consideration pursuant to the terms of my mandate.

Please accept, Excellency, the assurances of my highest consideration.

James Anaya
Special Rapporteur on the rights of indigenous peoples