

Indigenous Peoples and Foreign Policy: The New Zealand Experience

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I INTRODUCTION

The predominant forms of foreign policy discussed these days are underpinned by an assumption of Crown sovereignty in Aotearoa New Zealand. However, the first diplomatic relations and foreign policy in this country were conducted by hapu and iwi Maori. Prior to the 1800s, Maori had a long history of interaction in the Pacific and Aotearoa with other nations. Such interactions were governed by specific legal and political practices and institutions. A number of the concepts upon which these practices and institutions were based included whakapapa, utu, mana and koha.²

When discussing Maori participation in foreign policy therefore (and what level of participation there should be) it is hard not to return to the issue of sovereignty and how power is shared between Maori and the Crown as per Te Tiriti o Waitangi 1840. Foreign policy is unavoidably about how 'we' deal with 'them'. Hence definitions of 'we' and 'they' are vitally important. In Aotearoa New Zealand, the Crown has assumed the right to define the 'we'. They have also assumed the right to define by whom and on what terms others are dealt with. In short the Crown assumes total and indivisible control over foreign policy. Maori are only involved/consulted as a token measure, and often only those Maori groups the Crown perceives as non-threatening.

In this paper I will argue that the levels and forms of Maori participation in Crown foreign policy, formulation and implementation, are inadequate. Why? Because the current framework is based on flawed Crown assumptions about Te Tiriti o Waitangi, tino rangatiratanga and Indigenous rights, and the Crown is resistant to acknowledging its own limitations. I suggest that there should be far greater levels and different forms of Maori participation as per the rights reaffirmed for hapu in Te Tiriti o Waitangi, ongoing tino rangatiratanga, and the nature of evolving Indigenous rights under international law. In the final part of the paper I explore how there can be greater levels of participation. In the short term – as a very temporary and interim measure and as a first step towards participation in foreign policy, I suggest the powers of the Waitangi Tribunal should be fully utilised and extended. In the long term – the issue is really one about Crown recognition of tino rangatiratanga and that requires constitutional change. One model to consider could be the Tikanga House model utilised by the Anglican Church.

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I would like to thank Edwina Hughes for comments on an earlier draft of this paper.

² For further explanation of these concepts see Durie, E. T. (1995) "Will the Settlers Settle?" *Otago Law Review*, Vol. 8, No. 3.

II LEVELS OF MAORI PARTICIPATION IN CROWN FOREIGN POLICY CURRENTLY INADEQUATE

The predominant manner in which Maori are currently involved with foreign policy, that the Crown is engaged with, is determined by Crown agencies and is based on a number of assumptions, most significantly that Maori ceded sovereignty in Te Tiriti, that the Crown in the course of governing has the sole right to formulate foreign policy, and that while there are many interest groups in a liberal democracy, some with views and opinions regarding foreign policy, Maori are simply one interest group amongst many.

Government agencies involved with particular treaties or other foreign policy matters determine “whether there is a need for engagement”³ with Maori. If it is determined by the agency that Maori involvement is required, then they further determine the nature and extent that engagement should take, tempered by considerations of the “most efficient use of resources”⁴. ‘Engagement’ can then range from “raising awareness” to “consultation”. In developing the government’s position on international treaties Ministry of Foreign Affairs and Trade (MFAT) indicates that “other interested parties as well as Maori will need to continue to be engaged with and have their interests considered”.⁵ Maori participation rests therefore on the assumption that they are simply one interest group amongst many, rather than parties to Te Tiriti with tino rangatiratanga, who therefore must be dealt with as sovereign nations.

The recent case of China-New Zealand “Free” Trade Agreement provides a useful illustration where Maori interests are deemed to be narrowly ‘cultural’ and the manner in which consultation took place was selective and minimal. These practices are reminiscent of Crown conduct in previous trade agreements and Closer Economic Partnerships.⁶

In the National Interest Analysis of the China-New Zealand ‘Free’ Trade Agreement, reference to Maori interests falls under the ‘cultural effects’ section.⁷ Cultural interests are then argued to be protected under the exceptions to the Agreement (as per Article XX of GATT 1994 and Article XIV of GATS) which cover “measures necessary for the protection of public morals and those imposed for the protection of national treasures of artistic, historic or archaeological value”.⁸ This compartmentalizing of Maori interests does not adequately reflect the full extent of potential Maori concerns with an Agreement of this nature.

Somewhat incongruously, those Maori groups that MFAT consulted regarding the agreement were not those with ‘cultural interests’ but rather as, MFAT states, those with “trade and economic interests, including Federation of Maori Authorities and Maori exporters including Ngai Tahu Seafoods”.⁹ Wakatu Incorporation and

³ Available at MFAT website, accessed 9 December 2010, <http://www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/Engagement-with-Maori.php>

⁴ Available at MFAT website, accessed 9 December 2010, <http://www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/Engagement-with-Maori.php>

⁵ Available at MFAT website, accessed 9 December 2010, <http://www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/Engagement-with-Maori.php>

⁶ For further analysis on these Agreements see M. Bargh (ed) *Resistance and Indigenous Response to Neoliberalism*, Wellington: Huia, 2007.

⁷ Ministry of Foreign Affairs and Trade, *New Zealand-China Free Trade Agreement: National Interest Analysis*, p. 61.

⁸ Ibid.

⁹ Ibid, 70.

Tohu Wines are also listed as having been consulted.¹⁰ No detail has been provided of their views and it is unclear whether they supported or opposed the Agreement. Their concerns may have centered on intellectual and cultural property rights given the difficulties some Maori companies have had with breaches of copyright and the theft of Maori designs. Also counted by MFAT as part of the consultation programme is the publication and distribution of an International Treaties List which they argue is “distributed to iwi, and provided contact details for feedback from iwi”.¹¹ It is unclear which iwi are being referred to or how providing iwi a list of treaties falls within the definition of consultation.

The second case which demonstrates limitations of the current framework, has been the lack of Crown engagement with Maori over formulating a position on the Declaration on the Rights of Indigenous Peoples 2007. Over the years of the Draft text’s negotiation, Maori requested on numerous occasions for consultation to be held, particularly as the New Zealand government’s stance on the Draft continued to clash with the position of Maori.¹² In the last couple of years the Aotearoa Indigenous Rights Trust, a Maori organisation that has been closely following the Declaration’s passage through the United Nations, made several formal requests to have input, and for consultation between Maori and the Crown, but were rebuffed or ignored by the Minister and Ministry of Foreign Affairs and Trade.¹³

The Crown currently has very clear obligations and responsibilities relating to consultation domestically and internationally. Domestically, first and foremost the Crown has obligations and responsibilities stemming from Te Tiriti which clearly have not been met. This has been evident in a number of cases and Waitangi Tribunal Reports have subsequently outlined standards such as engaging with Maori prior to any decisions being made, being open to change the proposed policy or plan, and conducting consultation in good faith.¹⁴ Internationally the Crown also has clear commitments for example under the Convention on the Elimination of Racial Discrimination (CERD) as well as the Declaration on the Rights of Indigenous Peoples (which I will return to shortly) regarding upholding free, prior and informed consent.

The issue of free, prior and informed consent illuminates some of the shortcomings of the Crown’s current approach to engaging with Maori. Peace Movement Aotearoa coordinator Edwina Hughes argues that:

One of the explicit obligations in General Recommendation XXIII [CERD] is that states are to ensure that no decisions directly relating to the rights and interests of Indigenous peoples are to be taken without their informed consent - a right that is generally referred to these days as the right to “free, prior and informed consent”. Free, prior and informed consent is an obligation which has four elements - ‘free’, that is, without coercion or any

¹⁰ Ibid.

¹¹ Ibid, 69.

¹² Claire Charters, “Maori and the United Nations” in M. Bargh (ed) *Resistance: An Indigenous Response to Neoliberalism*, Wellington: Huia, 2007.

¹³ See Aotearoa Indigenous Rights Trust website, accessed 1 June 2010, available at <http://www.pcpd.org.nz/ddrip/air.html> For letters and petitions to the Ministry of Foreign Affairs and Trade requesting them to engage with Maori see Aotearoa Indigenous Rights Trust documents on the Pacific Centre for Participatory Democracy website accessed 10 December 2010, available at <http://www.pcpd.org.nz/ddrip/>

¹⁴ See for example Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Preliminary Report on Te Tau Ihu Customary Rights in the Statutory Ngai Tahu Takiwa* Wellington: Waitangi Tribunal, 2007 available from their website, <http://waitangitribunal.govt.nz/reports/downloadpdf.asp?reportid=84272A68-DF3F-4A4F-BCAD-2E66AEE09DD9.pdf> accessed 10 December 2010.

other form of pressure being brought to bear; 'prior' meaning in advance of any decision; 'informed' meaning that sufficient information is available to make a decision; and 'consent', which is generally understood to mean agreement.Free, prior and informed consent can be regarded as an absolute minimum requirement for states in their dealings with indigenous peoples, but it is a standard that the New Zealand government has yet to meet.¹⁵

III LEVELS OF PARTICIPATION SHOULD BE GREATER AND IN DIFFERENT FORMS

i. as per Te Tiriti

I do not intend here to rehearse the Articles of Te Tiriti, suffice to reiterate that Article Two guaranteed the continuance of tino rangatiratanga. Arguably this may be limited by the kawanatanga of the Crown - but so too is kawanatanga limited by tino rangatiratanga. The extent of these limitations has been disputed by iwi and the Crown since 1840. The results of the Waitangi Tribunal claim WAI262 may give some indication of a way forward. Claimants in that case argue that the Crown has breached tino rangatiratanga since 1840 including by signing international agreements such as the General Agreement on Tariffs and Trade.¹⁶ As Moana Jackson has argued, just because the Crown claims de facto sovereignty and rejects other sovereignty claims "can neither justify an imposed power, nor render meaningless the rights of those who have been subjected".¹⁷

ii. Ongoing iwi tino rangatiratanga

A second reason for the need for greater levels and different forms of Maori participation results from ongoing tino rangatiratanga expressed in iwi involvement in diplomatic relations, with other Indigenous nations.

Iwi have long been engaged in diplomatic relations with others, mainly other Indigenous nations. Most recently Ngati Awa and the Mataatua Assembly have assisted in the formation of the United League of Indigenous Nations to foster relations, including trade, amongst Indigenous nations in the US, Canada, Australia and Aotearoa. This alliance may be extended in the future.¹⁸

The finalisation of the Treaty of the United League of Indigenous Nations in August 2007 between representatives of at least eleven Indigenous nations, aims to foster greater self-determination for Indigenous peoples through direct political, economic and social links amongst Indigenous nations.¹⁹ The iwi of Ngati Awa is one of the signatories to this Treaty and has had representatives involved in its negotiation and other iwi may follow. The Treaty creates the mechanisms by which a United League of Indigenous Nations can be established that all Indigenous nations can be invited to join. Although still in the early stages of development, the League presents

¹⁵ Hughes, E. (2008) speech to UNANZ 2008 National Conference 'Our Common Future', 1 June 2008.

¹⁶ See Solomon, M. "A Long Wait for Justice" in Bargh, M. *Resistance: An Indigenous Response to Neoliberalism*, Wellington: Huia, 2007.

¹⁷ Jackson, M. (1992) "The Treaty and the Word: The Colonisation of Maori Philosophy" in Oddie, G. and Perett, R (eds) *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, p. 6.

¹⁸ See their website United League of Indigenous Nations (2007) website accessed 1 December 2010; <http://www.indigenoustrationtreaty.org/>, <http://www.indigenoustrationtreaty.org/home.html>

¹⁹ United League of Indigenous Nations (2007) website accessed; 1 December 2010; <http://www.indigenoustrationtreaty.org/>

an alternative forum for Indigenous peoples to link directly with each other without being encumbered by the presence of state representatives. There are numerous other examples over the years of iwi diplomatic relations which I do not have time to explore but would include the Kingitanga links with other Pacific royalty, and as one example the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples 1993.²⁰

iii. Evolving Indigenous rights under international law

The third issue, which suggests the need for a reconsideration of current arrangements, is the clarifying of Indigenous rights under international law. The Declaration on the Rights of Indigenous peoples was finally adopted in September 2007 and “recognises the rights of indigenous people on a wide range of issues and provides a universal framework for the international community and States”. Despite the New Zealand government being one of only four countries in the world to vote *against* the adoption of the Declaration by the UN General Assembly, the Declaration sets out what are now the internationally accepted minimum standards relating to Indigenous rights and a framework for dialogue between Indigenous peoples and States. Since its adoption, the government in Australia and the parliament in Canada have stated that they are now prepared to accept the Declaration leaving New Zealand solely in the company of the United States in its rejection of the Declaration, although Prime Minister John Key has suggested he may consider reversing this position.^{21*} A number of nations and UN agencies are moving towards incorporating the norms and standards that the Declaration establishes. The UN Development Group has formulated Guidelines to assist those within the UN system to integrate “indigenous peoples’ issues in processes for operational activities and programmes at the country level”.²²

Perhaps the most significant right, which the Declaration reaffirms, is the right of Indigenous peoples to self-determination. “By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.²³ In light of Indigenous peoples right to self determination, one of the important frameworks that the Declaration establishes to enable dialogue between Indigenous peoples and States, and which could be instructive for assisting the expansion of Maori participation in foreign policy, is respect for free, prior and informed consent which I have mentioned above.

²⁰ For further exploration of Indigenous - Indigenous links see M. Bargh “Tino Rangatiratanga: Water Under the Bridge” *He Pukenga Korero*, Vol. 8, No. 2. 2007.

²¹ Radio New Zealand National, “NZ May Endorse UN Indigenous Rights Declaration” 17 May 2009. Available on the RNZ website, accessed 2 June 2009, <http://www.radionz.co.nz/news/stories/2009/05/17/1245b0225af1>; *Editor’s note: Since this article was written, the New Zealand Government has announced its support for the Declaration (see <http://www.beehive.govt.nz/release/national-govt-support-un-rights-declaration>, last accessed 10 December 2010) although this support has been moderated by the National Government’s view that the Declaration is non-binding, aspirational and “...will not compromise the fundamentals of this Government’s approach to resolving Treaty claims, and its work with Maori and all New Zealanders on the many challenges we face.” See John Key at <http://www.beehive.govt.nz/release/national-govt-support-un-rights-declaration>, last accessed 10 December 2010).

²² UN Development Group, *Guidelines on Indigenous Peoples’ Issues*, February 2008, p. 3.

²³ Article 3, Declaration on the Rights of Indigenous Peoples, 2007. This article is based on Article One, International Covenant on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights.

IV HOW?

The third issue therefore is how to create greater levels and different forms of participation.

i. In the short term

In the short term and only as an interim measure and only to enable participation in foreign policy, one avenue may be to fully utilise and extend the powers of the Waitangi Tribunal.

As is well documented, the Waitangi Tribunal was established by the 1975 Treaty of Waitangi Act as “a permanent Commission of Inquiry charged with making recommendations on claims brought by Maori relating to actions or omissions of the Crown, which breach the promises made in the Treaty of Waitangi”.²⁴ It also includes the power of

inquiring into and making recommendations upon any claim properly submitted to the Tribunal, examining and reporting on any proposed legislation referred to the Tribunal by the House of Representatives or a Minister of the Crown, and making recommendations or determinations in respect of certain Crown forest land, railways land, State-owned enterprise land, and land transferred to educational institutions.²⁵

There is a mechanism here therefore, which already exists and which could be utilised and that could ensure that new breaches of Te Tiriti are not committed by the Crown. However, it is problematic. It is difficult to imagine the government voluntarily referring legislation, to the Tribunal to inquire into and make possibly negative recommendations about. Despite the likely flaws in this process, including the now common occurrence of the Crown blatantly dismissing and ignoring Tribunal recommendations, most significantly perhaps in recent years in the foreshore and seabed case, it is the only kind of process and mechanism of this nature currently available within the NZ political apparatus.²⁶

A plan to utilise the Tribunal resonates with the 2006 *UN Report of the Special Rapporteur on The Situation of Human Rights And Fundamental Freedoms of Indigenous Peoples*, where Rodolfo Stavenhagen recommended that:

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.²⁷

²⁴ Waitangi Tribunal website, accessed 10 December 2010, available at <http://www.waitangi-tribunal.govt.nz/about/about.asp>

²⁵ Waitangi Tribunal website, accessed 10 December 2010, available at <http://www.waitangi-tribunal.govt.nz/about/about.asp>

²⁶ For the Waitangi Tribunal's Report see their website, accessed 1 December 2010, available at <http://www.waitangi-tribunal.govt.nz/reports/generic/>

²⁷ UN Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen Mission to NZ”, March 2006, p. 20, Available at <http://www.converge.org.nz/pma/srnmz06.pdf>

In *The Treaty of Waitangi in New Zealand's Law and Constitution* Matthew Palmer presents a similar kind of idea but one which reduces the role of the Tribunal and creates a Treaty of Waitangi Court. In his book Palmer argues there is a great deal of uncertainty around the Treaty, particularly regarding who is responsible for clarifying issues relating to the Treaty. He argues that the Treaty could be stabilised in law by being clear whose job it is to determine what the Treaty means in times of dispute and in specific contexts. Palmer canvases a range of options and proposes the creation of a Treaty of Waitangi Court which would assess whether the actions of the Crown and Maori are consistent with the Treaty. Palmer's plan for a Treaty of Waitangi Court could be an extension, or subsequent development of the short-term measure for the Tribunal proposed above.

ii. In the long term

In the long term the issue is really one about a change in the Crown's basic assumptions and therefore Crown recognition of tino rangatiratanga and that requires constitutional change. Stavenhagen commented on constitutional change in his 2006 report stating that:

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...²⁸

Stavenhagen suggested that

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.²⁹

I will not cover the issue of entrenchment here but the idea of constitutional change, including parallel political systems has long been investigated and implemented by iwi. There is a long history of ongoing Maori political activities beyond the Crown-iwi binary.³⁰ The Maori parliaments of the 1800s would be one example.³¹

One of the models for constitutional change that has been proposed by Maori on a number of occasions for use in a national context, and which requires a much more detailed analysis, is one currently used by the New Zealand Anglican Church

²⁸ UN Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen Mission to NZ" March 2006, p. 20, Available at <http://www.converge.org.nz/pma/srnzmarch06.pdf>.

²⁹ Ibid.

³⁰ Bargh, M. (2007) "Tino Rangatiratanga: Water Under the Bridge?" *He Pukenga Korero*.

³¹ L. Cox, *Kotahitanga*, Oxford: Oxford University Press, 1993.

and elaborated upon by Whatarangi Winiata.³² The New Zealand Anglican Church considered the “Tikanga House model” for many years before its adoption as part of the Church Constitution in 1992. For the church the model establishes 13 different diocese, which are essentially different electorates; Maori, Pakeha and Pasefika - Polynesia. Different church officials and Bishops operate in these 13 different areas. The Maori and Pakeha areas geographically map upon one another in much the same way that the Maori and general electorates do in New Zealand national elections. The Pasefika – Polynesia diocese encompasses Fiji, Tonga, Samoa and the Cook Islands.³³ Bishops from each of the Tikanga Houses meet and make decisions with representatives from their diocese (or Hui Amorangi for Te Pihopatanga o Aotearoa) at their own synods utilising and maintaining their own tikanga. Decisions from each synod of the Tikanga Houses are then discussed and debated at a General Synod/Te Hinota Whanui.³⁴

The Tikanga House model presents a potential alternative and one which might be possible, with further analysis of its feasibility, to propose for the New Zealand parliament. The current structure of the electoral system already provides for separate representation from broadly Maori and non-Maori electorates (although many Maori are also enrolled on the general roll and Pasefika communities do not have their own electorate). From a practical view the establishment of meetings involving only the MPs from Maori electorates who would then report their decisions to the rest of parliament/the ‘Pakeha’ House is not unimaginable, as a first step. Winiata argues that the current activities of the Maori Party are indeed already those of a Tikanga Maori House within parliament. In 2007 he argued that:

The Caucus of the Tikanga Maori House meets on Tuesday mornings when Parliament is in session. In attendance are our four Members of Parliament, three senior staff members and the President; the Caucus is convened by the Whip. In the last twelve months during three periods in which Parliament was in recess, our four members have carried out coordinated visits to the three Māori electorates not held by the Māori Party as well as spending time in their own rohe.³⁵

Winiata argued further that with an increased share of the party vote (to the Maori Party), and therefore a greater number of seats in parliament the Tikanga Maori House could more adequately reconcile the kawanatanga of the Crown and tino rangatiratanga of iwi Maori.³⁶

While a Tikanga House may present some improvement on the status quo, such a model in many respects continues to accept an overriding Crown sovereignty within which a lesser form of tino rangatiratanga must operate.

Hapu and iwi continue to be hindered by these presently inadequate constitutional arrangements. Hapu and iwi must continually struggle to maintain their positions of tino rangatiratanga and to explain their position and political realities

³² See Winiata, W. (2007) “The Tikanga Māori House: The Influential Independent Māori Voice”, President’s Address, Māori Party Annual General Meeting, Hastings. Winiata, Whatarangi (2005) “The Reconciliation of Kawanatanga and Tino Rangatiratanga” Rua Rautau Lecture Rangiata Church Otaki.

³³ Anglican Church of New Zealand (undated) website accessed 1 December 2010; <http://www.anglican.org.nz/>

³⁴ Winiata 2005

³⁵ Winiata 2007.

³⁶ Winiata 2007.

both to the Crown and other New Zealanders.³⁷ And this includes struggling to have some participation in foreign policy formation.

Moana Jackson has recently argued that Aotearoa requires the de-constitution-alising of current power structures to envisage a Maori constitutional system.³⁸ There is no reason why de-constitution-alising New Zealand's current arrangements could not suit the needs and human rights of all peoples within Aotearoa.

³⁷ Bargh, M. (2006) "Changing the Game Plan", *Kotuitui: New Zealand Journal of Social Sciences Online*, Vol. 1, No.1.

³⁸ Jackson, M. 2008 presentation at the Maori Association of Social Scientists conference, Victoria University of Wellington.

