THE UN SPECIAL RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES AND NEW ZEALAND: A STUDY IN COMPLIANCE RITUALISM

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I. Introduction

New Zealand has long championed itself as a world leader in the recognition of Indigenous peoples' rights. Yet, its Indigenous rights situation has come under the scrutiny of the United Nations (UN) Special Rapporteur on the rights of indigenous peoples several times since 2005. The Special Rapporteur is one of a collection of UN human rights reporting mandates known as the "special procedures."[1] The special procedures are unsalaried independent experts engaged by the UN to investigate human rights issues either on a thematic or a country basis. The Special Rapporteur on the rights of indigenous peoples' role is to investigate and provide recommendations on how to prevent and remedy alleged violations of Indigenous peoples' human rights.[2] It has conducted two country missions to New Zealand in order to examine the human rights situation of Māori as well as issuing two communications to the government asking it to comment on alleged Indigenous rights violations.[3] It is one of few international human rights mechanisms to visit New Zealand to carry out investigations.[4] Yet, no scholarly analysis of the Special Rapporteur's influence on the New Zealand Government has been undertaken.[5] This article helps to fill that gap in the literature. It analyses the

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1 The special procedures derive their authority from the UN Charter through ESC Res 1235 (XLII) E/4393 (1967).

2 HRC Res 6/12 A/HRC/RES/6/12 (2007).

3 Economic and Social Council (ESC) *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Rodolfo Stavenhagen, Addendum: Mission to New Zealand* E/CN.4/2006/78/Add.3 (2006) [Stavenhagen Report]; HRC *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, Addendum: Summary of cases transmitted to Governments and replies received* A/HRC/9/9/Add.1 (2008) at [339]-[357]; HRC *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, Addendum: The situation of Maori People in New Zealand* A/HRC/18/35/Add.4 (2011) [Anaya New Zealand]; HRC *Communications report of Special Procedures* A/HRC/22/67 (2013) at 78.

4 Members of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment visited New Zealand in 2013 to investigate places of detention, for example. See Office of the High Commissioner for Human Rights "Prevention of Torture: UN human rights body presents confidential preliminary comments to the Government of New Zealand" (2013) <www.ohchr.org>.

5 Anecdotal comments on the Special Rapporteur's influence in New Zealand have been made by, for example, Tom Bennion and Darrin Cassidy "Special Rapporteur's Report Taken for a Spin" (2006) 70 Mana at 40-41; Jennifer Preston and others *The UN Special Rapporteur: Indigenous Peoples Rights: Experiences and Challenges* (International Work Group for Indigenous

influence of the Special Rapporteur's recommendations, issued following each country visit, on the New Zealand Government's behaviour towards Māori.[6] It proceeds from the assumption that the New Zealand Government should act in accordance with the Special Rapporteur's recommendations, a point addressed more fully below. It argues that the Special Rapporteur has had an imperfect but appreciable influence on the New Zealand Government's behaviour towards Māori. The Government has partially implemented a number of the experts' recommendations, but domestic factors were the prime determinants of these moves. The article draws on regulatory literature to characterise New Zealand's dominant behavioural response to the Special Rapporteur as one of ritualism: ultimately the Government has moved to outwardly agree with many of the Special Rapporteur's recommendations, while inwardly developing techniques to avoid them. The assessment is based on critical document analysis; 18 interviews, including with the two experts that have held the role of Special Rapporteur, advocates of Māori rights, members of the New Zealand Human Rights Commission, a UN bureaucrat and a politician; as well as participant observation in UN fora.

The analysis proceeds in four parts. It introduces the Special Rapporteur's New Zealand country missions and recommendations. It examines the New Zealand Government's initial response to the missions and recommendations, as well as the basis for assuming states should comply with the experts' recommendations. It then explores the influence of the Special Rapporteur's recommendations on the Government's behaviour towards Māori, focusing on three exemplar recommendations concerning the constitutional protection of Māori rights as Indigenous peoples, land and education. Finally, it characterises the Government's principal behavioural response to the Special Rapporteur's country recommendations as one of ritualism and considers the implications of this response.

II. Indigenous Rights Behaviour Under Scrutiny: The Special Rapporteur's Country Missions to New Zealand

The Special Rapporteur on the rights of indigenous peoples has a short and recent history of engagement on Indigenous rights issues in New Zealand. The Special Rapporteur's interest began soon after New Zealand issued a standing invitation to all thematic special procedures in 2004. A standing invitation means that in principle a state agrees to accept a request to visit the country from any thematic special procedures mandate. Since that standing invitation was issued, New Zealand has had two country visits by the Special Rapporteur on the rights of indigenous peoples: first from Rodolfo

Affairs, Copenhagen, 2007) at 36. The influence of the special procedures more generally is considered in Ted Piccone *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights* (The Brookings Institution, Washington, 2010).

6 The influence of the two communications is not considered in this article because the communications do not contain recommendations to the New Zealand government.

Stavenhagen, in November 2005, and then from James Anaya, in July 2010.[7] Stavenhagen's visit was prompted by the finding of the Committee on the Elimination of Racial Discrimination (CERD Committee) that legislation extinguishing Māori property rights in the foreshore and seabed discriminated against Māori.[8] The CERD Committee monitors state compliance with the Convention on the Elimination of All Forms of Racial Discrimination (CERD), which New Zealand ratified in 1972.[9] Anaya's visit was a follow-up visit to assess the implementation of Stavenhagen's recommendations. It was initiated by the New Zealand Government itself, following its belated endorsement of the UN General Assembly's Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2010.[10]

The format of each expert's visit was similar. Stavenhagen was in the country for eleven days, Anaya for six. Both met with high-level government representatives, including Anaya with the Prime Minister and Stavenhagen with the Deputy Prime Minister, along with senior representatives from the Ministry of Māori Affairs, the Ministry of Justice and other Ministries. Both met with representatives of *iwi* (tribe), *hapū* (sub-tribe) and other Māori groups. The experts also met with members of the New Zealand Human Rights Commission, the Waitangi Tribunal, the Māori Land Court and academics. At the end of each visit, the Special Rapporteur produced a report outlining the details of the mission, providing a brief background on the human rights situation of Māori, identifying core areas of concern and issuing a suite of conclusions and recommendations addressed to the New Zealand Government. The reports were delivered to the New Zealand Government; the Special Rapporteur's parent body, which was the Commission on Human Rights at the time of Stavenhagen's visit and the Human Rights Council at the time of Anaya's; as well as being made publically available through the website of the Office of the High Commissioner for Human Rights.

Both Special Rapporteurs issued recommendations to the New Zealand Government geared at tackling a broad range of Indigenous rights issues. The recommendations of the experts concerned issues including domestic security for Māori rights as Indigenous peoples; Māori representation in local and national government; participation in decision-making; land and resource rights, especially in relation to the foreshore and seabed; the process for hearing and settling claims regarding breaches of the Treaty of Waitangi signed by representatives of Māori and the Crown in 1840;[11] rights to culture, including Māori medium education; and, persisting socio-economic inequalities experienced by Māori. For example, Stavenhagen's

7 Stavenhagen Report, above n 3; Anaya New Zealand, above n 3.

8 Committee on the Elimination of Racial Discrimination (CERD) *Decision 1 (66): New Zealand Foreshore and Seabed Act 2004* CERD/C/66/NZL/Dec.1 (2005).

9 International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969).

10 Hon Pita Sharples (Maori Affairs Minister) "Minister Welcomes Special Rapporteur" (2010) Beehive <www.beehive.govt.nz>.

11 A brief background on the Treaty of Waitangi is provided in Part IV of this article.

recommendations included that the Treaty of Waitangi be constitutionally entrenched; the Waitangi Tribunal, an independent commission of inquiry investigating breaches of the Treaty of Waitangi, be granted binding powers of adjudication; the Foreshore and Seabed Act 2004, which extinguished Māori property rights over the foreshore and seabed and replaced them with lesser statutory rights be repealed or amended and the rights of Māori recognised; the Government negotiate with Māori a more fair and equitable policy and process for settlement of claims regarding breaches of the Treaty of Waitangi; more resources be allocated to Māori education at all levels; and that the Government continue to support achievement of the then draft UNDRIP by consensus.[12] Many of Anaya's recommendations echoed Stavenhagen's, although their precise form differed. For example, Anaya's recommendations included that the principles of the Treaty of Waitangi and related internationally protected human rights be provided security within the domestic legal system; the Waitangi Tribunal receive greater funding; legislation replacing the Foreshore and Seabed Act 2004 be consistent with the principles of the Treaty of Waitangi and international standards; the Treaty of Waitangi settlement process involve all interested groups, provide adequate redress to Māori and give greater consideration to the connection Māori have with their traditional lands and resources; and, that the Government continue its work to address socio-economic disparities between Māori and non-Māori.[13]

The differences in the formulation of the recommendations reflected the experts' differing approaches to the mandate. Both Stavenhagen and Anaya have underscored their role as Special Rapporteur in raising the voices and concerns of Indigenous peoples at the highest levels of government and the international system.[14] However, the way the experts have performed this task has differed. Stavenhagen was more openly critical of the New Zealand Government in his report; Anaya was less so. Stavenhagen's recommendations were far-reaching, often structural, and comparatively specific, while Anaya's were more pragmatic and generally broad enough to allow the Government room to manoeuvre on the precise form of the appropriate policy response. Stavenhagen appeared to place more weight on his role as a spokesperson for Māori. In contrast, Anaya emphasised the dialogue-building dimension of his mandate, seeking to foster an ongoing relationship with the New Zealand Government. It is up to each expert to calibrate their findings and recommendations as they see fit, within the guidelines of the special procedures' Code of Conduct and Manual of Operations.[15] The experts may

12 Stavenhagen Report, above n 3, at [83]-[103].

13 Anaya New Zealand, above n 3, at [68]-[85].

14 Interview with Rodolfo Stavenhagen, former Special Rapporteur on the rights of indigenous peoples (the author, Interview 7, April 2011); Interview with James Anaya, Special Rapporteur on the rights of indigenous peoples (the author, Interview 8, January 2011 and July 2013).

15 HRC Res 5/2 (2007) HRC *The Manual of Operations of the Special Procedures of the Human Rights Council* (2008).

be guided by a desire to formulate recommendations that will ignite domestic debate, gain widespread support from the affected Indigenous peoples or stand the greatest chance at implementation by the Government, amongst other motivations. But the experts must also wear the consequences of that calibration. In Stavenhagen's case, it prompted a vitriolic response from the New Zealand Government, as will be seen below, but a positive response from Māori.[16] In Anaya's case, it garnered a comparatively positive response from the New Zealand Government, but a lukewarm reaction from Māori.[17]

III. Responding to Indigenous Rights Criticism: The Government's Initial Response to the Special Rapporteur's Recommendations

The New Zealand Government's initial response to the missions and reports of the two Special Rapporteurs on the rights of indigenous peoples varied markedly. The Government showed "little interest" in Stavenhagen's visit (the Prime Minister did not meet with him), it was "not collaborative"[18] and it took extreme offence at his report.[19] Publically, the Prime Minister claimed the report was "unbalanced".[20] The Deputy Prime Minister, in a lengthy press release, called it "selective", "disappointing" and "narrow", as well as claiming that it was full of errors of fact and interpretation. He commented, "[h]is raft of recommendations is an attempt to tell us how to manage our political system. This may be fine in countries without a proud democratic tradition, but not in New Zealand where we prefer to debate and find solutions to these issues ourselves".[21] The Government argued that Stavenhagen had "failed to grasp the importance of the special mechanisms we have in place to deal with Māori grievances and the progress successive governments have made".[22] It criticised several of the specific concerns raised in Stavenhagen's report, including regarding the Treaty settlement process, Māori political representation and the protection of Māori cultural heritage. But its most extensive criticisms were directed at Stavenhagen's conclusions and recommendations regarding Māori rights over the foreshore and seabed,

16 See for example Moana Jackson "The United Nations on the Foreshore: A Summary of the Report of the Special Rapporteur" (2006) <www.converge.org.nz>.

17 The report received little public attention from Māori, but see Waatea603am "UN Report Shouldn't be Lost in Upheaval" (2011) <www.waatea603am.co.nz>; Interview 1 (the author, May 2011); Interview 4 (the author, May 2011); Interview 5 (the author, May 2011).

18 Preston and others, above n 5, at 35-36.

19 Ministry of Foreign Affairs and Trade Internal Communications (31 January, 17 February 2006) (Obtained under Official Information Act 1982 request to the Ministry of Foreign Affairs and Trade).

20 TVNZ "UN Report Critical of Foreshore Act" (4 April 2006) Television New Zealand <http://tvnz.co.nz/politics-news/un-report-critical-foreshore-act-695153>.

21 Deputy Prime Minister Michael Cullen "Response to UN Special Rapporteur Report" (2006) Beehive <www.beehive.govt.nz>.

22 Above n 21.

which are explored below.[23] The Government stated that it would make "a brief and carefully worded formal response to the UN; but will not act on its recommendations".[24] Its statement on the report to the UN was polite but largely ignored the report's contents, instead focusing on the reasons why the Government considered itself a leader in Indigenous rights recognition.[25]

Five years later, Anaya's visit and report on New Zealand were seemingly welcomed by the Government. Internal government documents describe Anaya as "informed and engaged", that he had "a sophisticated appreciation of how to engage with governments and ways of progressing issues for indigenous peoples" and that "his programme was a good news story for New Zealand".[26] The Prime Minister met with him. When Anaya's advance report was released the Government issued no public criticism of the report. In fact, it made no public comment all; in part because of the devastating earthquake that struck southern New Zealand hours after release of the report. In a formal statement on the final report to the UN Human Rights Council, the Government expressed appreciation for the report and acknowledged several of the concerns Anaya raised, including regarding timely resolution of historical claims under the Treaty of Waitangi, Māori rights to the foreshore and seabed, Māori overrepresentation in the criminal justice system and the negative socio-economic conditions experienced by Māori. It also used the opportunity to promote what it presented as developments in accordance with Anaya's recommendations, including regarding the foreshore and seabed, Māori participation in decision-making and efforts to reduce Māori recidivism. The Government stated that it was "already acting on many of his recommendations and will continue to draw on the report over time".[27] The Government had moved from an apparent rejection of the Special Rapporteur on the rights of indigenous peoples' mission and report to an apparent commitment to both within five years. The concern here is to what extent this rejection and then apparent commitment translated into action to implement the Special Rapporteur's recommendations.

The analysis proceeds on the assumption that the New Zealand Government should act in accordance with the Special Rapporteur's recommendations. This is open to debate. Some argue that a lone outsider who spends only a short time in the country should not have any say over how a country

23 Above n 21.

24 TVNZ "No consensus over UN report" (5 April 2006) Television New Zealand <http://tvnz.co.nz/content/695498/425825/article.html>.

25 HE Don Mackay, New Zealand Permanent Representative "Human Rights Council: Presentation of Report by Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples, Statement by HE Don Mackay, New Zealand Permanent Representative" (Geneva, 19 September 2006).

26 Ministry of Foreign Affairs and Trade Internal Communication (13 August 2010) (Obtained under Official Information Act 1982 request to the Ministry of Foreign Affairs and Trade).

27 HRC, Dell Higgie, New Zealand Government Representative speaking in "Webcast18th Session of the Human Rights Council. Statement of Special Rapporteur and Interactive Dialogue" (Webcast, 21 September 2011) <http://unsr.jamesanaya.org>.

addresses its Indigenous rights situation. The New Zealand Government's response to Stavenhagen's report is a classic example of this view. There is merit in such arguments: these are important issues with long and complex histories that often require the delicate balance of valid competing interests. At the same time, the mandate-holders are appointed because of their expertise. Both Stavenhagen and Anaya are leading scholars in the field of Indigenous peoples' rights, Stavenhagen from a social sciences background and Anaya a legal one. As outside experts, patterns and insights not observed by domestic actors may be revealed to them. Yet, the recommendations are a product of domestic input too, including from the constellation of actors that the experts meet with during their time in the country. The experts' function in raising the voices and concerns of Indigenous peoples to the highest levels of governments and the international system is vital in states like New Zealand where Māori are a numerical minority and remain on the margins of power and over-represented in negative socio-economic statistics.[28] Although the Special Rapporteur's suggestions are recommendations only, as the recommendations of an expert UN mechanism established under the authority of the UN Charter, the recommendations carry the force of that organisation.[29] States that are a party to the UN Charter, like New Zealand, are thus expected to implement the Special Rapporteur's recommendations.[30] Further, the normative framework that informs the mandate of the Special Rapporteur on the rights of indigenous peoples is drawn from a range of sources to which New Zealand is bound or has expressed its support, including the UNDRIP, the Universal Declaration of Human Rights and core international human rights treaties such as the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and CERD.[31] As a UN human rights mandate the Special Rapporteur is an authoritative voice on the application of these international norms in domestic contexts.

28 See for example Ministry of Social Development *The Social Report 2010* (Ministry of Social Development, Wellington, 2010).

29 Patrick Flood argues that "[v]alidly established Charter-based human rights mechanisms and procedures are legally binding on all member states" in Patrick J Flood *The Effectiveness of UN Human Rights Institutions* (Praeger Publishers, Westport, Connecticut, 1998) at 91-92. See generally Ingrid Nifosi *The UN Special Procedures in the Field of Human Rights* (Intersentia, Antwerp and Oxford, 2005); Philip Alston "The Commission on Human Rights" in Philip Alston (ed) *The United Nations and Human Rights* (Clarendon Press, Oxford, 1992) at 126-210.

30 See for example Commission on Human Rights Res 2004/76 (2004) at [3].

31 See for example Office for High Commissioner of Human Rights "Normative Framework" at <www.ohchr.org>; HRC Res 6/12 A/HRC/RES/6/12 (2007) at [1](g) – [1](i); HRC *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S James Anaya* A/HRC/9/9 (2008) at [41]; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature on 16 December 1966, entered into force 3 January 1976); Convention on the Elimination of All Forms of Racial Discrimination, above n 9.

IV. The Influence of the Special Rapporteur's Recommendations on New Zealand's Behaviour Towards Māori

A. Implementation of the Special Rapporteur's Recommendations: An Overview

Any attempt to assess the influence of the Special Rapporteur's recommendations on the Government is difficult. Even where moves have been made by the Government to act on rights issues that form the subject of the Special Rapporteur's recommendations, assessing whether those actions have been taken in response to the Special Rapporteur or other actors or factors is difficult. Governments rarely acknowledge the motivations for their actions;[32] New Zealand is no exception. Despite this, it is possible to sift through the available information to draw some plausible conclusions regarding the influence of the Special Rapporteur's recommendations on the New Zealand Government. It demands a two-stage analysis. First, an assessment of the extent to which action has been taken in accordance with the Special Rapporteur's recommendation and, secondly, an assessment of the extent to which that action is attributable to the Special Rapporteur.

The New Zealand Government has actioned few of the Special Rapporteur's recommendations in their totality. Some have been implemented. The recommendations that have been implemented are recommendations that simply require endorsement of an international instrument – the UNDRIP for example[33] – or the continuation of existing government action, such as support for Māori Television[34] and the Government's Whānau Ora social programme.[35] But even these moves have been problematic. For example, in the Government's statement endorsing the UNDRIP it repeatedly emphasised the aspirational nature of elements of the UNDRIP and implied that no changes to bring its domestic practices, policies and legislation into line with the rights affirmed in the UNDRIP were necessary.[36] Nor is there credible evidence to suggest that these moves were made in response to the Special Rapporteur's recommendations. For instance, the Government's endorsement of the UNDRIP is most persuasively attributable to domestic lobbying efforts, in the context of moves by the other states who were originally

32 See for example Philip Alston "Hobbling the Monitors: Should U.N. Human Rights Monitors be Accountable?" (2011) 52 (2) Harv Int'l LJ 561 at 574.

33 Stavenhagen Report, above n 3, at [102]. For New Zealand's endorsement see Hon Pita Sharples, Minister of Māori Affairs "Ninth Session of the United Nations Permanent Forum on Indigenous Issues, 19-30 April 2010" (New York, 19 April 2010).

34 Anaya New Zealand, above n 3, at [81]. For an example of continued funding to Māori Television see Treasury *Vote Māori Affairs: The Estimates of Appropriations 2013/14*.

35 Anaya New Zealand above n 3, at [84]. For an example of continued funding to Whānau Ora see Treasury *Vote Māori Affairs: The Estimates of Appropriations 2013/14*.

36 Sharples, above n 33.

also in opposition to the UNDRIP publically reversing their position.[37] The Government has rejected some recommendations, such as Stavenhagen's recommendation that the Waitangi Tribunal be granted binding powers of adjudication,[38] which the Government has indicated it has no plans to action.[39] But the Government's dominant response has been to partially implement aspects of the experts' recommendations. To understand the nature of this partial approach to implementation, it is necessary to examine the Government's behaviour in some depth. The Government's approach is illustrated here using three of the Special Rapporteur's recommendations concerning constitutional protection, land rights and education.

B. Constitutional Protection of Māori Rights as Indigenous Peoples

Both Stavenhagen and Anaya identified the domestic insecurity of Māori rights as a concern. Māori rights as Indigenous peoples are subject to a high degree of insecurity in New Zealand's domestic legal system. New Zealand's constitution is drawn from a variety of sources, including statutes, common law and convention. Beyond provisions regarding the functioning of New Zealand's electoral system, New Zealand statutes are capable of amendment by a simple Parliamentary majority, which contributes to rendering New Zealand a country with "perhaps the weakest constitutional safeguards in the western world".[40] The Treaty of Waitangi is increasingly viewed as a part of New Zealand's constitutional canon.[41] Its meaning is contested, in part because there are English and Māori language versions of the text. The Māori language version reserved *iwi* and *hapū tino rangatiratanga* (self-determination) and rights to all of their treasures, tangible and intangible, in exchange for British *kāwanatanga* (governance). In contrast, the English text purported to cede the British Crown sovereignty over New Zealand and to guarantee Māori full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties.[42] The orthodox legal position is that the Treaty requires incorporation into domestic statute in order to be legally enforceable; it is not a source of enforceable rights in itself.[43] For a short period from the mid-1980s the Government moved to incorporate references to the principles of the Treaty in various statutes,

37 For discussion on New Zealand's endorsement of the UN Declaration on the Rights of Indigenous Peoples see Kiri Rangi Toki "Ko Ngā Take Tare Māori: What a Difference a 'Drip' Makes: The Implications of Officially Endorsing the United Nations Declaration on the Rights of Indigenous Peoples" (2010) 16 Auckland U L Rev 243.

38 Stavenhagen Report, above n 3, at [89].

39 New Zealand Human Rights Commission *Tūi Tūi Tuituiā: Race Relations in 2010* (New Zealand Human Rights Commission, Wellington, 2011) at 8-9.

40 Bennion and Cassidy, above n 5, at 40-41.

41 Sir Robin Cooke "Fundamentals" [1988] NZLJ 158; *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 655 and 664 per Cooke P.

42 Claudia Orange *An Illustrated History of The Treaty of Waitangi* (Bridget Williams Books, Wellington, 2004) at 39, 280-282.

43 *Te Heuheu Tukino v Attorney General* [1941] AC 308 (PC).

securing some significant gains for Māori.[44] But in the last decade this practice has abated.[45] There is no reference to Māori or the Treaty in the relatively weak New Zealand Bill of Rights Act 1990 or the Constitution Act 1986. The Bill of Rights Act is not supreme law: no legislation can be struck down because it violates rights affirmed in the Act.[46] But under section 7 of that Act, Bills must be assessed for consistency with the rights it affirms and the Attorney-General must report on any inconsistency to Parliament.[47] It also provides that where a Bill of Rights Act-consistent interpretation "can be given" it should be preferred.[48]

Stavenhagen and Anaya's conclusions and recommendations regarding the domestic insecurity of Māori rights carried a similar thrust. Stavenhagen found that "New Zealand's human rights legislation does not provide sufficient protection mechanisms regarding the collective rights of Māori that emanate from article 2 of the Treaty of Waitangi (their *tino rangatiratanga*)".[49] He recommended that a "convention should be convened to design a constitutional reform" to regulate the Government-Māori relationship "on the basis of the Treaty of Waitangi and the internationally recognized right of all peoples to self-determination".[50] He went on to recommend, *inter alia*, that the Treaty and the New Zealand Bill of Rights Act 1990 be entrenched.[51] Five years later, Anaya raised the issue of the domestic legal insecurity of Māori rights under the Treaty and international human rights in his report.[52] He recommended that "[t]he 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". He recommended "[a]t a minimum, the development of safeguards similar to those under the Bill of Rights Act" for the Treaty of Waitangi.[53]

44 Statutory references to the principles of the Treaty of Waitangi are contained in, for example, the State-Owned Enterprises Act 1986, s 9; Conservation Act 1987, s 4; and Resource Management Act 1991, s 8. Case law on such references includes *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA); *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (CA); and *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA). For discussion of the gains secured by Māori see Paul Rishworth "Minority Rights to Culture, Language and Religion for Indigenous Peoples: the Contribution of a Bill of Rights" (paper presented to International Center for Law and Religion Studies Australia Conference, Canberra, 2009); Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 17-18.

45 Note the inclusion, after much lobbying, of reference to the principles of the Treaty of Waitangi in the Public Finance (Mixed Ownership Model) Amendment Act 2012, s 45Q.

46 New Zealand Bill of Rights Act 1990, s 4.

47 At s 7.

48 At s 6. See generally Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (Lexis Nexis, Wellington, 2005) at 3.

49 Stavenhagen Report, above n 3, at [13].

50 At [84].

51 At [85], [91].

52 Anaya New Zealand, above n 3, at [77]. See also [48]-[51].

53 At [77].

The Government initially rejected the Special Rapporteur's recommendations but ultimately it took some steps in line with them. Privately the Government identified Stavenhagen's position regarding New Zealand's constitutional structure as one of three key concerns in his draft report, observing that "[e]ntrenchment can be seen to disregard the essential character of the New Zealand constitution".[54] Before the Human Rights Council it dismissed the need for constitutional change, stating:

> the report raises questions concerning possible constitutional change. There is a diverse range of opinion about this subject in New Zealand and at this stage there is no consensus for constitutional change. However, any agreed change will be brought about through the free and full exercise of democratic prerogatives by Māori and non-Māori alike.[55]

Consistent with this position, for several years there was no movement on this recommendation. But late in 2008 the National and Māori Parties signed a confidence and supply agreement, which committed to establishing no later than early 2010 "a group to consider constitutional issues including Māori representation".[56] Soon after Anaya's mission ended, the Government announced the terms of reference for the review. It included consideration of Māori representation, including the Māori electoral option, Māori electoral participation and Māori seats in Parliament and local government, as well as the role of Māori customs and the Treaty in New Zealand's constitutional arrangements.[57] It also included consideration of the size and term of Parliament, Bill of Rights issues and whether New Zealand should have a consolidated constitution. The public were given an opportunity to provide submissions to the Constitutional Advisory Panel, which will report its advice to the Government by the end of 2013, with the Government providing its response by mid-2014. Anaya's report, which was released after the terms of reference were announced, identified the constitutional review process as one of the "significant strides" taken by the Government "to advance the rights of Māori people and to address concerns raised by the former Special Rapporteur".[58]

The constitutional review process only goes a small way towards giving effect to either Special Rapporteur's recommendations, however. The Government has committed to a conversation only. No specific action is required following the review. Majority interests, in Parliament and amongst the public, will hold sway regardless of the legitimacy of Māori claims for constitutional recognition of their rights as Indigenous peoples: the Government has advised that any significant proposals that come out of

54 Ministry of Foreign Affairs and Trade Internal Memorandum (3 February 2006) (Obtained under Official Information Act 1982 request to the Ministry of Foreign Affairs and Trade).
55 Mackay, above n 25.
56 National Party and the Māori Party *Relationship and Confidence and Supply Agreement between the National Party and the Maori Party* (16 November 2008) at 2.
57 Ministry of Justice *Terms of Reference – Consideration of Constitutional Issues* (Ministry of Justice, Wellington, 2010).
58 Anaya New Zealand, above n 3, at [66].

the review will need either to pass a referendum or receive broad cross-party support to be implemented.[59] As a result, the likelihood of moves to centre the Treaty in New Zealand's constitutional arrangements or to give effect to the right of Māori to be self-determining is slim, for example. Māori form a minority in the population and in Parliament and domestic rhetoric around perceived Māori privileges remains strong.[60] The terms of reference make no mention of Indigenous peoples' right to self-determination or international Indigenous rights norms. Some have argued that the Treaty is marginalised because the review is concerned with how the Treaty fits into the constitution rather than how the constitution is drawn out of the Treaty.[61] Concerns about the focus of the Government's Constitutional Advisory Panel prompted the creation of a parallel *iwi*-led constitutional working group: Aotearoa Matike Mai. It has engaged with Māori to develop a model constitution based on Māori *kawa* (protocol) and *tikanga* (custom), the Treaty and the 1835 Declaration of Independence, which asserted New Zealand's independence under the rule of a collection of North Island chiefs.[62]

The role of Stavenhagen and Anaya in securing even this small achievement is minimal. The confidence and supply agreement with the Māori Party was the prime driver for the Government's review, in turn reflecting decades long debate among Māori concerning New Zealand's constitutional arrangements. As Risse and Ropp explain, changes in domestic politics – such as the move here from a Labour to a National-led coalition Government with the support of the Māori Party – can often act as a forerunner to improved domestic approaches to human rights.[63] Other domestic actors, such as the New Zealand Human Rights Commission, have made domestic legal security for the Treaty principles and international human rights a priority for action too.[64] Further, additional international actors to the Special Rapporteur have raised similar concerns over the years.[65] But Stavenhagen's recommendation provided an additional leverage point for the Māori Party's advocacy for a review.[66] And,

59 NZ Herald "Editorial: Treaty central to talks on constitution" (New Zealand, 16 December 2010).

60 See for example New Zealand Human Rights Commission *Tūi Tūi Tuituiā: Race Relations in 2012* (New Zealand Human Rights Commission, Wellington, 2013) at 63.

61 Mike Smith "Interview with Moana Jackson on Constitutional Change" (27 September 2007) YouTube <www.youtube.com>; Interview 3 (the author, May 2011).

62 Independent Iwi Constitutional Working Group: Aotearoa Matike Mai <www.converge.org.nz/pma/iwi.htm>.

63 Risse and Ropp "Conclusions" in T Risse, S C Ropp and K Sikkink, (eds) *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, Cambridge, 1999) at 241.

64 See for example Rosslyn Noonan, New Zealand Human Rights Commission in HRC, above n 27.

65 See for example CERD *Concluding observations of the Committee on the Elimination of Racial Discrimination: New Zealand* CERD/C/NZL/CO/17 (2007) [CERD 2007] at [13]; HRC *Report of Working Group on the Universal Periodic Review: New Zealand* A/HRC/12/8 (2009) at [81(21)].

66 Interview 2 (the author, May 2011).

before the Human Rights Council the Government highlighted the steps it had taken in conformity with Anaya's recommendations on domestic protection for Māori rights.[67]

C. Māori Rights to the Foreshore and Seabed

Stavenhagen and Anaya both devoted attention to Māori land rights in their reports on New Zealand. Indigenous peoples' rights to their lands and natural resources are a central issue in New Zealand, as elsewhere. In the last decade, a prime controversy has centred on the Government's appropriation of extant Māori property rights to New Zealand's foreshore and seabed through the Foreshore and Seabed Act 2004 and later replacement legislation.[68] The Foreshore and Seabed Act was enacted following a decision of New Zealand's Court of Appeal that opened the way for the potential recognition of Māori freehold property interests in the foreshore and seabed.[69] The Government reacted by passing legislation under urgency without adequate consultation with Māori to override the decision: the Foreshore and Seabed Act. The Act vested those areas of the foreshore and seabed where Māori might have an interest in the Crown but excluded existing freehold titles from the vesting; extinguished the ability to recognise any freehold title for Māori; and instituted onerous tests for Māori to prove new legislatively constrained customary rights.[70] The Government's response to the Court decision prompted protest in New Zealand on a scale not witnessed since the 1970s, including a *hīkoi* (march) of tens of thousands of people on Parliament.[71] It was the subject of a scathing Waitangi Tribunal report, which found that:

> The policy clearly breaches the principles of the Treaty of Waitangi. But beyond the Treaty, the policy fails in terms of wider norms of domestic and international law that underpin good government in a modern, democratic state. These include the rule of law, and the principles of fairness and non-discrimination.[72]

The CERD Committee also invoked its early warning and urgent action procedure to review the Act while in Bill form, finding that it discriminated against Māori.[73] Despite this, the Government pushed the legislation through Parliament in substantially the same form as the much criticised policy.

67 Dell Higgie, New Zealand Government Representative in HRC, above n 27.

68 For discussion of the foreshore and seabed legislation in relation to the New Zealand Bill of Rights Act 1990 see Fleur Adcock "Māori and the Bill of Rights Act: A Case of Missed Opportunities?" (2013) NZJPIL (forthcoming).

69 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

70 For discussion of the Foreshore and Seabed Act 2004 see Claire Charters and Andrew Erueti "Report from the Inside: The CERD Committee's Review of the Foreshore and Seabed Act 2004" (2005) 36 VUWLR 257.

71 TVNZ "Timeline: Foreshore and Seabed Act" (2009) TVNZ <http://tvnz.co.nz>.

72 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Waitangi Tribunal, Wellington, 2004) at xiv.

73 CERD, above n 8, at [6]. For discussion see Charters and Erueti, above n 70.

Stavenhagen and Anaya each offered recommendations on the foreshore and seabed issue. Stavenhagen found that the Act "extinguished all Māori extant rights to the foreshore and seabed in the name of the public interest and at the same time opened the possibility for the recognition by the Government of customary use and practices through complicated and restrictive judicial and administrative procedures".[74] He recommended that the Foreshore and Seabed Act "be repealed or amended" and that the Government and Māori negotiate a Treaty settlement that recognises "the inherent rights of Māori in the foreshore and seabed" and that establishes "regulatory mechanisms" that allow for the general public's "free and full access" to New Zealand's beaches and coastal areas without discrimination.[75]

Again, the Government resisted Stavenhagen's recommendations in strong terms but eventually took some steps in accordance with them. Privately, the Government identified Stavenhagen's position regarding Māori interests in the foreshore and seabed as one of its key concerns with his draft report.[76] Publically, the Deputy Prime Minister erroneously claimed that Stavenhagen had misstated the effect of the legal decision that had led to enactment of the Foreshore and Seabed Act and the legal position prior to that decision; failed to recognise the changes made to the Act while it was in Bill form as a result of the Waitangi Tribunal report and public submissions; and, misstated the effects of excluding freehold interests from the Crown vesting.[77] However, in September 2010 the Government introduced legislation into the House of Representatives to repeal and replace the Act – the Marine and Coastal Area (Takutai Moana) Bill – as Stavenhagen had recommended.[78]

Contrary to Stavenhagen's recommendations, the Marine and Coastal Area (Takutai Moana) Bill only proposed to slightly improve the position under the Foreshore and Seabed Act. As with the Foreshore and Seabed Act, the Bill proposed extinguishing Māori interests in the foreshore and seabed. But instead of transferring them to the Crown as the original Act did, it would transfer them to a new construct called a "common space". As with the Act, the replacement Bill also discriminated against Māori. In effect, it would only apply to areas where Māori may have an interest, excluding the bulk of foreshore privately held by others from its scope. It did differ from the original Act in that it restored to Māori their right of access to the courts – Māori would have six years to lodge a claim to have their "customary title" in the "common space" recognised. But the "customary title" would be a new form of subordinate title less than the freehold title potentially available

74 Stavenhagen Report, above n 3, at [79].
75 At [92].
76 Ministry of Foreign Affairs and Trade, above n 19.
77 Cullen, above n 21.
78 The Marine and Coastal Area (Takutai Moana) Bill is available from the New Zealand Parliament website <www.parliament.nz>.

prior to enactment of the Foreshore and Seabed Act. In order to establish title Māori would also have to prove continuous use of the relevant area since 1840, a difficult task for most.[79]

The recommendations in Anaya's advance report concerned the Marine and Coastal Area (Takutai Moana) Bill; his mission had taken place just prior to its introduction into the House. By the time Anaya had finalised his report for presentation to the Human Rights Council the Bill had been enacted. In his advance report Anaya commented that the Bill "represents a notable effort to reverse some of the principal areas of concern of the 2004 Foreshore and Seabed Act".[80] But he noted "that the bill still allows for certain past acts of extinguishment of Māori rights to have effect". This prompted him to remind "the Government that the extinguishment of indigenous rights by unilateral, uncompensated acts is inconsistent with the Declaration on the Rights of Indigenous Peoples." In addition, Anaya noted concerns that the Bill only required the Government to "acknowledge" rather than "give effect" to the Treaty of Waitangi and that there was a six year limitation to lodge claims for customary interests.[81] Anaya recommended that the Government consult widely with Māori on the contents of the Bill "in order to address any concerns they might still have". He further recommended that special attention be directed to the Bill's sections 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" so as "to ensure that those provisions are consistent with the principles of the Treaty of Waitangi and international standards".[82] The final report mirrored these findings and recommendations, with some minor refinements to reflect the enactment of the Bill the month following public release of Anaya's advance report.[83] Notably, in the final report Anaya moved to recommend that the provisions of the Act "are *implemented* in a way that is consistent with the principles of the Treaty of Waitangi and international standards."[84]

The Government expressed a commitment to Anaya's recommendations on the legislation but did not action them. The Bill was enacted without substantive amendment as the Marine and Coastal Area (Takutai Moana) Act 2011. It did not address Māori concerns or conform to the principles of the Treaty of Waitangi and international standards, as Anaya recommended. Yet, during the second reading of the Bill the Attorney-General noted that

79 Moana Jackson "A Further Primer on the Foreshore and Seabed: The Marine and Coastal Area (Takutai Moana) Bill" (8 September 2010) Converge <www.converge.org.nz/pma/mj080910.htm>; Jacinta Ruru "Finding Support for a Changed Property Discourse for Aotearoa New Zealand in the United Nations Declaration on the Rights of Indigenous Peoples" (2011) 15 Lewis & Clark L Rev 951 at 974.

80 HRC *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, Addendum: The situation of Maori People in New Zealand*, A/HRC/18/XX/Add.7 (2011) (advance unedited version).

81 At [56].

82 At [78].

83 Anaya New Zealand, above n 3, at [56], [78]-[79].

84 At [79] (emphasis added).

he had "looked at international developments – as I was urged to do by the UN special rapporteur, James Anaya" in developing the tests for "customary title" in the Bill.[85] Further, during the 2011 interactive dialogue on Anaya's report before the Human Rights Council, New Zealand stated that it had "taken note of the Special Rapporteur's concerns about customary rights over the marine and coastal area". It asserted that "[t]he new Act follows extensive consultations with all New Zealanders, including Māori" and "also reflects express consideration of international human rights standards relevant to such customary claims".[86] The Government may have "considered" international human rights standards but those standards are not reflected in the Act, for example it continues to unilaterally extinguish Māori rights without guaranteeing compensation. Nor was the Bill enacted following adequate consultation with Māori. The Parliamentary Select Committee considering the Bill received approximately 6000 submissions on the Bill.[87] All bar one of the submissions from *marae* (Māori meeting places), *hapū*, *iwi*, Māori land owners, Māori organisations and Māori collectives opposed passage of the Bill as it was drafted.[88] Yet, the Select Committee issued a brief report in response recommending that the Bill be passed without amendment.[89] The flaws in the Act are such that its provisions cannot be "*implemented* in a way that is consistent with the principles of the Treaty of Waitangi and international standards," as Anaya recommended in his final report.[90]

Again, the Special Rapporteur's role in helping to bring about the largely token changes in the foreshore and seabed legislation was small. The Government did profess to have taken on board Anaya's concerns. Attention to the issue from Stavenhagen and Anaya also bolstered domestic opposition to the legislation and meant that the Government was repeatedly being asked to explain its approach on the international stage. But Stavenhagen and Anaya were not the only international actors expressing concern at the legislation. Actors including the CERD Committee,[91] states participating in New Zealand's first universal periodic review before the Human Rights Council[92]

85 Hon Christopher Finlayson "Marine and Coastal Area (Takutai Moana) Bill: Second Reading" (2011) 670 NZPD 16976.

86 Higgie, above n 67.

87 CERD *Reports Submitted by States Parties under Article 9 of the Convention: New Zealand* CERD/C/NZL/18-20 (2012) [CERD 2012] at [42].

88 See for example, Kaitiaki o te Takutai "Summary of Māori submissions on the Marine and Coastal (Takutai Moana) Bill 2010" (22 February 2011) <www.converge.org.nz/pma/macab.htm>.

89 Māori Affairs Committee, New Zealand House of Representatives *Marine and Coastal Area (Takutai Moana) Bill: Report of the Māori Affairs Committee* (2011). For criticisms of the Select Committee process see Carwyn Jones "Māori Affairs Select Committee Report on Marine and Coastal Area Bill" (19 February 2011) Ahi-kā-roa <http://ahi-ka-roa.blogspot.com/2011/02/maori-affairs-select-committee-report.html>.

90 Anaya New Zealand, above n 3, at [79]. Emphasis added.

91 CERD 2007, above n 65, at [19].

92 HRC, above n 65, at [61].

and the UN Human Rights Committee[93] all issued recommendations on the issue. However, domestic factors again had the most sway. In the same 2008 confidence and supply agreement between the National and Māori Parties that provided for a constitutional review, the parties agreed to "initiate as a priority a review of the application of the Foreshore and Seabed Act 2004 to ascertain whether it adequately maintains and enhances mana whenua".[94] *Mana whenua* is the exercise of traditional authority over an area. A Government appointed Ministerial panel was established to fulfil this task. In its 2009 report the Ministerial panel determined that the Act, *inter alia*, discriminated against Māori and recommended that it be repealed, with a more appropriate balance being struck between Māori property rights and public rights and expectations.[95] The replacement Act was a product of this determination. The role of the Māori Party was again pivotal. In turn, the Māori Party itself was formed on the basis of the groundswell of Māori opposition to the Foreshore and Seabed Act.

D. Māori Rights to Education

Both Special Rapporteurs considered Māori rights to education in their reports. Māori educational outcomes and access to a quality education in *te reo* Māori (the Māori language) remain a concern in New Zealand. For much of the 19th and 20th centuries New Zealand adopted an assimilationist education model, with the use of *te reo* Māori in schools actively discouraged and high levels of discrimination against Māori within educational institutions and curricula. As a result, by the latter half of the twentieth century *te reo* Māori was on the verge of being lost and Māori educational outcomes were poor. Māori-led efforts resulted in the creation of *kōhanga reo*, *te reo* Māori immersion preschools in the 1980s; the recognition of *te reo* Māori as an official language in 1987; the development of a Māori Language Strategy in 2003; and, the creation of *wānanga* or Māori tertiary education providers. As a result of these and other initiatives, by 2003 there were 61 *te reo* Māori immersion schools, 83 bilingual schools as well as others with some immersion and bilingual classes; and Māori participation in lower level tertiary education had grown rapidly. But there remained a shortage of professionally trained *te reo* Māori teachers and Māori educational outcomes continued to be low when compared with those of non-Māori.[96]

93 Simon Power "Response to Questions 1 to 16: Minister Simon Power" (15 March 2010) Beehive <www.beehive.govt.nz>; Human Rights Committee *List of Issues to be Taken Up in Connection with the Consideration of the Fifth Periodic Report of New Zealand* (CCPR/C/NZL/5) CCPR/C/NZL/Q/5 (2009) at [9].

94 National Party and the Māori Party, above n 56, at 2.

95 Ministry of Justice *Pākia ki Uta, Pākia ki Tai: Summary Report of the Ministerial Review Panel: Ministerial Review of the Foreshore and Seabed Act 2004* (Ministry of Justice, Wellington, 2009) at 12-13.

96 Stavenhagen Report, above n 3, at [59]-[64]; Maori Language Act 1987; Ministry of Māori Development *He Rautaki Reo Māori – The Māori Language Strategy* (Ministry of Maori Development, Wellington, 2003); CERD 2012, above n 85, at [139]-[141].

Stavenhagen and Anaya each issued recommendations to address concerns regarding Māori educational outcomes and teaching in *te reo* Māori. Stavenhagen found that "[d]espite progress thus far, the schooling system has been performing on average less well for Māori than for non-Māori students, a problem which points to as yet unresolved issues concerning culturally appropriate educational methodologies".[97] He recommended that "[m]ore resources should be put at the disposal of Māori education at all levels, including teacher training programmes and the development of culturally appropriate teaching materials".[98] Relatedly, he recommended that revival of the Māori language continue to be recognised and respected through appropriate educational channels.[99] Five years later Anaya identified "many key improvements in Māori education since the 2006 report of the previous Special Rapporteur".[100] But he similarly concluded that "the education achievement of Māori children still lags behind that of other New Zealanders, particularly in early childhood education and in secondary school retention".[101] In his recommendations Anaya urged "the Government to work to overcome the shortage of teachers fluent in the Māori language and to continue to develop Māori language programs".[102]

The Government's actions reveal a degree of commitment to improve Māori educational outcomes and teaching in te reo Māori in-line with the Special Rapporteur's recommendations. The Government did not publically criticise either expert's recommendations on these issues. Nor did it do so in internal government documents concerning the visits and reports. More resources have been devoted to Māori education, although not at all levels. For example, the Government's 2013 budget allocates $8,000,000 over a four year period to a new Māori Language Research and Development Fund administered by Te Taura Whiri i te Reo Māori, the Māori Language Commission, "to strengthen the evidence base for effective Māori language policies and programmes". It also devotes funds to a package of scholarships for students training to become teachers in Māori-medium education and high-school level *te reo* Māori.[103] There have been some positive moves in the development of teacher training programmes and culturally appropriate teaching materials. *The New Zealand Curriculum*, the revised curriculum for both primary and secondary schools, was released in 2007. It includes references to the Treaty, acknowledges that *te reo* Māori is an official language for delivery of the curriculum and recognises the importance of a curriculum that reflects and values *te ao* Māori.[104] *Te Marautanga o Aotearoa*, a companion

97 Stavenhagen Report, above n 3, at [64].
98 At [97].
99 At [100].
100 Anaya New Zealand, above n 3, at [58]-[59].
101 At [59].
102 At [80].
103 Hon Dr Pita Sharples "Increased investment in Māori language" (press release, 16 May 2013).
104 Ministry of Education *The New Zealand Curriculum* (Ministry of Education, Wellington, 2007).

document built upon the values of *kōhanga reo* and *kura kaupapa* that sets out the curriculum for schools teaching in *te reo Māori*, was introduced into schools in 2011.[105] It was the first New Zealand educational curriculum to be developed and written in *te reo Māori*. Further, *Ka Hikitia - Managing for Success: The Māori Education Strategy 2008-2012* was released in 2006 with a focus on "increasing the learning and capacity of teachers, placing resourcing and priorities in Māori language in education, and increasing whānau and iwi authority and involvement in education".[106] *Ka Hikitia – Accelerating Success 2013-2017*, the revised Māori education strategy, was released in mid-2013.[107] *Tau Mai Te Reo*, the Ministry of Education's Māori language in education strategy, was released at the same time.[108] In addition, strategies have been designed to improve Māori students' educational success, including *Tū Māia e te Ākonga 2013-2016* and *Te Rautaki Māori 2012-17*.[109] And, the Education Review Office, the government department that publically reports on the quality of education in New Zealand, has made Māori students' success "a matter of national interest and priority".[110]

Issues remain, however. In 2012 the New Zealand Government acknowledged the existence of "significant challenges" in relation to Māori education, including regarding improving "effective teaching and learning for Māori students, especially in relation to cultural responsiveness", increasing "the resources and support available for teachers in Māori medium/ settings", increasing "the supply of teachers proficient in te reo Māori" and ensuring that "secondary schools enable Māori students to gain worthwhile qualifications and make subject choices that open up future opportunities".[111] Māori educational achievement continues to lag behind that of non-Māori. For example, only 47.8 per cent of Māori leave school with a National Certificate in Educational Achievement at level 2 or above, compared with 74 per cent of New Zealanders of European descent. Only 12 per cent of Māori obtain a university bachelor degree by the age of 25, compared with 33 per cent of New Zealanders of European descent.[112] There are concerns that teachers are not being supported in the implementation of the Treaty dimension of *The New Zealand Curriculum*, affecting the quality with which it is taught.[113] *Ka Hikitia* has been criticised for failing to make provision for a *kaupapa* Māori (or Māori-based) approach to learning within mainstream

105 Ministry of Education *Te Marautanga o Aotearoa* (Ministry of Education, Wellington, 2008).
106 Ministry of Education *Ka Hikitia – Managing for Success: The Māori Education Strategy 2008-2012* (Wellington, 2008); Anaya New Zealand, above n 3, at [58].
107 Ministry of Education *Ka Hikitia - Accelerating Success 2013-2017: The Māori Education Strategy* (Wellington, 2013).
108 Ministry of Education *Tau Mai Te Reo: The Māori Language in Education Strategy 2013-2017* (Wellington, 2013).
109 New Zealand Human Rights Commission, above n 39, at 81.
110 At 78.
111 CERD 2012, above n 87, at [142].
112 At [132].
113 Interview 3 (the author, May 2011).

educational institutions.[114] Two Waitangi Tribunal reports have further highlighted concerns. In 2011 the Tribunal found that the Crown had failed in its duty to protect *te reo* Māori under the Treaty, identifying the language as at crisis point and recommending urgent action.[115] In 2012 the Tribunal found that New Zealand's early childhood education system had failed to adequately sustain *kōhanga reo* as an environment for language transmission, in breach of the Treaty and recommending, *inter alia*, that the Government develop a policy and funding regime tailored to *kōhanga reo*.[116] In 2013 the Government appointed an independent advisor to assist in its reengagement with the Kōhanga Reo National Trust following the Tribunal's findings on *kōhanga reo*,[117] but it has yet to formally respond to the Tribunal's findings on the state of *te reo* Māori.

The role of the Special Rapporteur on the rights of indigenous peoples in contributing to these small positive steps is less clear. There is no evidence that either expert influenced the Government's moves. The Government has not publically tied these steps to either Special Rapporteur's recommendations, as it did with Anaya's recommendations under the Marine and Coastal Area (Takutai Moana) Act 2011, for example. Nor do the timing of the moves hint at a pivotal role for the visits or recommendations. Other international actors have also expressed concern at the educational achievement of Māori students and at the state of the Māori language.[118] But the primary driver for these developments is again the lobbying of domestic actors, including the actions of claimants before the Waitangi Tribunal, such as the Kōhanga Reo National Trust, and the New Zealand Human Rights Commission, which made New Zealand's status as a well-established bilingual nation a priority in its 2005 to 2010 action plan for human rights.[119] The Māori Party features heavily again too. Its confidence and supply agreements with the National Party saw the then co-leader of the Māori Party appointed as Associate Minister of Education following the national elections in both 2008 and

114 Wally Penetito "Keynote: Kaupapa Māori Education: Research as the Exposed Edge" in Te Wahanga *Kei Tua o te Pae Hui Proceedings: The Challenges of Kaupapa Māori Research in the 21st Century* (New Zealand Council for Educational Research, Wellington, 2011) at 41.

115 Waitangi Tribunal *Ko Aotearoa Tenei: Te Taumata Tuarua: Volumes 1 and 2* (Waitangi Tribunal, Wellington, 2011).

116 Waitangi Tribunal *Matua Rautia – The Report on the Kōhanga Reo Claim* (Waitangi Tribunal, Wellington, 2012).

117 Hon Hekia Parata (Minister of Education) "Appointment of independent advisor on kōhanga reo" (2013) <www.hekiaparata.co.nz>.

118 See for example CERD *Concluding observations of the Committee on the Elimination of Racial Discrimination: New Zealand* CERD/C/NZL/CO/18-20 (2013) at [15], [17]; Committee on Economic, Social and Cultural Rights (CESCR) *UN Committee on Economic, Social and Cultural Rights: Concluding observations: New Zealand* E/C.12/NZL/CO/3 (2012) at [12], [26]; CERD 2007, above n 65 at [20]; CESCR *UN Committee on Economic, Social and Cultural Rights: Concluding observations: New Zealand* E/C.12/1/Add.88 (2003) at [20], [35].

119 New Zealand Human Rights Commission *Mana ki Te Tangata/The New Zealand Action Plan for Human Rights: Priorities for Action 2005-2010* (New Zealand Human Rights Commission, Wellington, 2005) at [4.4].

2011.[120] Further, in the 2011 agreement the National Party agreed to advance Māori Party policies providing for increases in Māori participation in early childhood education, improved Māori achievement in primary, secondary and tertiary education and to consider recognising the unique status of Māori medium education providers through their own statutory legislation.[121] The Special Rapporteur's recommendations simply bolstered the lobbying efforts of these domestic actors.[122]

V. Compliance Ritualism and its Implications

How can the New Zealand Government's dominant pattern of partial implementation of the recommendations of the Special Rapporteur on the rights of indigenous peoples be understood? Some will paint the partial implementation of these recommendations as a success story for the Special Rapporteur. Certainly, any moves in-line with the experts' recommendations, however small, are deserving of celebration. Yet, a deeper reading reveals that this pattern of partial implementation can also be understood as a deflection technique. The Government deflects attention from its failure to substantively implement the Special Rapporteur's recommendations by taking some shallow steps consistent with those recommendations. The regulatory literature characterises such a behavioural response as "ritualism."

Ritualism is one of five behavioural responses that are possible to normative orders. It occurs where the individual abandons the cultural goals of the normative order but abides by the institutionalised means for achieving those goals.[123] Or as John Braithwaite, Toni Makkai and Valerie Braithwaite argue, it is the "acceptance of institutionalised means for securing regulatory goals, while losing all focus on achieving the goals or outcomes themselves".[124] It is derived from Robert Merton's paradigm of individuals' behavioural adaptions to normative orders.[125] Hilary Charlesworth has applied the concept to state behaviour in the human rights context. She argues that in "the field of human rights, rights ritualism is a more common response than an outright rejection of human rights standards and institutions".[126] In her view "[r]ights ritualism can be understood as a way of embracing the language of human rights precisely to deflect real human rights scrutiny and to avoid accountability

120 National Party and the Māori Party above n 56, at 3; National Party and the Māori Party *Relationship Accord and Confidence and Supply Agreement with the Māori Party* (11 December 2011) [National Party and the Māori Party 2011] at 5.

121 At 3.

122 Interview 3 (the author, May 2011).

123 Robert K Merton *Social Theory and Social Structure* (The Free Press, New York, 1968) at 238, 241.

124 John Braithwaite and others *Regulating Aged Care* (Edward Elgar, Cheltenham, 2007) at viii, 7.

125 The other behavioural responses are conformity, innovation, retreatism and rebellion, see Merton above n 123.

126 Hilary Charlesworth "Kirby Lecture in International Law: Swimming to Cambodia. Justice and Ritual in Human Rights After Conflict" (2010) 29 Aust YBIL 1 at 12.

for human rights abuses".[127] For example, she points out that despite signing up to several core international human rights treaties in order "to earn international approval", Cambodia has failed to implement the commitments in those treaties into domestic law.[128] Charlesworth argues that the tactic is not restricted to states from the global South, suggesting that Australia also engages in rights ritualism.[129]

The author characterises New Zealand's dominant behavioural response to the Special Rapporteur's recommendations as one of ritualism. The New Zealand Government has ultimately moved to outwardly agree with many of the Special Rapporteur's recommendations, while inwardly developing techniques to avoid them. It resists conformity to the Special Rapporteur's recommendations regarding the constitutional protection of Māori rights and Māori rights to the foreshore and seabed but disguises this resistance with ceremonial moves in apparent conformity with the recommendations: the Government engages in a constitutional review process unlikely to result in improved protection for Māori rights and enacts legislation that perpetuates the discrimination it purports to remedy. The Government's response to Māori rights to education is different. Here the Government has taken more substantive steps to conform to aspects of the Special Rapporteur's recommendations. These steps reflect an at least partial commitment to the goals of the international Indigenous rights norms that underpin the Special Rapporteur's recommendations regarding Māori educational outcomes and access to an education in *te reo* Māori. They are not simply a commitment to the institutionalised means for achieving those goals, such as conducting a review or developing a policy that exists on paper only. Yet, even the Government's commitment to these educational goals has limits.

Deflection explains the Government's principal approach to the Special Rapporteur's recommendations. Sheryl Lightfoot's concept of "soft" and "hard" Indigenous peoples' rights assists in articulating how. Lightfoot argues that New Zealand emphasises "individual rights and soft collective rights (language, culture, education, etc.), while simultaneously resisting the hard rights of land and self-determination".[130] The author argues that the New Zealand Government ritualises its conformity to the Special Rapporteur's recommendations regarding "hard" rights in order to deflect attention from its underlying resistance to those rights. It leverages its partial conformity to the Special Rapporteur's recommendations regarding "soft" rights for

127 At 12.
128 At 13.
129 At 13.
130 Sheryl Lightfoot "Emerging International Indigenous Rights Norms and 'Over-Compliance' in New Zealand and Canada" (2010) 62(1) Political Science 84 at 96. Moana Jackson similarly argues that "[t]he only reality Maori are permitted to define and inhabit is a 'cultural' construct of language, music, art and custom", see Moana Jackson "Colonization as Myth-Making: A Case Study in Aotearoa" in S Greymorning (ed) *A Will to Survive: Indigenous Essays on the Politics of Culture, Language and Identity* (McGraw-Hill, New York, 2004) at 107.

the same purpose. I characterise constitutional protection of Māori rights and Māori rights to the foreshore and seabed as "hard" rights because they correlate to Indigenous peoples' rights to self-determination and to their lands, both of which entail power and wealth sharing on the part of the state. In contrast, Māori rights to education are soft rights because they correlate to Indigenous peoples' cultural rights and generally do not challenge existing state power and wealth structures to the same extent.

The New Zealand Government has much to gain from this approach. It affords the Government the appearance of rights conformity while it avoids commitment to the substance or goals of hard Indigenous peoples' rights. By deflecting attention from its ritualised behaviour New Zealand avoids outright confrontation with the Special Rapporteur on the rights of indigenous peoples, as occurred with Stavenhagen. It avoids the negative domestic and international press associated with such an approach: the Government's rejection of Stavenhagen's report was the subject of significant domestic media attention,[131] whereas Anaya's report and the Government's benign response largely flew under the media's radar.[132] It also avoids strong critique from the Special Rapporteur: by eventually moving to ritualise its conformity to Stavenhagen's recommendations the Government was praised for its perceived progress in Anaya's 2011 follow-up report and received more muted criticisms from Anaya for ongoing concerns. Because the Government does not outright reject the norms the subject of the Special Rapporteur's recommendations its resistance is more subtle and, thus, more difficult to identify. This carries implications for how the human rights situation of Māori is viewed both domestically and on the world stage. In particular, it enables New Zealand's self-propagated image as a world leader in Indigenous rights recognition to go unquestioned. The analysis offered here indicates that New Zealand's approach to Indigenous rights recognition is in fact more complex, favouring recognition of soft rights over hard rights.

VI. Conclusion

The Special Rapporteur on the rights of indigenous peoples has had an imperfect but appreciable influence on the New Zealand Government's behaviour towards Māori. The Government has implemented some of the Special Rapporteur's recommendations, it has rejected others. But ritualism, dressed up as partial implementation, has been the Government's dominant behavioural response to the Special Rapporteur's recommendations. The

131 See for example "No consensus over UN report" above n 24; Moana Jackson "The United Nations and the foreshore" (2006) 68 Mana at 18-19; Dan Eaton "Pressure Mounts on Govt over UN Report" *The Press* (Christchurch, 6 April 2006); Tracy Watkins "Labour Defiant over UN Rebuke" *The Dominion Post* (Wellington, 5 April 2006).

132 See Waatea603am, above n 17; Carwyn Jones "Special Rapporteur Report: Treaty Settlements" (28 February 2011) Ahi-kā-roa <http://ahi-ka-roa.blogspot.com/2011/02/special-rapporteur-report-treaty.html>.

Government initially rejected the Special Rapporteur's recommendations concerning the protection of Māori rights in New Zealand's constitutional arrangements and in the foreshore and seabed, only to later take steps that give the appearance of a commitment to those recommendations. But the commitment is not to the goals of the Special Rapporteur's recommendations: domestic legal security for Māori rights under the Treaty and international human rights law, including in respect of the foreshore and seabed. Rather, it is to the institutionalised means for achieving those goals: a constitutional review and new foreshore and seabed legislation. The Government has demonstrated a degree of commitment to the Special Rapporteur's recommendations regarding Māori rights to education. But it leverages partial conformity to this soft cultural right to deflect attention from its underlying resistance to the hard rights regarding self-determination and land. The analysis indicates that human rights investigators must be vigilant to the possibility that states are engaging in Indigenous rights ritualism, even (and perhaps especially) in states that are reputedly world leaders in Indigenous rights recognition like New Zealand. It also reveals that in New Zealand it is domestic – rather than international – factors that are the prime determinant of the Government's behaviour towards Māori.