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Amnesty International Aotearoa New Zealand:

AIANZ Submission
Marine and Costal Area (Takutai Moana) Bill

19 November 2010

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1. Executive summary

Amnesty International Aotearoa New Zealand (AIANZ) welcomes the opportunity to comment on the Marine and Costal Area (Takutai Moana) Bill ('the Bill'). AIANZ welcomes the provision for applicants to apply to the courts for a recognition order, as well as several manifestations of Māori customary rights within the Bill including the second right of refusal to iwi and hapū, the provision for the transfer of title in accordance with tikanga and the provision of permission rights.

While AIANZ welcomes the repeal of the Foreshore and Seabed Act 2004 ('the Act'), it is concerned at the absence of meaningful differences in practical effect of the Act and the Bill. In its current form, the Bill continues to discriminate against Māori by virtue of the fact that customary interests cannot include the right to exclusive occupation, unlike specified freehold title. Additionally, AIANZ believes the tests for establishing protected customary rights and customary marine titles should not be codified in the Bill but left to the courts to develop. Finally, AIANZ submits that the Bill should not include a time limit for customary interest applications.

2. Background

Since its enactment, Amnesty International has been concerned with the human rights implications of the Act and, in particular, its adverse impact on indigenous rights.[1] The Act extinguishes the possibility of establishing Māori customary titles over the foreshore and seabed and does not provide a guaranteed right of redress for the abrogation of these rights. In its submission to the Ministerial Review Panel in May 2009[2], Amnesty therefore raised concerns over the adverse impact the Act had, and is still having, on the following human rights:

a. The right to be free from discrimination;
b. The right not to be arbitrarily deprived of property and to a remedy;
c. The right to culture;
d. The right to development; and
e. The right to free, prior and informed consent.

Additionally, in its submission responding to the Consultation Document "Reviewing the Foreshore and Seabed Act 2004" in April 2010[3] Amnesty argued that the following human rights concerns should be noted and/or addressed in any reform, repeal or replacement of the Act:

a) Irrespective of which option was finally enacted, the right to a remedy must be legislated for;
b) A risk of discrimination arose under all four options presented by the Government; and
c) Whichever option was selected, the tests for establishing customary interests must not be too onerous.

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[1] An explanation of the origins of indigenous rights and, in particular, indigenous property rights, is available in annex 1.

[2] Amnesty International Aotearoa New Zealand (May, 2009). *Submission on the Foreshore and Seabed Act 2004 to the Ministerial Foreshore and Seabed Review Panel*. Retrieved from http://www.amnesty.org.nz/files/Final_Submission_on_Foreshore_Seabed_Review_Version_19_May_2009.pdf

[3] Amnesty International Aotearoa New Zealand (April, 2010). *Submission to the New Zealand Government's consultation document: Reviewing the Foreshore and Seabed Act 2004.* Retrieved from http://www.amnesty.org.nz/files/100429-FSA-review-submission.pdf

As the Bill has, in part, been introduced to address the above human rights concerns, Amnesty International welcomes the opportunity to provide a submission to the Māori Affairs Select Committee (the 'Select Committee') on the Bill.

As the first bill of broad application to be presented to Parliament since New Zealand's endorsement of the United Nations Declaration on the Rights of Indigenous Peoples ('the UNDRIP'), Amnesty International considers the Bill to be a timely opportunity for New Zealand to exhibit its genuine commitment to the rights enshrined in the UNDRIP. Indeed, as the UNDRIP is an articulation of basic human rights in language that contextualises and gives meaning to those rights for indigenous peoples, Amnesty International believes the UNDRIP may also provide invaluable normative guidance to the Select Committee when reviewing the Bill.

3. Positive aspects of the Bill:

a. Repeal of the Act

Amnesty International welcomes the repeal of the Act under clause 14 of the Bill and appreciates the symbolic significance of repeal within the context of such widespread opposition to the Act. However, Amnesty's concerns, outlined below, do bring into question the extent to which the Bill, in its current form, makes any meaningful, practical changes to address human rights concerns with the Act.

b. A durable scheme

Amnesty likewise welcomes the Bill's objective of achieving a "durable scheme", under clause 4(1)(a), to the issue of ownership of the foreshore and seabed. Noting concerns outlined below however, Amnesty again has serious reservations as to whether the Bill, in its current form, will provide such a scheme for this vexed issue.

c. Consultation

Amnesty welcomes the six weeks provided by the Select Committee to prepare submissions on the Bill which will allow stakeholders adequate time to prepare considered and constructive input to the Select Committee on how the Bill might best resolve the issue of ownership of the foreshore and seabed.

d. Remedy

Amnesty welcomes provision for applicants to apply to the High Court for a recognition order establishing their customary marine title or protected customary rights (clause 98(1)). Additionally, the provision for applicants dissatisfied with the High Court's decision to appeal to the Court of Appeal (clause 112(1)) is also welcomed.

e. Second right of refusal to iwi and hapū

Amnesty International welcomes the Bill's requirement, under clause 47, on owners who wish to dispose of their freehold interests in reclaimed land to first provide iwi and hapū exercising customary authority over the land the opportunity, after the Minister, to purchase the title. Amnesty considers this requirement to be both a creative and principled manifestation of Māori customary rights within the Bill.

f. Transfer in accordance with tikanga

Amnesty welcomes the ability of a customary marine title group to delegate or transfer its title under clause 63(2)(a) and (b) in accordance with tikanga. This is both a recognition that Māori have the right "to maintain, protect and develop the past, present and future manifestations of their cultures" and that legal recognition of Māori lands, territories and resources should be "conducted with due respect to the[ir] customs, traditions and land tenure systems" as affirmed by Articles 11(1) and 26(3) of the UNDRIP, respectively.[4]

g. Permission rights

Amnesty welcomes the provision, under clauses 65 and 70 of the Bill, of Resource Management Act 1991 permission and conservation permission rights to customary marine title groups as the provision for customary marine titles to be at least partially proprietary in nature.[5] Notwithstanding these and other rights,[6] however, Amnesty is concerned there appears to be a lack of traditional proprietary rights which attach to customary marine titles under the Bill.[7]

4. Human rights concerns with the Bill:

a. A repeal in name only?

In broad terms, the Act created a framework for transmuting indigenous title and rights to the foreshore and seabed and, in doing so, stripped the rights of their proprietary and inherent characteristics and rendered their recognition contingent on oppressive and reductive tests.[8]

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[4] Article 11(1) of the UNDRIP states that "indigenous peoples have the right to practise and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature". Article 26(3) states that "states shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned". United Nations (2007). *Declaration on the Rights of Indigenous Peoples* . Retrieved from http://www.un.org/esa/socdev/unpfii/en/drip.html

[5] Amnesty also notes the right to protect wāhi tapu and wāhi tapu areas under clauses 77-80; the rights in relation to marine mammal watching permits under clause 75; the rights in relation to the process for preparing, issuing, changing, reviewing, or revoking a New Zealand coastal policy statement under clause 76; the prima facie ownership of newly found taonga tūturu under clause 81; ownership of certain minerals; and the right to create a planning document under clauses 84-91.

[6] Including, the right to "use, benefit from, or develop (including deriving commercial benefit)" under clause 63(2)(c) of the Bill.

[7] Particularly noting the prohibition on alienation and dispossession under clause 63(1)(a) and the prohibition on excluding people under clause 27(1).

[8] See Amnesty International Aotearoa New Zealand (May, 2009). *Submission on the Foreshore and Seabed Act 2004 to the Ministerial Foreshore and Seabed Review Panel*. Retrieved from

Similarly, the Bill is a framework for transmuting rights. While it recognises that title amounts to an ‘interest in land’ under clause 63(1)(a), it does not recognise the full spectrum of proprietary rights which characteristically attach to land ownership.[9] Similarly, while its tests for rights recognition under clauses 53 and 60 are less onerous than the Act’s, they remain both burdensome and reductive (see below for more detail). Equally, the distinction between Crown ownership, as legislated for under the Act, and common marine and coastal area, as drafted in the Bill, is noticeably limited.

Of further concern in this regard is the fact that the explanation for why the Bill's discriminatory effect is demonstrably justified is almost identical to that which was employed to justify the Act's discriminatory effect back in 2004.[10]

The human rights concerns that fuelled opposition to the Act have yet to be addressed by the Bill. Amnesty therefore does not consider the Bill to be meaningfully different in its practical effect to the Act which it replaces.

Noting the continued widespread opposition to the Act, including from the New Zealand public, the United Nations Committee on the Elimination of Racial Discrimination (CERD) and the United Nations’ Special Rapporteur on Indigenous Peoples,[11] the absence of any significant difference between the Act and the Bill would undermine the objective of achieving a ‘durable scheme’ to ownership of the foreshore and seabed. Of additional concern in this regard is the apparent absence of widespread consensus amongst Māori that the Bill successfully resolves concerns with the Act. Indeed, the absence of consensus amongst Māori is particularly concerning when contrasted with the characteristic agreement among Māori over Crown-iwi settlements of historical grievances.

b. Treaty of Waitangi and the UNDRIP

Amnesty International is concerned that the Bill only *acknowledges* the Treaty of Waitangi under clauses 4(1)(D)) and 5 and does not, as in other legislation, *give effect* to the Treaty and its principles. The principles of the Treaty act as the foundation on which the partnership between Māori and the Crown has been established and must continue to be developed, within a framework of respect for the human rights of all citizens. If an enduring solution to the foreshore and seabed issue is to be achieved and not periodically or perpetually challenged in the Waitangi Tribunal or other forums, meaningful recognition of the Treaty of Waitangi must be evidenced in the Bill. Consequently, Amnesty recommends that clause 4(1)(D) be replaced with the following wording, similar to that

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http://www.amnesty.org.nz/files/Final_Submission_on_Foreshore_Seabed_Review_Version_19_May_2009.pdf and Amnesty International Aotearoa New Zealand (April, 2010). *Submission to the New Zealand Government’s consultation document: Reviewing the Foreshore and Seabed Act 2004.* Retrieved from http://www.amnesty.org.nz/files/100429-FSA-review-submission.pdf.

[9] See below the sections on 'Discrimination' and 'Proprietary Rights' for further information.

[10] See below the section on 'Discrimination' for further detail on this point.

[11] Both Rodolfo Stavenhagen and James Anaya, respectively.

found in section 4 of the Conservation Act 1987: This Act shall be interpreted and administered so as to give effect to the principles of the Treaty of Waitangi.[12]

Additionally, as the Bill is the first legislation to be introduced into Parliament which affects indigenous rights generally since New Zealand's endorsement of the UNDRIP, Amnesty recommends a clause be added, under the Bill's *purpose and acknowledgements*, to recognise the UNDRIP and the pre-existing human rights of indigenous peoples that it affirms. The inclusion of such a clause would reaffirm the human rights of indigenous peoples to which New Zealand is already bound to protect and would demonstrate New Zealand's genuine and concrete commitment to the UNDRIP.

c. Discrimination

While discrimination based on race or ethnicity is prohibited both in domestic and international law,[13] Amnesty International believes that the Bill in its current form will continue the discriminatory effects against Māori that were first enacted under the Act. In particular, Amnesty International considers the Bill to be discriminatory by virtue of the fact that, unlike specified freehold title, customary interests cannot include the right to exclusive occupation (clause 7 and clause 27(1)).[14]

The acting Attorney-General, Hon Simon Power, has concurred with these points, noting that "because the Bill treats [customary] interests differently from other categories of interest in land, notably private freehold titles, the Bill indirectly draws a distinction based on race or ethnic origin. As that distinction involves greater, but also lesser, relative rights, it gives rise to a prima facie limit on the right to be free from discrimination under s 19 of the Bill of Rights Act [NZBORA]".[15] He has further stated that this discrimination is demonstrably justifiable under section 5 of the NZBORA for the following reasons: "On the whole, the Bill strives to mark a clear path forward that balances the yet to be recognised, but longstanding, interests of Māori with the rights and interests of the general public and of individual landowners and holders of other rights. It also represents the resolution of a longstanding issue that has entailed delay, strong division of opinion and attendant uncertainty ... With that difficult balance in mind, I have considered whether the Bill is, ultimately, proportionate in its choice of means to achieve these goals. I have, particularly, considered the trade-off between the recognition of longstanding customary rights and the promotion of public benefit through predictability and certainty, including as to obligations to afford compensation. I also attach particular significance to the lengthy and full process of consultation that resulted in these proposals."[16]

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[12] Alternatively, Amnesty recommends clause 4(1)(D) be replaced with the following wording from section 9 of the Crown-Owned Enterprise Act 1987: "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi." For a more recent example, see section 3A of the Climate Change Response Act 2002.

[13] See Annex 2.

[14] Amnesty does note that certain exclusions apply to these public rights of access, including the right to recognise wahi tapu under clause 78.

[15] Ministry of Justice (2010). *Marine and Coastal Area (Takutai Maona) Bill, Opinion of the Acting Attorney-General.* Retrieved from http://www.justice.govt.nz/policy-and-consultation/legislation/bill-of-rights/marine-and-coastal-area-takutai-moana-bill

[16] Ibid.

In 2004 the acting Attorney General, Hon Margaret Wilson, stated in her section 7 report on the Act's consistency with the NZBORA[17] that the discrimination under the Act is demonstrably justifiable.[18] She argued that "the Bill seeks to achieve a balance that recognizes and protects Māori customary interests, recognizes and protects the interests of the general public (including Māori) and resolves the substantial uncertainties resulting from the Court of Appeal's decision in Ngati Apa. Taken in conjunction with existing mechanisms for the recognition and protection of Māori common law customary interests in the foreshore and seabed (e.g. the fisheries legislation) and in conjunction with the likely future recognition of such interest (e.g. in relation to aquaculture), I consider the Bill meets the section 5 test."[19] The Bill's almost identical justification for its discriminatory effect to that employed to justify the Act's discriminatory impact is of concern, particularly noting Amnesty's above concern at the absence of meaningful differences between the practical effect of the Act and the Bill.

Amnesty disagrees with the acting Attorney General's conclusion and suggests that the limitations the Bill places on the right to be free from discrimination are not demonstrably justified in a free and democratic society. For, Amnesty considers the Bill's choice of means to be disproportionate to the objective it seeks to achieve. This is because Amnesty believes the Bill's objective of achieving a determinate and durable solution to the issue of ownership of the foreshore and seabed can be achieved in a way which infringes less on the section 19 right to be free from discrimination.

The options and models proposed by the Ministerial Review panel provided workable solutions which limited less (if at all) the right to freedom from discrimination.

In particular, Amnesty recommends the discriminatory element of the Bill[20] be addressed by amending clauses 27(1)(a)-(c) so that every individual has the right to access areas of "the common marine and coastal area that are not customary marine title areas".

Amnesty takes this opportunity to encourage the Government, noting its commitment during New Zealand's Universal Periodic Review,[21] to make a declaration in support of Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination and in so doing enable an individual or a group of persons claiming to be the victim of racial discrimination to lodge a complaint with the Committee on the Elimination of Racial Discrimination.

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[17] Section 19 of the NZBORA.
[18] Ministry of Justice (2004). *Attorney General's comments to the Foreshore and Seabed Bill*. Retrieved from http://www.justice.govt.nz/policy-and-consultation/legislation/bill-of-rights/foreshore-and-seabed-bill
[19] Ibid.
[20] By virtue of the fact that, unlike specified freehold title, customary interests cannot include the right to exclusive occupation.
[21] Report of the Working Group on the Universal Periodic Review on New Zealand (7 July 2009) A/HRC/12/8/Add.1

The test

Amnesty welcomes the Government's acknowledgment that the "complicated, restrictive judicial and administrative procedure"[22] provided for by the Act is a key issue the Bill seeks to redress.

Amnesty International believes the tests for establishing protected customary rights and customary marine titles, under clauses 53 and 60 respectively, should be removed from the Bill so that courts can develop appropriate tests over time. While the Bill's codification of tests would create certainty and may reduce litigation costs initially, Amnesty International believes that, given their experience in developing such tests in the past,[23] courts are in the best position to create such tests. This would enable courts to develop tests which both accommodate the manifestation of Māori exercising their rights to culture and development[24] and ensure their right to legal recognition of their land is provided for in a way that gives "due respect to the customs, traditions and land tenure systems of [Māori]".[25]

In particular, Amnesty notes that the Bill's requirement for iwi and hapū to prove "exclusive use" when applying for customary marine title, under clause 60(1)(b) is inconsistent with tikanga[26] and therefore the rights of Māori to culture and development[27] and their right to legal recognition of their land in a manner that respects their customs, traditions and land tenure systems.[28]

Furthermore, when continuity of occupation since 1840 has been severed, it has characteristically occurred because of the unlawful actions of the Crown. Amnesty therefore considers the requirement of "exclusive use" to be both restrictive and unnecessary, particularly given the presence of alternative approaches in other jurisdictions such as Canada.[29]

If the Bill does retain the tests in their current form, iwi and hapū will largely be unable to access legal recognition for their customary rights and their legal disenfranchisement from their ancestral relationship with the foreshore and seabed will likely continue. This likelihood of continued disenfranchisement is further increased by the absence of any provision within the Bill for claimants to receive legal aid in the event that negotiation with the Crown proves unfruitful. Amnesty International recommends the Select Committee therefore consider including a clause within the Bill to enable applicants to apply for legal aid.

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[22] *Reviewing the Foreshore and Seabed Act 2004*, p. 9.
[23] For example: *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 and *In Re Ninety Mile Beach* [1963] NZLR 461.
[24] Article 11 and 32 respectively of the UNDRIP.
[25] Article 26(3) of the UNDRIP.
[26] For example, Māori legal tradition of manaaki.
[27] Article 11 and 32 respectively of the UNDRIP, Article 27 of the ICCPR and section 20 of the NZBORA.
[28] Article 26(3) of the UNDRIP.
[29] Canadian courts have asserted that both common law and aboriginal perspectives must be taken into account when deciding whether or not customary interests equate to a right to exclude others, given that the recognition of customary interests involves reconciling indigenous rights with the Crown's assertion of sovereignty. See *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

d. Proprietary rights

In light of the rights to culture, development and legal recognition of the property rights of Māori which respects their land tenure system, Amnesty International also believes that codification of the proprietary rights which attach to customary marine title, under clauses 65 to 81 of the Bill, should be removed. This would enable courts to determine the proprietary rights of customary marine title in a way that accommodates the right of Māori to "own, use, *develop* and control the lands, territories and resources that they possess".[30] Māori must not be punished or constrained from developing their culture, practices and land by static and reductive proprietary rights. As the Bill already recognises the evolutionary nature of protected customary rights under clause 53(1)(b), removing the codification of the proprietary rights of customary marine title would enable courts to ensure consistency between these two categories of rights.

Finally, Amnesty International also notes that a resource consent that has been issued prior to the Bill coming into force appears to have the effect of extinguishing customary marine title, a situation which would be grossly unfair if it eventuated.[31]

e. Time Limit

The Bill has, in part, been introduced to provide justice for past breaches of Māori human rights and, in particular, property rights. As the right to justice[32] does not have an expiry date, Amnesty International believes that the time limit of 6 years, under clause 98(2) should be removed from the Bill. Furthermore, Amnesty believes it is important to note that the Treaty of Waitangi is a living document (as is the consequential partnership between Māori and the Crown) and, as such, implies that the passing of time does not extinguish manifestations of that relationship, including the legal recognition of Māori customary rights. Amnesty also considers it important to acknowledge that indigenous rights are often collective as compared to individual. This presence of collective rights means that an individual or generation of Māori should not be impeded or penalised by the fact that another individual/generation of people did not apply for legal recognition of their customary interests.

[30] Article 26(1) of the UNDRIP.
[31] Clause 60(2) of the Bill.
[32] Article 14 of the ICCPR.

5. **Summary**:

Noting the human rights concerns outlined above, Amnesty International makes the following recommendations to the Select Committee:

- Clause 4(1)(D) be replaced with: "This Act shall be interpreted and administered so as to give effect to the principles of the Treaty of Waitangi";
- Add a clause under the Bill's *purpose and acknowledgements*, to recognise the UNDRIP and the pre-existing human rights of indigenous peoples that it affirm;
- Amend clauses 27(1)(a)-(c) so that every individual has the right to access areas of "the common marine and coastal area that are not customary marine title areas";
- Make a declaration in support of Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination;
- Remove clauses 53 and 60 which codify the test for establishing protected customary rights and customary marine titles;
- Consider including a clause to enable applicants to apply for legal aid;
- Remove clauses 65 to 81 which codify the proprietary rights which attach to customary marine title; and
- Remove clause 98(2) which imposes a time limit of 6 years for customary interest claims.

Annex 1:

Indigenous peoples (property) rights

Indigenous peoples' rights, under both international and domestic laws, are predicated on a variety of justifications, including: the fact that they have historically exercised self-determination living under pre-colonial customary legal systems; their status as the first, or prior, peoples on the land; the destructive effect of colonisation on their political autonomy, territorial rights, and distinctive way of life; and their non-dominant and vulnerable status within the modern state.[33]

Indigenous rights are a sub-set of human rights, extended to indigenous peoples. Indigenous rights conventions, covenants and declarations extend the individual rights of non-indigenous people to indigenous peoples, while also incorporating the right of the collective, or individuals in association with others, as equally essential to the rights of indigenous peoples. As Special Rapporteur on Indigenous Peoples, James Anaya, states indigenous rights "far from affirming rights that place indigenous peoples in a privileged position, aim at repairing the ongoing consequences of the historical denial of the right to self-determination and other basic human rights".[34] It is these justifications which have caused both international institutions and states alike to recognise indigenous peoples' rights.

The international community has recognised these rights in several significant conventions, covenants and declarations. Most notable among them are the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the *International Covenant on Civil and Political Rights (ICCPR) and the* Declaration on the Rights of Indigenous Peoples (UNDRIP).

The ICERD is binding, New Zealand having ratified it in 1972. Article 5(e)(iv) of ICERD explicitly prohibits discrimination in relation to the right to own property alone or in association with others. While the ICERD is concerned with guaranteeing the fundamental human rights of *all* human beings, the ICERD Committee has issued a special statement indicating that the situation of indigenous peoples is of particular concern to the Committee. Indeed, the Committee has noted that in many regions around the world indigenous peoples have, and are still, being discriminated against, especially with regard to the loss of their traditional lands. On the particular issue of traditional lands, the Committee has requested that states "recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have

[33] Claire Charters and Andrew Erueti (Eds.), *Māori property rights and the foreshore and seabed: the last frontier*, Victoria University Press, 2008 p. 177.

[34] James Anaya (2010). *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Preliminary note on the mission to New Zealand* . Retrieved from: http://unsr.jamesanaya.org/PDFs/NZ%20A%20HRC%2015%2037%20Add%209_EN.pdf

been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories".[35]

Similarly, the ICCPR is also binding, New Zealand having ratified it in 1978. While the ICCPR is concerned with the protection of individual rights, Article 27 requires that "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". While on the face of it, Article 27 appears to be limited to protecting rights to engage in traditional activities, and to only encompass broader claims to traditional lands obliquely in those cases where traditional land was considered central to the conduct of such activities, the Human Rights Committee (HRC), the treaty body charged with monitoring states' compliance with the Covenant, has indicated that Article 27 may encompass broader territorial rights to traditional lands. For example, the HRC cited Article 27 in expressing its concern at Canada's practice of extinguishing aboriginal title in modern treaties.[36]

It is also important to note that, within the New Zealand context, the HRC has stated that "the right to enjoy one's culture cannot be determined in abstracto but has to be placed in context. In particular, article 27 does not only protect traditional means of livelihood of minorities, but allows also for adaptation of those means to the modern way of life and ensuing technology."[37]

Finally, the Declaration on the Rights of Indigenous Peoples, to which New Zealand has recently declared its endorsement, represents the most comprehensive international instrument dealing with indigenous rights. While not legally binding, UNDRIP requires that "states in consultation and cooperation with indigenous peoples ... take the appropriate measures, including legislative measures, to achieve the ends of the Declaration".[38]

Article 25 of UNDRIP recognises that "[i]ndigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard".[39]

Furthermore, Article 26 recognises that:

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

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[35] UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 23: Indigenous Peoples, Annex V, U.N. Doc. A/52/18/Annex (18 Aug 1997).
[36] UN Human Rights Committee 'Concluding observations of the Human Rights Committee: Canada' (2 November 2005) CCPR/C/CAN/CO/5.
[37] *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000).
[38] Article 38 of the UNDRIP.
[39] Article 26 of the UNDRIP.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

While not only recognising indigenous peoples' right to traditional lands, Article 26 establishes detailed standards for implementation and transparent mechanisms to give recognition to these rights.

This international recognition of indigenous peoples' right to traditional lands was recognised domestically in New Zealand in the Court of Appeal's decision in *Attorney-General v Ngati Apa* [2003] 3 NZLR 643[40], but was expressly regulated and significantly curtailed by the enactment of the Act.

Following this, the ICERD Committee invoked its early warning procedure to express its concern "at the apparent haste with which the legislation was enacted [and noted that] insufficient consideration may have been given to alternative responses to the *Ngati Apa* decision, which might have accommodated Māori rights within a framework more acceptable to both Māori and all other New Zealanders."[41] The ICERD Committee therefore concluded that "the New Zealand Government enter into a dialogue with Māori to seek ways of mitigating the FSA's discriminatory effects, including through legislative amendment, where necessary."[42]

[40] The Court overturned earlier precedent which had ruled that, because of circumstances unique to New Zealand, Māori land ties were so weak that they could be extinguished through such indirect routes as unrelated phrases in legislation or through the Native (now Māori) Land Court's investigation of dry land adjoining the foreshore. However, following overseas precedent, the Court in *Ngāti Apa* ruled that, if legislation was to extinguish customary rights to land, it must do so explicitly.
[41] UN Committee on the Elimination of All Forms of Racial Discrimination 'Decision 1(66): New Zealand Foreshore and Seabed Act 2004' (11 March 2005) CERD/C/66/NZL/Dec.1.
[42] Ibid.

Annex 2:

The right to be free from discrimination

Article 2 of the UDHR stipulates that "everyone is entitled to all rights and freedoms without distinction of any kind, such as race, colour...". Similarly, Article 2(1) of the ICCPR states that "each State Party…undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race...". Additionally, Article 2(1) of ICERD states that "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races...". The Article goes on to provide practical advice as to exactly what measures governments should take to eliminate such discrimination, including that "each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists".

The right to not be discriminated against is also reflected in section 19(1) of the NZBORA which states that "everyone has the right to freedom from discrimination [based on race or ethnic origins]".