United Nations CERD/C/SR.1680

International Convention on the Elimination of All Forms of Racial Discrimination

Distr.: General
3 May 2013
English
Original: French

Committee on the Elimination of Racial Discrimination
Sixty-sixth session

Summary record of the 1680th meeting
Held at the Palais Wilson, Geneva, on Friday, 25 February 2005, at 10 a.m.

Chairperson: Mr. Yutzis

Contents

The meeting was called to order at 10.05 a.m.

Prevention of racial discrimination, including early warning measures and urgent action procedures (agenda item 3) (*continued*)

The situation in New Zealand (CERD/C/66/Misc.9; document distributed in the meeting room, in English only)

1. **Ms. January-Bardill**, speaking as Chairperson of the Working Group on Early Warning and Urgent Action, recalled that in July 2004, three Maori non-governmental organizations had requested the Committee to use the early warning procedure to urge the New Zealand Government to withdraw its Foreshore and Seabed Bill which, according to them, constituted discrimination against Maoris as it envisaged the extinguishment of their titles over coastal zones and the seabed. According to the Government, the bill was intended to clarify the status of the foreshore and seabed and vest ownership in the Crown while respecting duly registered private titles.

2. In a letter dated 20 August 2004, the Committee had asked the New Zealand Government for additional information on the bill and the timetable for its adoption, given that, according to non-governmental sources, it could have been adopted before 31 December 2004. In September 2004, the New Zealand Government had replied to the Committee and to the claims made by the non-governmental organizations, vigorously denying that the bill was discriminatory. On 17 November 2004, the bill had been adopted and then, in December 2004, two Maori organizations had asserted that the new Act restricted Maori property rights even more than the bill had done. In a letter to the Committee dated 17 February 2005, the New Zealand Government had replied in detail to the assertions of the Maori organizations and had questioned the reasons for triggering the early warning procedure.

3. She thanked the New Zealand Government for paying such careful attention to the Committee's requests for information and sending a delegation to help it examine the situation in New Zealand with respect to Maori customary titles.

4. **Mr. Caughley** (New Zealand) said that the Foreshore and Seabed Act, which had been approved by 16 of the 19 Maori Members of Parliament, was a consequence of the Court of Appeal's decision in *Ngati Apa* v. *the Ministry of Justice* in June 2003. Essentially, the court had expressed reservations concerning the possibility of the Maoris exercising property rights over the foreshore and seabed and had reaffirmed the principle of non-exclusivity as regards the use and enjoyment of the coastal maritime zone. The main purpose of the Foreshore and Seabed Act was to preserve the public foreshore and seabed as a communal space for all New Zealanders and to allow the Crown to provide for their protection, including that of the Whanau, Hapu and Iwi areas. Crown ownership extended to the whole of the foreshore and seabed, with the exception of the areas in private, in particular Maori, ownership.

5. He noted that under the Act any group of New Zealanders who, since 1840, had enjoyed the exclusive use of part of the public foreshore or seabed could apply to the High Court in order to assert their territorial customary rights. In addition, the Act provided for public access to the sacred sites to be prohibited on condition that the Maori land court had notified the Ministry of the Environment and the Ministry of Maori Affairs of their existence.

6. He also pointed out that the Foreshore and Seabed Act was not in any way aimed at replacing the dispute settlement mechanisms of the Treaty of Waitangi, which included recognition of the ancestral territories of the Maoris and the offering of apologies by the Crown in the event of those territories being violated, together with the payment of compensation in cash or in kind. New Zealand would give the Committee an account of the

progress made with the settlement of disputes based on the Treaty of Waitangi in its next periodic report. It should be noted that the redress for which the Act provided included the establishment of a marine reserve for the Maoris.

7. The New Zealand Government considered that the Act disputed by the Maori organizations was consistent with the International Convention on the Elimination of All Forms of Racial Discrimination and enabled the indigenous communities to assert their territorial customary rights. Moreover, private titles, often the result of coastal erosion, covered only very limited areas and could not be used for marine zone privatization. As the Committee had acknowledged on more than one occasion, it was not always possible to satisfy the land claims of the indigenous peoples in full, particularly those relating to the marine zones of New Zealand, a country with a limited marine commons of inestimable value. In the view of the New Zealand Government, the Foreshore and Seabed Act constituted a balanced approach insofar as it provided for compensation for indigenous peoples whose territorial customary rights had been infringed, while ensuring that the seabed was protected and sustainably managed.

8. **Mr. Thornberry**, speaking as the Rapporteur for New Zealand's last periodic report (CERD/C/362/Add.10), was surprised by the rapidity with which the New Zealand authorities had responded to the Court of Appeal's June 2003 decision in *Ngati Apa* v. *the Ministry of Justice* by introducing the Foreshore and Seabed Bill less than a year later, on 6 May 2004. The issues were particularly complex and, without prejudice to the Committee's position, bore witness to the extreme vulnerability of the Maori community.

9. He considered that, apart from being very complex, the Foreshore and Seabed Act of November 2004 posed numerous problems, mainly linked with the almost total extinguishment of Maori customary titles. Its provisions raised questions about the purport and effect of customary law in New Zealand and, more particularly, about the exercise of customary rights over submerged land. It was regrettable that because of the legal flux surrounding the precise nature of indigenous property rights, the New Zealand authorities should have chosen to enact as a matter of urgency legislation which would ultimately curtail Maori customary titles and indeed serve to bring about their extinguishment. It would be interesting to know whether it was absolutely necessary to legislate on the question of Maori titles over the foreshore and seabed and whether there might not be an alternative legal solution that made it possible to guarantee public access to those areas. The new Act had instituted a regime under which, on the one hand, the Crown had full ownership of the foreshore and seabed, which became public property, while, on the other, the Maoris lost their titles but retained the interests. The situation created by that new regime posed a serious problem of discrimination, since it injured the property rights of the Maoris more than those of non-Maoris. That was contrary to the Convention, which required States parties to grant fair treatment to all.

10. He also pointed out that the Act contained provisions on "redress", whereas it would probably have been more consistent with international law to use the term "compensation" instead. He recalled that, in its General Recommendation XXIII on rights of indigenous peoples, the Committee had called upon States parties: "To recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned…, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories."

11. Furthermore, under the provisions of the Act relating to redress, a Maori group that might have been assigned a property right would not be authorized either to go to court or to seek any form of compensation. In 2003, in the Ngati Apa case, the Court of Appeal had

ruled that when indigenous property rights were abolished the injured parties should be compensated and authorized to initiate proceedings before the competent courts. It would be useful if the delegation would provide further information regarding the actual existence of that right of recourse, as well as with regard to the questions of redress and compensation.

12. In his view, the criteria established by the Act for recognizing indigenous property rights were too strict and he asked the delegation to explain why the existence of an established link between the Maori people and the land since 1840 did not, under New Zealand law, constitute sufficient evidence for the Maoris to be granted title.

13. Some provisions of the new Act also appeared to contravene various articles of the Convention, in particular article 5, which established the right to equal treatment before the tribunals and the right to equal participation in cultural activities, and article 6, which established the universal right to effective remedies and just and adequate reparation. The legislation also infringed the economic, social and cultural rights of the Maoris and threatened the spiritual bond between the Maori people and their land.

14. He recalled that another human right implicitly established by the decisions of international courts was the right of indigenous peoples to participate in the taking of decisions that concerned them. He therefore wished to learn from the delegation whether the Maoris had been consulted during the drafting of the Foreshore and Seabed Bill and whether they had participated in the process of its legislative adoption. He also asked the delegation whether the majority of Maoris had approved the changes introduced by the Act.

15. **Mr. Aboul-Nasr** had found the background to the Foreshore and Seabed Act difficult to understand. The controversy it had created appeared to derive from the fact that it presupposed the existence of a conflict of interest between the New Zealanders and the Maoris, who seemed to be regarded as two separate entities not belonging to the same country.

16. He considered that those two groups of people should be treated in the same way, in the case in question by reaffirming that they constituted a single entity, with the same rights and obligations. In his opinion, it was not permissible to legislate for the purpose of determining which part of the population had rights over a particular part of New Zealand's territorial waters or coastline.

17. **Mr. Kjaerum** welcomed the New Zealand Government's readiness to engage in a frank dialogue with the Committee concerning the Maoris' indigenous property rights. The situation was very complex and it would therefore be helpful if the New Zealand delegation could provide additional information on a number of points. In particular, he would like to receive an account of the main events that had taken place between the ruling by the Court of Appeal in the *Ngati Apa* case in 2003 and the adoption of the Foreshore and Seabed Act in November 2004.

18. He also wanted to know whether the New Zealand authorities had entered into a dialogue with all the indigenous communities affected by the new Act, whether the Act had created tension between the Maoris and the current Government and, if so, whether steps had been taken to redress the situation and resume the process of constructive dialogue between the parties.

19. **Mr. Avtonomov** asked the delegation whether difficulties of a legal nature concerning Maori customary titles had arisen even before the adoption of the Foreshore and Seabed Act in November 2004 and, more precisely, whether the Government had reason to fear that the recognition of indigenous property rights might constitute discrimination against other persons or groups and threaten the property rights of the Crown. It would be particularly helpful to learn whether the dispute was linked with the use of those lands or

with access to them for non-Maoris. He then asked the New Zealand delegation to explain why the final provisions of the new Act differed so markedly from those in the bill and had turned out to be distinctly less advantageous for the Maoris.

20. **Mr. Pillai** noted that the aim of the 2004 Act was to give the Crown full ownership and enjoyment of the foreshore and seabed and to preserve their public character and wished to know to what extent private titles over those areas had been affected by the Act. He also wished to know what percentage of the foreshore and seabed areas was held by Maoris and by non-Maoris, respectively.

21. He then asked the delegation to indicate the grounds on which the Maoris might base an action for refusal to recognize their property rights. He also wished to know whether the Maoris had been consulted during the drafting and adoption of the Bill and whether the Government intended to consult that community before drawing up detailed regulations concerning the establishment of rights over coastal and maritime zones.

22. **Mr. Tang** asked the New Zealand delegation what measures had been taken by the State party to protect the customary titles of the indigenous peoples living on its territory. He noted that the Maori Commercial Aquaculture Claims Settlement Act of 2004 granted the Maoris 20 per cent of those areas and wanted to know if they had been consulted before that provision was adopted. He also asked the delegation whether representatives of the Maoris had participated in the legislative process of adoption of that Act.

23. **Mr. Shahi** said that, although the Foreshore and Seabed Act was not an expropriation measure that would deprive the Maoris of all their property rights, it nevertheless violated a good number of those rights when viewed from the standpoint of the customary law of the indigenous peoples, which was recognized by international law. As the Act was proving controversial, he thought that the Committee should recommend that the representatives of the Maoris and the New Zealand Government intensify their negotiations in order to arrive at an amicable agreement, perhaps with the good offices of members of the Committee, eminent individuals familiar with comparable problems in other countries, or international arbitrators.

24. **Mr. Cali tzay** was surprised by the talk of full recognition of customary titles when the new Act appeared to be depriving the Maori population of those rights. Moreover, although 16 out of 19 Maori MPs might have approved the Act, that did not mean that all Maoris were in favour of it. Like members of parliament everywhere, those parliamentarians had followed the line of the political party that had got them elected and were not necessarily expressing the viewpoint of the Maoris.

25. **Mr. Boyd** wondered whether, insofar as one of the New Zealand Government's main concerns in having the Foreshore and Seabed Act adopted had been to ensure public access to those areas and the coast, there were not solutions available less radical than an act which had the effect of completely extinguishing customary property rights, for example, the granting of limited rights of way. He would like to know whether that solution had been considered and, if so, why it had been rejected.

26. The Act appeared clearly to favour property interests protected by a private title, which were fully upheld, to the detriment of property interests derived from Maori customary law, which were wholly extinguished by the Act, thus making it impossible to sell land subject to customary law at its true market value. He would like to receive a more specific explanation of the method used for choosing the compensation criteria, which did not appear to be based on market value.

27. Finally, he noted that some of the conditions imposed on the recognition of customary titles by the High Court in the event of legal proceedings being instituted, for example, proof of continuous occupation of the land since 1840, would be very difficult to

satisfy. He wondered whether that might not be a barrier to any effective recognition of those rights.

28. **Mr. Amir** said that, internationally, there were few examples of binational States in which two nations lived side by side. It was not easy to establish the position of customary law in relation to international law and the domestic law applicable to non-Maoris, and the legal literature provided by the New Zealand Government was too copious for it to be possible to understand, in the short space of time available, how that situation, which might amount to expropriation, had arisen. He wished to know whether Maoris who did not live in the coastal zones could also be expropriated as a result of a conflict between modern and customary law. He also asked whether customary law should not have equal force, thereby enabling the territorial sovereignty of the Maoris to be recognized, inasmuch as they were a recognized nation.

29. **Mr. Valencia Rodriguez** said that, according to the general rule of the law of the sea, the beaches and the continental shelf were considered to form part of the public property of the State. Individual ownership was possible in only two cases: in the presence of a prior title duly recognized by the State, and where the State had granted title over all or part of an area to private individuals on certain conditions. However, all the inhabitants of a country were entitled to enjoy the national resources contained within its public maritime spaces, subject to the laws and regulations in force, on an equal footing and without discrimination. He therefore wished to know what New Zealand's laws and regulations had to say about the utilization of those resources, and whether certain groups within the population were being granted privileges at the expense of the Maoris. In particular, even though New Zealand had recognized and accepted them, Maori traditional and ancestral rights were not respected in the new legislation. He wished to know whether the New Zealand Government intended to negotiate with the Maoris with a view to recognizing the rights that could be considered traditional and ancestral.

30. **Ms. January-Bardill** said that relations between the New Zealand Government and the Maori population appeared to be fairly good, recalling that the Committee had drawn attention to certain positive aspects of those relations in its general observations in 2002 including, in particular, the large number of initiatives taken in numerous areas in an effort to meet the specific needs of the Maoris. Against that background, the extinguishment, pure and simple, of customary rights seemed like a very radical means of dealing with the shoreline question.

31. As the Committee had often found, the exceptional measures taken by governments to correct inequalities or the underprivileged status of a section of the population were frequently interpreted as favouritism, which gave rise to feelings of rejection. She therefore wondered whether, apart from the issues of access, regulation and protection, the rapidity with which the Foreshore and Seabed Bill had been adopted had not been intended to forestall those feelings.

32. **Mr. Sicilianos** said that the Foreshore and Seabed Act was certainly meant to be definitive, but much remained to be done to solve the problems it raised, in particular those relating to the definition of Maori customary rights and compensation for extinguished property rights. While the adoption of the Act was one thing, its application was another, as Mr. Boyd had already pointed out in connection with the rules of evidence required for expiring customary titles. According to two professors at Wellington's Victoria University, the Act incorporated the most restrictive criteria of both Australian and Canadian law, which made it the most restrictive piece of indigenous rights legislation in force in Australia, Canada and New Zealand. He would therefore like to know whether New Zealand intended to show flexibility in applying the provisions concerning rules of evidence. He also wished to know whether there was the political will to compensate the Maoris properly, in accordance with the principle of full and swift compensation recently

codified by the International Law Commission within the context of the codification of the international law on State responsibility.

33. **The Chairperson** gave the New Zealand delegation a few minutes to prepare its replies to the questions and observations of the Committee members.

The meeting was adjourned at 12.10 p.m. and resumed at 12.20 p.m.

34. **Ms. Hardy** (New Zealand) said that the new Foreshore and Seabed Act targeted the same rights as those that had formed the subject of the Court of Appeal's June 2003 decision in *Ngati Apa* v. *the Ministry of Justice*, namely, existing customary property rights, and not the rights that the indigenous peoples had lost for various reasons in the past. She also stressed that it was not the purpose of the new Act to regulate matters relating to the rights of the indigenous peoples in general.

35. Responding to the concerns expressed by a number of experts to the effect that the new Act might be tacitly aimed at extinguishing indigenous rights over the coastal zones and seabed, she said that New Zealand was the only country in the world to recognize the territorial customary rights of indigenous peoples over maritime areas. By way of comparison, she noted that although Australia accorded indigenous peoples a use right over certain maritime areas, it had not incorporated that principle into common law. Moreover, New Zealand had granted indigenous peoples the right to enjoy areas affected by the Act at issue by adopting, in 2004, two laws that particularly favoured the Maoris, namely, the Maori Fisheries Act, granting them 20 per cent of the fishing quotas, and the Maori Commercial Aquaculture Claims Settlement Act, which granted them 20 per cent of marine farming activities.

36. She cited and commented upon the four criteria for recognizing Maori customary rights over the areas concerned laid down in section 50 of the Foreshore and Seabed Act, on which the Maori Land Court was based. The first of those criteria, broadly modelled on the corresponding provisions of the Canadian legislation, required the practice or activity claimed by the indigenous peoples to have formed an integral part of their custom − *tikanga* − since 1840. According to the second, the practice or activity must have been carried on uninterruptedly in the area of the foreshore and seabed since that time, otherwise the rights could be considered to have been extinguished. The third criterion required that the practice or activity in question should continue to be carried on in accordance with *tikanga*, provided that the Maori rights concerned were in force and had not for some reason been lost or withdrawn, even unjustly, by the Crown. Finally, in accordance with the fourth and last criterion, the practice or activities in question must not have been prohibited by any enactment or rule of law. In the light of those clarifications, she disputed the arguments put forward by the experts, who had asserted that the New Zealand regime concerning the recognition of indigenous rights was particularly strict and more draconian than the corresponding Canadian or Australian regimes. She added that if the indigenous peoples had difficulty in proving that their activities met the criteria cited for obtaining full title to the areas concerned (which would give them the right to occupy those areas and make exclusive use of them), they would have to resort to mechanisms other than those for which the Foreshore and Seabed Act provided in order to assert their rights.

37. The effects of orders made by the Maori Land Court were set out in detail in section 52 of the Foreshore and Seabed Act. More especially, it should be borne in mind that that section established the right of the Whanau, Hapu and Iwi to derive a commercial benefit from the exploitation of the areas concerned, in accordance with procedures laid down in the 1991 Resource Management Act, which governed conflicts between commercial interests and the protection of the environment.

38. Where the protection of the sacred sites (*wahi tapu*) was concerned, section 54 of the Foreshore and Seabed Act allowed the Maoris to go before the Maori Land Court if they

considered that those sites, which were of special significance to them, might be harmed by the rights of access. In that case, the Maori Land Court would refer the matter to the competent ministries, namely, the Ministry of Conservation and the Ministry of Maori Affairs, which could prohibit or restrict access.

39. The Maoris could also go to the High Court to argue their claim to a territorial customary right to the foreshore areas and seabeds not granted to the Crown.

40. With regard to the question of redress rather than compensation, she noted that under the terms of the Treaty of Waitangi aimed at settling disputes between the Crown and the Maoris, it was the notion of "redress" that had been adopted. That choice had been intended to ensure the flexibility of the process and to take the interests of the Maoris in the foreshore and seabed duly into account rather than merely pay them financial compensation. There could be no doubting the intention of the New Zealand Government to pursue the negotiations with the various tribal groups in good faith in order that they might obtain redress. She saw evidence for that in the support that the Government was giving those groups, whether financially or for collecting the information needed by the High Court in order to conclude whether the customary right recognition criteria had been met, in the regular organization of meetings between the competent ministries and Maori groups, in the visits to the Ngati Porou and Te Whanau-a-Apanui sites by dignitaries of the Crown and in the expressed intention of the competent ministers to reach agreements on redress before the end of the first half of 2005.

41. Concerning the difference in treatment between specified freehold interests or private title, which had not been called into question by the Foreshore and Seabed Act, and the territorial customary interests of the Maoris, which were supposedly threatened, she invited the members of the Committee to consult the relevant documentation provided by the New Zealand Government. She confined herself to pointing out that, generally speaking, no private title had been granted over the maritime areas, which constituted a "special legal area" under international law where navigation rights were concerned and which had to be accessible to people going there for recreational purposes. The few private plots located along the coastline and encroaching on the sea consisted of land that had suffered erosion and, moreover, took up only 6.4 kilometres of coast, which was negligible when compared with the area claimed by the Maoris on the foreshore and seabed on the basis of their territorial customary rights.

42. **Ms. Hippolite** (New Zealand) recalled the broad outlines of the programme for the adoption of the Foreshore and Seabed Act, following the June 2003 decision of the Court of Appeal in *Ngati Apa* v. *the Ministry of Justice*. In August 2003, the Government had published a working document on the issue, then the competent ministers and parliamentarians had held meetings with representatives of the Iwis and Maoris, as well as with representatives of the various interested parties. Between September and December 2003, the Deputy Prime Minister, the Minister for Maori Affairs and the Attorney General had pursued the dialogue with the Maori representatives and examined the written contributions received. Following the hearing held in April 2004 by the Tribunal of Waitangi, the Foreshore and Seabed Bill had been submitted to Parliament. Consideration of the bill had begun in May 2004 and had ended on 17 November 2004, the date on which the Act was adopted.

43. **Mr. Thornberry** recalled the complexity of the issue, which involved reconciling the interests of different sectors of the population while simultaneously taking into account the requirements of more than one body of law, namely, a legal system of the "western" type and a system of customary law rooted in the ancestral traditions of the indigenous people, and ensuring equal treatment for all the interested parties. He said he was gratified by the quality of the dialogue between the New Zealand delegation and the Committee and that of the printed documentation provided by the New Zealand Government, which had

enabled the Committee to gain a better understanding of the dispute over the customary property rights of the Maoris.

44. **Mr. Caughley** (New Zealand) said he was glad to have been able to participate in the dialogue with the Committee as that had given his delegation the opportunity to explain in greater detail the content of the Foreshore and Seabed Act, which appeared to have given the members of the Committee much cause for concern. In that connection, he reaffirmed New Zealand's unwavering commitment to human rights.

45. **The Chairperson** said that the Committee would rule very shortly on the question that had formed the subject of the discussion and would communicate its concluding observations to the State party as quickly as possible.

46. *The New Zealand delegation withdrew.*

The meeting rose at 1.05 p.m.