Aotearoa Indigenous Rights Trust
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June 2007

Mr Régis de Gouttes
Chairperson
United Nations Committee on the Elimination of Racial Discrimination
C/o Nathalie Prouvez
United Nations Office of the High Commissioner for Human Rights
Palais Wilson
1211 Geneva 10
SWITZERLAND

Dear Sir,

Shadow-Report to New Zealand's State Report to the Committee on the Elimination of Racial Discrimination: Summary by AIR Trust

Aotearoa Indigenous Rights Trust (AIR Trust) submits the attached summary of its submissions to the United Nations (UN) Committee on the Elimination of Racial Discrimination (CERD Committee). You will see that most of our submissions consist of primary materials, which support the principal arguments set out in the attached document. We have indicated which materials support which argument.

AIR Trust is a small organization made up of Maori individuals with close associations with their tribes. It has been most involved in working groups on the UN Declaration on the Rights of Indigenous Peoples but has also been active in other issues. For example, one member was the legal representative of the Treaty Tribes Coalition and Te Runanga o Ngai Tahu, large organizations representative of tribes, before the CERD Committee in its consideration of New Zealand's Foreshore and Seabed Act 2004 in 2005.

In addition to presenting its own submissions on New Zealand's State Report to the CERD Committee in person in July and August 2007, the AIR Trust representative, Claire Charters, will also present the reports of the Maori Party and, where there are overlaps, those of Peace Movement Aotearoa.

We thank you in advance for your consideration of our report and we look forward to meeting with you later in the month.

Yours sincerely

Tracey Whare
AIR Trust

SHADOW REPORT TO THE UN CERD COMMITTEE: RESPONSE TO NEW ZEALAND'S PERIODIC STATE REPORT TO BE PRESENTED JULY/AUGUST 2007

CLAIRE CHARTERS*
AOTEAROA INDIGENOUS RIGHTS TRUST

JULY 2007

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1. INTRODUCTION

1.1. This submission provides a synopsis of Aotearoa Indigenous Rights Trust (AIR Trust) shadow-report to New Zealand's state report to the UN Committee on the Elimination of All Forms of Racial Discrimination.

1.2. We have endeavoured to be as concise as possible as we are aware that the Committee has much material before it. Thus, we simply state our submissions here and then refer Committee members to the relevant supporting documentation.

1.3. We have also referred, where appropriate and for support, to submissions from organizations including those from: the Maori Party, the Treaty Tribes Coalition, Peace Movement Aotearoa and a Te Tai Tokerau iwi collective. However, this synopsis in no way replaces those reports and does not purport to speak on behalf of those organizations.

2. OVERALL PICTURE OF NEW ZEALAND'S APPROACH TO MAORI ISSUES

2.1. AIR Trust believes that the following characteristics of New Zealand society and government impact negatively on New Zealand's ability to guarantee freedom from racial discrimination. The specific points set out in the remainder of these submissions attest to them.

2.2. First, the New Zealand Government and indeed New Zealanders generally support human rights and value their reputation as a human-rights abiding nation. However, there is a serious gap between the rhetoric and the reality. When contentious Maori issues arise, the New Zealand government is quick to focus on the impact Maori rights will have on other New Zealanders' interests and then to prioritise the interests of non-Maori, in the name of human rights. For example, New Zealand confiscated all Maori property interests in the foreshore and seabed in the interests of preserving non-Maori "rights" to access New Zealand's beaches, when access was not in fact at stake. Further, the New Zealand government was one of the principal proponents of including references to "third-party rights" in the Declaration on the Rights of Indigenous Peoples, seemingly contrary to the objective of securing an international instrument on *indigenous* peoples' rights and without recognition that individuals' rights are already well-covered by a plethora of binding human rights

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instruments. New Zealand is quick to support the "human rights" of non-Maori at the expense of Maori human rights.

See: Whare and Charters Brief of Evidence to the Waitangi Tribunal in the Wai 262 Flora and Fauna Claim.

2.3. Secondly, the New Zealand government and New Zealanders generally want the "tainting" of New Zealand's colonial history, which includes massive Maori land loss and the illegitimate assumption of authority over Maori, "dealt with" so that New Zealand can "move on". Evidence of this includes, of late, the imposition of a final date for submission of historical claims to the Waitangi Tribunal in September 2008. New Zealanders collective desire to "put Maori issues behind them" has an enormously negative impact on Maori because leads to a sense of "impatience" with Maori claims and a "fatigue" that undermines New Zealand's ability to face up to its history and acknowledge that the impact of historical injustice cannot simply "go away".

See: Treaty Tribes Coalition Shadow Report.

2.4. Third, Maori rights and the Treaty of Waitangi are central issues in New Zealand society and politics. While this means that Maori issues are constantly on the New Zealand agenda, it usually translates into Maori issues becoming a political football, at the expense of Maori interests. This can be seen most clearly when, in the midst of the furore over Maori rights to the foreshore and seabed, the opposition launched an attack on Maori rights by arguing that there should be "one law for all" and airing a perception that Maori were "getting too much." The Opposition received an enormous boost in electoral support on this platform. But, this political dialogue obfuscated, and facilitated, the Government's extinguishment of all Maori extant property rights in the foreshore and seabed in the apparent attempt to secure non-Maori access to the beaches, which was not jeopardy in any event.

See: Treaty Tribes Coalition Shadow Report.

2.5. All of the above phenomena occur despite Maori being at the bottom of almost every socio-economic indicia.

See: Maori Party Shadow Report.

3. NEW ZEALAND'S CONSTITUTIONAL STRUCTURE

3.1. New Zealand's ability to guarantee freedom from racial discrimination is seriously hampered by its constitutional structure.

See: Report of the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples on New Zealand; Treaty Tribes Coalitions Shadow Report; Tai Tokerau Iwi Collective Shadow Report; Peace Movement Aotearoa Shadow Report.

3.2. New Zealand government operates under the most fundamental version of Parliamentary sovereignty compared to all other Commonwealth constitutional

arrangements, even that of the United Kingdom (which is constrained by European Union human rights and other obligations).

3.3. New Zealand's legislature is not legally bound to comply with domestic human rights law. The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 are not enforceable as against the legislature meaning it can pass discriminatory legislation such as the Foreshore and Seabed Act 2004.

3.4. The Treaty of Waitangi is not legally enforceable against the legislature either, and requires legislative incorporation to be enforced generally. The Government supported a bill in Parliament to delete the principles of the Treaty of Waitangi from all legislation.

See: Maori Party Shadow Report; Treaty Tribes Coalition Shadow Report; Tai Tokerau Iwi Collective Shadow Report; Peace Movement Aotearoa Shadow Report.

3.5. The Waitangi Tribunal's recommendations are not binding on the Executive or the Legislature and are increasingly frequently dismissed and criticised by the Government.

Tai Tokerau Iwi Collective Shadow Report.

3.6. The courts have refused to review the fairness of Treaty settlements reached between iwi and hapu and the Crown on the basis that they are political matters.

See Birdling "Healing the Past or Harming the Future: Large Natural Groupings and the Waitangi Settlement Process"

3.7. The legislature's omnipotent power is aggravated by the legislature's institutional and political structure. There is only one house and the legislature is dominated by the executive. The majority of the members of the governing party also hold executive positions.

See: Charters "Why the Legislature Cannot Protect Rights in Hard Cases".

4. TREATY SETTLEMENTS

4.1. New Zealand's Treaty settlements policy and process are fundamentally flawed in a number of ways.

See: Report of the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples' on New Zealand; the Maori Party Shadow Report; the Treaty Tribes Coalition Shadow Report; Tai Tokerau Iwi Collective Shadow Report.

4.2. The Treaty settlements policy and process are determined wholly by the Government meaning one party to the Treaty, and the party responsible for the breaches of the Treaty, is also the arbiter of the fairness of the measures to provide redress for Maori historic grievances.

4.3. A number of Treaty settlement policies are unfair:

4.3.1. The Government will not address the issue of Maori self-government/self-determination/tino rangatiratanga.
4.3.2. The Government will not address the issue of Maori interests in oil and gas.
4.3.3. The Government will only settle with "large natural groupings" and, as a result, often overlooks the specific claims of smaller groups.
4.3.4. The Government determines the entity it will negotiate with.
4.3.5. The settlements are unfair as between Maori iwi and hapu: some tribes receive much less in financial and cultural terms than others – for example, some tribes will receive an additional 17c of every NZ dollar that the Government spends over NZ$1 billion on Treaty settlements, others will not.
4.3.6. The amount allocated to Treaty settlements is miserly, being approximately 2% of the original claims. This is particularly poor compared to the value of what tribes/iwi have lost.
4.3.7. The requirement that all settlements fully and finally extinguish a tribes' claims.

See: Maori Party Shadow Report; Treaty Tribes Coalition Shadow Report; Tai Tokerau Iwi Collective Shadow Report.

4.4. The Waitangi Tribunal has recently criticised governmental Treaty settlements policy. For example, it stated in relation to one settlement that as a result of governmental actions in its Treaty settlement "Te Arawa is now in a state of turmoil as a result. Hapu are in contest with other hapu and the preservation of tribal relations has been adversely affected."

See:
http://www.nzherald.co.nz/topic/story.cfm?c_id=252&objectid=10445985;
and
http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10446541.

4.5. The Government frequently ignores the reports of the Waitangi Tribunal, which form the basis of a number of Treaty settlements. Examples include the Waitangi Tribunal's Foreshore and Seabed Report and Oil and Gas Report.

4.6. The Government, in a break with convention, publicly criticises the Waitangi Tribunal.

See: Charters "Why the Legislature Cannot Protect Rights in Hard Cases".

4.7. The courts will not review the fairness of Treaty settlements because the issues are deemed too political meaning there is not an independent and impartial tribunal with binding powers available to review Treaty settlements.

See: Birdling "Healing the Past or Harming the Future: Large Natural Groupings and the Waitangi Settlement Process"

5. NEW ZEALAND'S APPROACH TO INTERNATIONAL NORMS ON INDIGENOUS PEOPLES' RIGHTS

5.1. New Zealand has persistently and consistently belittled international institutions that have criticised its approach to indigenous peoples' rights and has taken a discriminatory approach in negotiations on the Declaration on the Rights of Indigenous Peoples.

Response to the CERD Committee Foreshore and Seabed Decision

5.2. The New Zealand government's response to the CERD Committee's decision on the Foreshore and Seabed Act 2004 was hostile. For example, the Prime Minister stated:

> "I know that those who went off to this committee on the outer edges of the UN system are spinning it their way but I have to say there is nothing in that decision that finds that New Zealand was in breach of any international convention at all."
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> "This is a committee on the outer edges of the UN system. It is not a court. It did not follow any rigorous process as we would understand one. In fact, the process itself would not withstand scrutiny at all. And frankly, we don't think that those who went to it got what they wanted for [phon] anyway."
>
> "The other thing is I don't think we should elevate this to any statement that this is the UN making a finding against New Zealand. This is a Committee pursuant to a convention that sits on the outer edge of the UN system – this is not the UN Security Council with an open and transparent process. In fact the process really had quite a lot of shortcomings."
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> See: media reports in response to the CERD Committee's Foreshore and Seabed Decision.

5.3. The Government has not made any attempt to discuss with Maori the means to address the discriminatory aspects of the Foreshore and Seabed Act 2004, as requested by the CERD Committee. The Government has ignored the CERD Committee's decision.

5.4. The impact of the Foreshore and Seabed Act 2004 is misrepresented in New Zealand's state report. It fails to point out that:

- the statutory tests to have customary rights or territorial customary rights recognised are inconsistent with Maori customary law;
- the statutory tests to have customary rights or territorial customary rights recognised are extremely difficult to meet. Many academics consider them the most difficult tests in the Commonwealth;
- fee-simple titles in the foreshore and seabed were not extinguished. Maori titles were;
- a foreshore and seabed reserve, a possible option for redress, does not give Maori any proprietary rights in the area over which they have proven their territorial rights. Foreshore and seabed reserves remain "public foreshore and seabed" and are to be managed by a board to be agreed to by the Maori

group concerned, the Government and the relevant local government (see section 41). Public access to foreshore and seabed reserves cannot be restricted;

- if Maori choose to negotiate redress for the loss of their territorial customary rights, the Government is under no obligation to provide redress. There will be no independent and impartial oversight of the negotiating process. Indeed, Maori will be in a very poor negotiating position (see, in particular, section 38);
- the FSA legislatively overrode Maori access to the courts to prove their territorial and non-territorial interests in the foreshore and seabed under Te Ture Whenua Maori Act 1993 and common law aboriginal title;
- the Waitangi Tribunal found the Government's foreshore and seabed policy, on which the FSA is based, to be contrary to the principles of the Treaty of Waitangi and international human rights norms.

See: submissions to the CERD Committee submitted in March 2005 on the Foreshore and Seabed Act 2004; Maori Party Shadow Report; Treaty Tribes Coalition Shadow Report; Tai Tokerau Iwi Collective Shadow Report; Peace Movement Aotearoa Shadow Report.

Response to the Report of the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples

5.5. The Government and the Opposition was equally dismissive of the report of the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples. For example, media reports record the following:

Deputy Prime Minister Dr Michael Cullen said earlier that the Government would listen to what Prof Stavenhagen had to say on the Foreshore and Seabed Act but would only act on recommendations consistent with government policy.

Meanwhile, National Party Maori Affairs spokesman Gerry Brownlee said today New Zealanders did not need to be told by the UN what it meant to be a Kiwi. "Fair-minded Kiwis will reject these statements outright, because they know them to be untrue." Mr Brownlee said Prof Stavenhagen had been in the country for only nine days. "So, how can he possibly assume to have thoroughly examined 160 years of New Zealand history?"

New Zealand has been red-carded on race relations issues and human rights breaches in a United Nations report by Special Rapporteur Professor Rodolfo Stavenhagen. However, Prime Minister Helen Clark said today the Special Rapporteur had produced a somewhat unbalanced report. "The first draft that came to the New Zealand Government was grossly inaccurate and I think some of those problems have been carried through to the second draft. "Overall, I think New Zealand would see it as a missed opportunity to get a balanced look at what happens in this country. We do have unique reconciliation processes here which tend to be simply dismissed by the Special Rapporteur.

Deputy Prime Minister Michael Cullen has described the final report of the UN Special Rapporteur for indigenous issues as disappointing, unbalanced and narrow. And, "His 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.”

See: Report of the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples; Peace Movement Aotearoa Shadow Report; Media reports on the Government's response to the Report of the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous people.

Declaration on the Rights of Indigenous Peoples

5.6. New Zealand has been one of the few states leading opposition to the Declaration on the Rights of Indigenous Peoples (the Declaration), together with Australia, the United States, the Russian Federation and, more recently, Canada. It has made statements opposing the Declaration at every opportunity, including in the Human Rights Council.

See: Charters “The Rights of Indigenous Peoples”; Whare and Charters Brief of Evidence to the Waitangi Tribunal in the Wai 262 Flora and Fauna Claim and especially Annex K.

5.7. New Zealand has persistently attempted to weaken indigenous peoples' land rights norms to standards that are less than that established by the CERD Committee in its jurisprudence, including in its General Comment on Indigenous Peoples. For example, New Zealand has sought to delete any reference to indigenous peoples' material relationship with their traditional lands, water-down references to indigenous peoples' land ownership under indigenous peoples' customary law; to protect non-indigenous peoples' land rights relative to indigenous peoples' land rights; and to avoid strong obligations to provide restitution and compensation to indigenous peoples when providing redress for illegitimate takings of indigenous peoples' traditional lands.

See: Charters “The Rights of Indigenous Peoples”; Whare and Charters Brief of Evidence to the Waitangi Tribunal in the Wai 262 Flora and Fauna Claim and especially paras 23 and 24; Treaty Tribes Coalition Shadow Report; Peace Movement Aotearoa Shadow Report.

5.8. New Zealand's position on the Declaration has been criticised by indigenous peoples and leading human rights non-governmental organizations the world over.

See: Whare and Charters Brief of Evidence to the Waitangi Tribunal in the Wai 262 Flora and Fauna Claim and especially annexes AF and AG.

5.9. New Zealand has persistently and consistently refused to consult with Maori on their position on the Declaration.

See: Whare and Charters Brief of Evidence to the Waitangi Tribunal in the Wai 262 Flora and Fauna Claim and especially annexes O and P; Maori Party Shadow Report; Tai Tokerau Iwi Collective; Peace Movement Aotearoa.

5.10. Governmental delegations on the Declaration have been hostile to Maori participating in the negotiations on the Declaration.

See: Whare and Charters Brief of Evidence to the Waitangi Tribunal in the Wai 262 Flora and Fauna Claim and especially annex O.

5.11. In March 2007, the CERD Committee called on Canada to support the immediate adoption of the Declaration. In the light of the above, a similar request would be appropriate in relation to New Zealand.

AIR Trust
July 2007