

11 October 2011

**INTERNATIONAL CONVENTION ON THE ELIMINATION OF RACIAL  
DISCRIMINATION**

CERD/C/NZL/20 (Future)

Twentieth periodic report of States Parties due in 2012: New Zealand

**NGO Comment on Draft State Report**

**Human Rights Foundation**

The Human Rights Foundation is a non-governmental organisation, established in December 2001 to promote and defend human rights through research-based education and advocacy. We have made submissions on new laws with human rights implications. We also monitor compliance and implementation of New Zealand's international obligations in accordance with the requirements of the international conventions New Zealand has signed, and have prepared parallel reports for relevant United Nations treaty bodies to be considered alongside official reports. Though the primary focus of the Foundation is on human rights in New Zealand, we recognise the universality of human rights and have an interest in human rights in the Pacific and beyond.

The Human Rights Foundation and the Equal Justice Project wish to make the following comments on the Draft State Report under CERD relating to five areas:

- (i) Access to education for asylum seekers and refugees (CERD Articles 2 and 5)
- (ii) Deep sea oil exploration: permit being issued without consultation with affected indigenous communities (CERD Article 2)
- (iii) Operation 8 – excessive use of police powers against Maori community in “anti-terror” raids in 2007 (CERD Articles 2 and 5)
- (iv) Use of Tasers – disproportionate use against Maori community (CERD Articles 2 and 5)
- (v) Disproportionately high suicide rate in Maori community (CERD Articles 2 and 5)

## **Access to education – ethnic minorities; asylum seekers and refugees – CERD Articles 2 and 5**

Legislative change under the Immigration Act 2009 now allows all children (up to 18 years) to receive free enrolment and free education (see s.352). However there are consistent reports that in practice schools are not enrolling children who do not have a visa - by definition ethnic minorities - and particularly claimants under the UN Refugee Convention, Convention against Torture and International Covenant on Civil and Political Rights.

This undermines the implementation by state schools of a positive law change.

## **Deep sea oil exploration - breach of CERD Articles 2 and 5**

The Draft State Report to CERD fails to mention a significant area of concern which is affecting indigenous rights in New Zealand – the Government's decision to issue a permit for deep sea oil exploration without consultation with the local affected indigenous tribe - Te Whānau-ā-Apanui.

The Government's decision to issue a permit to Brazilian oil giant Petrobras International to carry out offshore drilling in the Raukumara Basin in April/May 2011 breaches indigenous rights and the Treaty of Waitangi/te Tiriti o Waitangi (the Treaty). It raises concerns of racial discrimination, both in property rights and through Treaty breaches. It risks severe environmental damage, which would harm the spiritual, economic and cultural interests of tangata whenua on much of the North and East coasts of New Zealand. As such, the issue should be included in the Government's 20<sup>th</sup> report to CERD.

We are particularly concerned at the lack of consultation with local iwi. This breaches Articles 19 and 32 of the UNDRIP which the Government agreed to support in 2010. Te Whānau-ā-Apanui has indicated that they do not support the offshore drilling and have taken legal action against it.<sup>1</sup>

In issuing the permit, the Government breached important Treaty principles such as good faith and partnership between the Crown and Maori. Good faith requires consultation on major issues.<sup>2</sup> The failure to consult could have severe continuing implications for race relations in New Zealand. Treaty breaches discriminate against Maori. Legislation in New Zealand should aim to comply with the Treaty, or involve consultation with Maori and consideration of Treaty principles.<sup>3</sup> Courts presume legislation is meant to comply with the Treaty and where relevant take the Treaty into account even where there is no statutory mention of it. The decision also breaches legislative references to the Treaty of Waitangi, such as Article 4 of the Crown Minerals Act 1991. In this context, the lack of consultation with affected iwi is particularly grave.

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1 Jay Harkness. "Why Petrobras has no right(s) to drill for deep sea oil off the East Cape" 19 September 2011. <http://www.greenpeace.org/new-zealand/en/news/blog/why-petrobras-has-no-rights-to-drill-for-deep/blog/36880/>.

<sup>2</sup> *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 at 152.

<sup>3</sup> Legislation Advisory Committee. *Guidelines on Process and Content of Legislation*. "Principles of the Treaty of Waitangi". [http://www2.justice.govt.nz/lac/pubs/2001/legislative\\_guide\\_2000/chapter\\_5.html](http://www2.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_5.html).

Offshore drilling could harm Maori customary and statutory fishing rights, such as those allocated to iwi in settlement of breaches of Treaty of Waitangi.<sup>4</sup> If an oil spill occurs, it would cause huge detriment to Maori spiritual, cultural, social and economic interests in a large area of the East and North coasts and harm their statutorily provided fishing quota allocations.<sup>5</sup> This would also affect future potential interests such as the new species quota allocated automatically to Maori. The mana of local Maori groups would be adversely affected, as would the cultural obligation of kaitiakitanga<sup>6</sup> they have for the area.<sup>7</sup> The decision puts at risk many taonga which are protected by Article 2 of the Treaty.

The Government failed to take these relevant issues into account when issuing the permit. Because of its effect on race relations and indigenous rights, the issue should have been addressed in the report.

On 19 September 2011, Greenpeace and Te Whānau-ā-Apanui filed a judicial review in the High Court in Auckland challenging the Government's decision to issue Petrobras a permit for deep sea oil exploration off the East Cape. This is the first time an oil permit has been challenged in the New Zealand courts on both environmental and Treaty of Waitangi grounds. *Inter alia*, Greenpeace and Te Whānau-ā-Apanui will argue that the Government acted unlawfully by failing to have proper regard to the principles of the Treaty of Waitangi, including to consult with Te Whānau-ā-Apanui and failing to give consideration to the iwi's fishing rights and customary title claims to the area.

In a press release about the judicial review action, tribal leader Rikirangi Gage, of Te Whānau-ā-Apanui, stated<sup>8</sup>:

"We have a sacred responsibility to protect and preserve our natural environment and the Government has a sacred duty under the Treaty of Waitangi to work alongside us to achieve this. The Government is continuing to fail both these obligations and is putting both the marine environment and our communities at risk."

"Rather than pander to the interests of foreign oil companies, the Government must face up to the fact that the burning of fossil fuels is one of the major contributors to global climate change and that we must all join together as a nation to protect our children's future."

### **Operation 8 - breach of CERD Articles 2 and 5**

The Government's 20<sup>th</sup> report to the CERD should include reference to the 'Operation 8' raids in Ruatoki and other areas in 2007. Operation 8 has been linked with Maori political

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<sup>4</sup> Maori Fisheries Act 2004

<sup>5</sup> Maori Fisheries Act 2004. Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. Dr Pita Sharples said such an oil spill would 'kill the coastal economy' which iwi rely on. Auckland University Law School guest lecture, 7 October 2011.

<sup>6</sup> See s 7(a), Resource Management Act 1991.

<sup>7</sup> Waitangi Tribunal. Wai 262, 2.314. 6 July 2006. [http://www.waitangi-tribunal.govt.nz/doclibrary/public/wai262/SOI/Wai262SOI\(doc2.314\)small.pdf](http://www.waitangi-tribunal.govt.nz/doclibrary/public/wai262/SOI/Wai262SOI(doc2.314)small.pdf)

<sup>8</sup> Greenpeace to legally challenge deep sea oil permits, Monday, 19 September 2011, 11:29 am Press Release: Greenpeace New Zealand see <http://www.scoop.co.nz/stories/PO1109/S00260/greenpeace-to-legally-challenge-deep-sea-oil-permits.htm> (accessed 10.10.2011)

activism and perceived as having a racial element. As such, 'Operation 8' harmed race relations and the trust between police and Maori, especially Tuhoe. In the lead up to the raids, police also violated section 21 of the New Zealand Bill of Rights Act, the right to be free of unreasonable search and seizure.<sup>9</sup>

Operation 8 must be viewed in its social and historical context to understand its impact. The raids worsened the "uneasy relationship"<sup>10</sup> that Tuhoe historically had with the Crown, and were given added potency by their similarity to historical events such as Parihaka. Dr Pita Sharples said that the raids "set race relations back 100 years".<sup>11</sup>

The raids also added to the perception that the criminal justice system "systematically discriminates against Maori".<sup>12</sup> Much of the illegal evidence was gathered by trespass on Tuhoe-owned land. Ruatoki has a predominantly Maori population and many of those arrested were activists for Maori sovereignty. The police tactics used were heavy handed and said to have "traumatised" the mostly Maori population.<sup>13</sup> For example, there were claims that a school bus was boarded and the children confronted by armed police. The "effective mass detention" of Ruatoki citizens could be a breach of the right to liberty of the person.<sup>14</sup>

In national media and the public's perception, the raids were linked to Maori and Maori political activism. MP Te Ururoa Flavell believes that Operation 8 was a breach of the Treaty of Waitangi, that the Tuhoe people were "stigmatised" and that it appeared that Maori had been targeted.<sup>15</sup> Operation 8 "seriously strained relations between Tuhoe and the police."<sup>16</sup> Because of these perceptions of discrimination and racial targeting, the Government should address the issue in its report to the CERD Committee. The Government needs to repair trust between the Crown and Maori, specifically between the police and Tuhoe.

For 13 of the 17 eventually charged, the breach of section 21 was so serious that the evidence was ruled inadmissible, and the charges dropped. The Court held that there was a "serious breach" of the "fundamental values" in section 21.<sup>17</sup> Several Supreme Court judges

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<sup>9</sup> *Hamed v R* [2011] NZSC 101.

<sup>10</sup> NZ Herald Staff 'Secret Justice no justice at all' Herald on Sunday (New Zealand, 11 September 2011) [http://www.nzherald.co.nz/anti-terror-raids/news/article.cfm?c\\_id=1501470&objectid=10750877](http://www.nzherald.co.nz/anti-terror-raids/news/article.cfm?c_id=1501470&objectid=10750877).

<sup>11</sup> NZ Herald Staff "Raids set Maori-Pakeha relations back 100 years – Sharples" NZ Herald (New Zealand, 18 October 2007) [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10470629](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10470629).

<sup>12</sup> NZ Herald Staff "Justice system discriminates against Maori – Sharples" NZ Herald (New Zealand, 1 October 2011) [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10755915](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10755915).

<sup>13</sup> Such as then MP Jeanette Fitzsimons. Peter Lewis "NZ Police under fire over 'racist' raids" ABC News (Australia, 19 October 2007) <http://www.abc.net.au/news/2007-10-19/nz-police-under-fire-over-racist-raids/703668>.

<sup>14</sup> S 21, New Zealand Bill of Rights Act 1990. Andrew Geddis "Once upon a time in Te Urewera" (2011) Pundit <http://pundit.co.nz/content/once-upon-a-time-in-te-urewera>.

<sup>15</sup> NZPA 'Siege leaves community in fear- Maori MP' Stuff.co.nz (New Zealand, 15 October 2007) <http://www.stuff.co.nz/31721>.

<sup>16</sup> Paul Buchanan 'Postscript on Operation 8' (2007) Scoop <http://www.scoop.co.nz/stories/HL0711/S00312.htm>.

<sup>17</sup> Dean Knight "Covert video surveillance and the (c)overt erosion of the Rule of Law" (2011) *Elephants and the Law*. <http://www.laws179.co.nz/2011/09/covert-video-surveillance-and-covert.html>.

found that acted deliberately or recklessly.<sup>18</sup> Further issues arise with the Government subsequently legislating to suspend the effect of the Court's decision on other surveillance operations. For these reasons, the circumstances of Operation 8 should thus be included in the State's report to CERD.

### **Taser Use and Effect on Ethnic Groups - breach of CERD Articles 2 and 5**

The State Report to CERD should also include the issue of the use of tasers for the following reasons.

After the Taser trial period from September 2006 to August 2007, 50,000-volt tasers were issued to police nationwide from March 2010.<sup>19</sup> Although it was introduced to be used as a last resort, it is now considered as part of the basic police daily armament.<sup>20</sup> The new Police Commissioner has announced the removal of restrictions on taser usage.<sup>21</sup> While tasers had been available in only 26% of frontline cars, and could only be used with the communications centre's permission, they are now to be distributed to every police car.<sup>22</sup> This breaches the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Under these international conventions, law enforcement officials should be trained to use all force strictly in accordance with these international guidelines. They also require officers to use force only to the minimum extent necessary to achieve a lawful objective, in proportion to the threat posed and in a manner designed to minimize damage or injury.<sup>23</sup> Rolling out Tasers to every Police car, with no indication that adequate training will be made available to all frontline Police, serious breaches New Zealand's international responsibilities.

The Auckland police districts leadership has claimed that the introduction of tasers has resulted in the largest reductions in crime in the country.<sup>24</sup> However, we are coed that tasers have now become a tool for compliance enforcement.<sup>25</sup> Tasers are also used disproportionately against those with mental health issues - four out of ten of those tasered in the past year had experienced mental health problems.<sup>26</sup> Furthermore, statistics show that tasers are being also used disproportionately on ethnic groups.<sup>27</sup> In particular, 40% of those tasered during the 11-month period were Maori, and 19% of those tasered were Pacific Islanders.<sup>28</sup> However, the police have said the high incidence of use of tasers on Maori reflects the unfortunate reality they were over-represented in crime statistics.<sup>29</sup> Maori account for about 17% of New Zealanders aged 14 to 16, but make up 54% of offenders in the youth courts and 60% of teenagers in custody.<sup>30</sup> In fact, Maori are tasered in even greater numbers than their representation in crime statistics.

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<sup>18</sup> *Hamed v R* [2011] NZSC 101 per Tipping J at [233].

<sup>19</sup> [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10747277](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10747277), Aug 25, 2011

<sup>20</sup> [http://www.nzherald.co.nz/maori/news/article.cfm?c\\_id=252&objectid=10747456](http://www.nzherald.co.nz/maori/news/article.cfm?c_id=252&objectid=10747456), Aug 26, 2011.

<sup>21</sup> [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10717383](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10717383), April 6, 2011

<sup>22</sup> Above n 2.

<sup>23</sup> <http://www.amnesty.org.nz/our-work/control-arms/taser-stun-guns-nz/recommendations-nz-police>

<sup>24</sup> [http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10716398](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10716398), April 1, 2011

<sup>25</sup> Above n 3.

<sup>26</sup> Above n 2.

<sup>27</sup> Above n 1.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> <http://www.stuff.co.nz/national/3354966/More-marae-courts-planned>, February 21, 20110

We are concerned that the taser roll out has inadequately addressed the need for training. All use of force training programmes should include regular conceptual and operational training on international human rights standards, including the absolute prohibition against torture and other cruel, inhuman or degrading treatment.

### **Maori Suicidal Rate - breach of CERD Articles 2 and 5**

The Government's report on the CERD should also address the disproportionately high suicide rates amongst Maori.

The general suicide figures have increased from 540 in 2007-2008 to 558 in 2010-2011.<sup>31</sup> The figures also show that Maori still have the highest rate of suicide.<sup>32</sup> The rate for Maori is 17.8 per 100,000 people, compared with 13.5 for European and other groups.<sup>33</sup> Other statistics show that New Zealand has the highest youth suicide rate in the OECD for teenagers aged 15 to 19.<sup>34</sup> Although Maori make up about 10% of the population, they represent 20% of the suicide statistics.<sup>35</sup> To illustrate the severity of the problem, one in five of suicide incidents in 2007 were Maori.<sup>36</sup>

There are several causes to the disproportionately high suicide rate amongst Maori. Racism, or fears of it, is highlighted as a significant factor towards the high suicide rate amongst Maori youth.<sup>37</sup> Mental Health Foundation chief executive Judi Clements also points to unemployment and the consequentially high risk of depression as the likely factor.<sup>38</sup> According to the research on the risk and prevention factors of suicide among Maori youth, feeling disconnected from the Pakeha culture stops Maori from accessing support systems, welfare and good education.<sup>39</sup> The report also lists other suicide risk factors, such as anxiety, psychiatric conditions, family violence and sexual abuse.<sup>40</sup>

A number of possible solutions to the issue have been suggested: role of a family, the feeling of belonging and being cared about are vital for Maori youth in particular.<sup>41</sup> Another necessary step is eradicating the negative stereotypes of Maori, and the value they add to the New Zealand community.<sup>42</sup> This contributes to the racism, or the fear of it, Maori must confront to every day. Furthermore, kaumatua talk on suicide, despite the concerns those conversations could encourage copycat behavior, and iwi or hapu having strategies in place to address broader issues such as drug and alcohol use and sexual abuse will also help to attack the root cause of the problem.<sup>43</sup> All these issues require government intervention, yet are ignored in the Draft CERD Report

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<sup>31</sup> <http://www.radionz.co.nz/news/national/83624/chief-coroner-demands-new-approach-to-reduce-suicide-rates>

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> <http://www.stuff.co.nz/sunday-news/news/4947196/Why-our-kids-are-dying>

<sup>35</sup> Ibid.

<sup>36</sup> <http://www.waatea603am.co.nz/News/2011/May/Maori-suicide-rate-still-too-high>

<sup>37</sup> Above n 4.

<sup>38</sup> Above n 6..

<sup>39</sup> Above n 4..

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Above n 1.