Mandates of the Special Rapporteur in the field of cultural rights; the Special Rapporteur on the independence of judges and lawyers and the Special Rapporteur on the rights of Indigenous Peoples

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(Please use this reference in your reply)

1 July 2024

Excellency,

We have the honour to address you in our capacities as Special Rapporteur in the field of cultural rights; Special Rapporteur on the independence of judges and lawyers and Special Rapporteur on the rights of Indigenous Peoples, pursuant to Human Rights Council resolutions 55/5, 53/12 and 51/16.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the alleged violation of the rights to land, territories, and resources of the Maori Indigenous communities of Wairarapa Moana and Nelson Tenths through the enactment of the **Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Claims Settlement Act** ("Claims Settlement Act"), which allegedly **violates the free, prior, and informed consent (FPIC) of Wairarapa Moana, as it was passed only days after the New Zealand Supreme Court ruled that the Waitangi Tribunal could order the return of the lands to the concerned Indigenous Peoples**.

According to the information received:

Wairarapa Moana is a community of Indigenous Peoples located in Pouākani. More specifically, in 1916 the Crown gave Wairarapa Moana 10,695 hectares of land at Pouākani as compensation for their failure to provide lands in the Wairarapa as part of the Wairarapa Moana exchange. Therefore, Wairarapa Moana began their journey to the South Waikato lands and settled.

The Nelson Tenths is a community of Māori Indigenous Peoples located in the Nelson region. More specifically, at the time of European settlement in 1841, Nelson Tenths whānau (family) held authority over the Nelson, Motueka, and Golden Bay lands. Nelson Tenths families of different hapū (sub-tribe) belong to four iwi (tribe comprising various hapū), Ngāti Koata, Ngāti Rārua, Ngāti Tama, and Te Ātiawa. The whānau, hapū, and iwi are social structures that form the core aspects of Māori relationships and identity. Tikanga Māori (Māori law) guides these social relationships and maintains order and justice within these structures.

Māori are the Indigenous Peoples from New Zealand and although the issues presented in this document discuss the cases of Wairarapa Moana and the Nelson Tenths communities we acknowledge that these are also violations experienced by other Māori in New Zealand. The entrenched issues surrounding the violation of Māori land rights in New Zealand stem from the lack of robust constitutional protections. One primary concern is parliamentary sovereignty, which grants the New Zealand Parliament the ability to override any court decision, including those protecting the rights of Indigenous Peoples. Amongst other issues, this legislative power undermines judicial attempts to

uphold Māori land rights, resulting in frequent and unresolved grievances. As New Zealand has an unwritten constitution, the absence of concrete constitutional guarantees for the protection of Māori rights, leaves Māori vulnerable to legislative changes that can negate court rulings in the Government's favor, continuing a cycle of dispossession and legal marginalization.

The Waitangi Tribunal was established to address breaches of the Treaty of Waitangi; however, the Tribunal has been criticized for its ineffectiveness in providing concrete remedies for land and resource rights violations. The UN Special Rapporteur on the Rights of Indigenous Peoples in the 2011 country visit report to New Zealand highlighted that the Tribunal's recommendations are not binding which significantly limits their impact.[1] Despite numerous findings of treaty breaches, the lack of enforceable outcomes means that many claims remain unresolved contributing to ongoing Indigenous Peoples rights violations faced by Māori Also without binding recommendations or effective implementation mechanisms, the Tribunal's role is significantly weakened. The Wairarapa Moana and Nelson Tenths cases are examples of the current New Zealand system failing Māori and therefore, these systemic issues highlight the need for substantial reforms to ensure genuine protection and recognition of not only Māori land rights but all Māori rights.

Wairarapa Moana

The land owned by Wairarapa Moana ki Pouākani Incorporation (Wairarapa Moana) at Pouākani was provided by the Crown in substitution for "ample reserves." In 1896, the Crown had agreed, but failed, to provide these ample reserves when it acquired title to Lakes Wairarapa and Onoke. In the 1940s, the New Zealand Government confiscated the land from Wairarapa Moana under the Public Works Act. In the late 1980s, the legislative provision authorizing Wairarapa Moana to seek the return of the land arose out of an agreement between Māori and the Crown. This agreement enabled the New Zealand Government to transfer Crown-owned land to Crown-owned companies, known as State Owned Enterprises. Allegedly, the resumption jurisdiction of the Waitangi Tribunal is the only instance where the Waitangi Tribunal can make a determination that is binding on the New Zealand Government. Usually, the Tribunal's rulings are only persuasive and non-binding. In 2017, Wairarapa Moana had a right to seek the return of this land under New Zealand domestic law and did so, bringing an application for resumption to the Waitangi Tribunal.

In 2022, the New Zealand Supreme Court confirmed Wairarapa Moana's right to seek the return of the Pouākani lands. On 12 December 2022, the Waitangi Tribunal issued memorandum – directions observing, "if the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Claims Settlement Bill were not passed into law tomorrow, the Tribunal would pursue the path outlined for it in Wairarapa Moana ki Pouākani v Mercury NZ Ltd [2022] NZSC 142. This might have the effect of returning significant hydro assets to the Wairarapa Moana ki Pouākani Incorporation or another appropriate entity." Allegedly, the hydro dam was built in 1945 without Wairarapa Moana's consultation and without

[1] A/HRC/18/35/Add.4

their free, prior and informed consent. In 1948, the Crown acquired 787 acres of the Pouākani land for the construction of the Maraetai hydro dam. Allegations have been made that Wairarapa Moana could not be trusted in relation to the operation of the dam and power station situated on the Pouākani lands and that if resumption were to occur, the National Grid would collapse. According to information received, considering Wairarapa Moana less capable than an external entity to manage the dam is based on unfounded and racially discriminatory assumptions. In this regard, the Committee of Management of Wairarapa Moana is no different from the board of Mercury NZ Ltd, which currently operates the project and employs experts. There is no reason to suggest that Wairarapa Moana would manage the project any differently. Currently, due to the management of the dam being outsourced, Wairarapa Moana are excluded from all management and decisions made regarding developments of this project on their ancestral territory.

On 13 December 2022, the Ngāti Kahungunu ki Wairarapa Tāmaki nui-ā-Rua Claims Settlement Bill had its final reading in the New Zealand Parliament. This Bill then became law on 16 December 2022. Allegedly, the Claims Settlement Act extinguished Wairarapa Moana's ongoing claim to have its land returned and forced a settlement against the wishes of the majority of Wairarapa Moana owners. Furthermore, legislation to settle the Wairarapa Moana claim was adopted without consultation and the free, prior and informed consent of Wairarapa Moana Peoples.

Nelson Tenths

In 1841, the Māori customary landowners in the Nelson region consented to the establishment of the Nelson settlement under certain conditions. These conditions included the reservation of 151,000 acres of land, comprising approximately 10 per cent of the settlement, along with significant cultural sites such as burial grounds, cultivation areas, and residences, for the perpetual benefit of the Māori owners and their descendants.

Four years later, in 1845, this agreement was formalized through a Crown Grant. However, allegations have been made that the government failed to honor this agreement, reserving only 3,000 acres instead of the agreed-upon 151,000. Following the former National government's refusal to consider the iwi's claims at the Waitangi Tribunal, the claimants of the land pursued legal action against the government in the New Zealand High Court, alleging a breach of trust under private law. The case eventually reached the New Zealand Supreme Court in 2017, which ruled in favor of the Māori customary landowners of the Nelson Tenths.

Following the case, efforts have been made to resolve the matter amicably through out-of-court negotiations, aimed at upholding government accountability, human rights, and domestic and international legal obligations. It has been alleged that these attempts have been unsuccessful. Furthermore, reports allege that the New Zealand Government intends to sell or dispose of land within the Nelson area, the same land protected by the 1845 Crown Grant.

In 2022, the Supreme Court issued its decision in *Wairarapa Moana ki Pouākani Incorporation v Mercury NZ Limited* [2022] NZSC 142 referring the resumption applications back to the Waitangi Tribunal for it to continue its iterative process in achieving satisfaction and justice for the participants in this inquiry. In 2023, the case returned to the High Court to determine the extent of the Crown's breaches, potential remedies, and any defenses available to the Crown. However, the outcome of this decision is pending. Disruptions to the legal proceedings have occurred due to the recent election of the new coalition government and the appointment of a new Attorney-General, the defendant in the case. Nevertheless, requests for meetings by Nelson Tenths with the new Attorney-General and involved Ministers have reportedly gone unanswered.

The international human rights mechanisms have also addressed the issue several times. The Special Rapporteur on the rights of Indigenous Peoples and human rights treaty bodies have recommended that the Government of New Zealand open up discussions with Māori regarding the constitutional review process. However, these recommendations have not yet been implemented. In 2011, the Special Rapporteur recommended that the Government open up discussions with Māori as soon as possible regarding the constitutional review process.[2] In 2013, the Committee on the Elimination of Racial Discrimination (CERD) recommended New Zealand ensure that public discussions and consultations are held on the status of the Treaty of Waitangi within the context of the constitutional review process.[3] Finally, in 2016 the Human Rights Committee (CCPR) echoed the CERD's recommendation that New Zealand should strengthen the role of the Treaty of Waitangi in the existing constitutional arrangements, and that the Government should guarantee the informed participation of Indigenous Peoples in all relevant national and international consultation processes, including those directly affecting them.[4]

While we do not wish to prejudge the accuracy of these allegations, we are particularly concerned about the emphasis on unilateral Parliamentary sovereignty above all else. In the absence of any constitutional protection, the legislature continues to breach fundamental civil and Treaty rights of Māori.

We are particularly concerned regarding the impact the Claims Settlement Act will have on Wairarapa Moana and their rights to their lands. We are concerned that the legislation prevents Wairarapa Moana from exercising rights to the land, territories, and resources of the Pouākani land which is protected under article 26 of the UNDRIP, as well as under several human rights instruments such as ICCPR and CERD, and their cultural rights to maintain their ways of life and culture and to participate in decision-making processes that have an impact on their cultural life, protected under article 27 of ICCPR and article 15 of ICESCR. Furthermore, we are concerned that the Government failed to afford adequate legal recognition and protection to Wairarapa Moana's interests in the Pouākani land, and failed to grant due respect to Wairarapa Moana's tikanga (law). Importantly, tikanga is a law akin to State law, however, the State law continues to undermine and diminish tikanga's importance and relevance in Māori grievances.

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2 A/HRC/18/35/Add.4; CERD/C/NZL/CO/18-20; CCPR/C/NZL/CO/6
3 CERD/C/NZL/CO/18-20 (7).
4 CCPR/C/NZL/CO/6 (46).

We are concerned about how this legislation will not only affect the current generation but will also create intergenerational trauma for several generations to come. The Wairarapa Moana peoples have been the guardians of the land for generations, and they are the best caretakers of it. However, Māori have not been consulted on legislation that may impact their right to land, territories and resources, as required under article 19 of the UNDRIP which stipulates that states shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their FPIC before adopting or implementing legislative or administrative measures that may affect them. this particularly relevant as this legislation might affect the Wairarapa Moana peoples' cultural expressions and livelihoods as Māori, which are inherently dependent on their lands, waters, and forests.

We are preoccupied that given the nature of the legislation, the Māori Peoples will allegedly lose access to their lands altogether, and with it, their cultural and traditional activities such as hunting, fishing, using of or caring for the waterways, and using herbs, plants, and trees in ceremonies or to supplement their diet. Finally, we are particularly concerned with the construction of the hydro dam in violation of the rights of Indigenous Peoples to be consulted, and without obtaining their free, prior and informed consent.

Similarly, we are concerned as to how the delay in recognizing the rights to the agreed-upon 151,000 acres of land in the Nelson region will have an impact on the human rights of the Nelson Tenths peoples. This delay prevents Nelson Tenths from exercising their right to the lands, territories, and resources in the Nelson region, and from accessing their traditional territories, therefore affecting the continued exercise of their traditional activities and spiritual ceremonies. Hence, the intergenerational passing of scientific knowledge about this area is also detrimentally impacted.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.

2. Please provide information on whether your Excellency's Government intends to repeal the Claims Settlement Act and redress the current inadequate practice regarding treaty settlements with the good faith consultation and the free, prior and informed consent of Wairarapa Moana and all iwi Māori to reflect the rights of Māori as Indigenous Peoples.

3. Please provide information as to your Excellency's Government considerations of addressing future Treaty settlement policies and the ongoing Māori-Crown relationship as one of mutuality and complementarity of the two legal systems operating within New

Zealand.

4. Please provide information on any steps or measures your Excellency's Government has taken or is planning to take to engage with the Nelson Tenths as a matter of urgency to reach a principled, fair, and effective solution that honors the Government's legal duties and recognizes the rights of Māori Indigenous Peoples as customary landowners. Furthermore, please provide information on your Excellency's Government's intentions to return the lands of Māori or, if this is not possible, to provide fair and adequate compensation for the loss of land in line with international law. In the latter situation, please explain what measures will be adopted to allow the Wairarapa Moana, Nelson Tenths and all Māori iwi and hapū to continue their traditional activities, in their remaining traditional territories.

5. Please provide information on any steps taken by your Excellency's Government for just, fair and timely mitigation or redress of adverse environmental, economic, social, cultural, or spiritual impacts on the Māori Peoples.

6. Please provide information on the consultations undertaken to seek the free, prior and informed consent of Māori Indigenous Peoples and to meaningfully include them in decision-making processes about the projects affecting them.

7. Please provide information regarding your Excellency's Government's timeline to undertake constitutional reform, given the aforementioned concerns. In particular, please provide information about the manner in which the entrenched issues surrounding the violation of Māori land rights in New Zealand will be addressed, and through which your Excellency's Government will provide more robust constitutional protections to avoid such violations of Māori rights.

We would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting website. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of our highest consideration.

Alexandra Xanthaki
Special Rapporteur in the field of cultural rights

Margaret Satterthwaite
Special Rapporteur on the independence of judges and lawyers

José Francisco Cali Tzay
Special Rapporteur on the rights of Indigenous Peoples

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw the attention of your Excellency's Government to its obligations under international human rights instruments.

We would like to refer to International Covenant on Civil and Political Rights (hereinafter, "ICCPR"). Article 2(3)(a) of the ICCPR provides that state parties will undertake measures to ensure those whose rights are violated have an effective remedy. Article 14(1) of the ICCPR provides that all persons shall be equal before the courts and tribunals and that everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. Finally, article 26 of the ICCPR provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

We would like to recall the Convention on the Elimination of All Forms of Racial Discrimination (hereinafter, "CERD"), which New Zealand has been a party to since 1972. In particular, we would like to draw attention to general recommendation 23 of the UN Committee on Elimination of Racial Discrimination, which in its paragraph 5, calls on States "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 or otherwise inhabited or used without their free, prior and informed consent to take steps to return those lands and territories" (Doc A/52/18, annex V 1997).

We would like to refer your Excellency's Government to article 15 paragraph 1(a) of International Covenant on Economic, Social and Cultural Rights (ICESCR), which New Zealand ratified on 28 December 1978, recognizing the right of everyone to take part in cultural life. In its general comment 21, the Committee on Economic, Social and Cultural Rights explained that this right entails the right to take part in the development of the community to which a person belongs, and in the definition, elaboration and implementation of policies and decisions that have an impact on the exercise of a person's cultural rights (para. 15.c).

As the Committee on Economic, Social and Cultural Rights makes clear, States must adopt appropriate measures or programmes to support minorities or other groups in their efforts to preserve their culture (para. 52.f), and must obtain their free, prior and informed consent when the preservation of their cultural resources is at risk (para. 55). In the case of Indigenous Peoples, cultural life has a strong communal dimension that is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. The Committee has stressed that "Indigenous Peoples' cultural values and rights associated with their ancestral lands and their relationship with nature must be respected and protected, in order to avoid the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity".

Recalling that the Sustainable Development Goals are a voluntary process enshrined in human rights that remain obligations under international law, the Special

Rapporteur underlines that no violation of human rights, including cultural rights, may be justified in the name of development or sustainable development (A/77/290, para. 95), and recommended, inter alia, that States, international organizations and other stakeholders ensure that sustainable development processes (a) are culturally sensitive and appropriate, contextualised to specific cultural environments, and seek to fully align themselves with the aspirations, customs, traditions, systems and world views of the individuals and groups most likely to be affected; (b) fully respect and integrate the participation rights and the right of affected people and communities to free, prior and informed consent; and (c) are self-determined and community led (A/77/290, paras. 97-98).

General comment 21 (2009) of the Committee also recalls that States have the obligation to respect and protect cultural heritage in all its forms. Cultural heritage must be preserved, developed, enriched and transmitted to future generations as a record of human experience and aspirations. In this connection, we would like to draw your Excellency's Government's attention to the reports of successive Special Rapporteurs in the field of cultural rights relating to the right of access to and enjoyment of cultural heritage (A/HRC/17/38) and to the protection of cultural heritage (A/HRC/31/59 and A/71/317). They stressed the significance of accessing and enjoying cultural heritage by individuals and communities as part of their collective identity and development processes. They underscored that the right to participate in cultural life implies that individuals and communities have access to and enjoy cultural heritages that are meaningful to them, and that their freedom to continuously (re)create cultural heritage and transmit it to future generations should be protected.

In addition, we would like to refer your Excellency's Government to relevant provisions of the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on 13 September 2007 and endorsed by New Zealand in 2010. As affirmed in article 3, Indigenous Peoples have the right to self-determination, which includes the right to freely determine their political status and freely pursue their economic, social, and cultural development.

In particular, we refer to article 8 subsection 2(a), (b), and (c) of UNDRIP which affirms that States shall provide effective mechanisms for the prevention of, and redress for, any action which has the aim or effect of depriving Indigenous Peoples of their integrity as distinct peoples, or of their cultural values or ethnic identities. Any action that has the aim or effect of dispossessing them of their lands, territories, or resources, and finally, any form of forced population transfer that has the aim or effect of violating or undermining any of their rights.

In addition, article 18 establishes that "Indigenous Peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures as well as to maintain and develop their own indigenous decision-making institutions." Article 19 stipulates that states shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting or implementing legislative or administrative measures that may affect them.

Article 25 confirms the right of Indigenous Peoples to maintain and strengthen their spiritual relationships with their lands. As affirmed in article 26 of the

Declaration: “Indigenous Peoples have the right to the lands, territories, and resources which they have traditionally owned, occupied, or otherwise used or acquired.” Article 26 further provides that 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.” Furthermore, this article establishes a positive duty on States to “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.”

In addition, article 27, provides for the access to a fair, independent, impartial, open, and transparent process for recognizing and adjudicating their rights in relation to the land. Article 28 stipulates the right of Indigenous Peoples to redress through the return of land or fair, equitable compensation, and the free, prior and informed consent. UNDRIP furthermore sets out in article 29 that Indigenous Peoples have the right to the conservation and protection of the environment and affirms in article 32 that Indigenous Peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories. Article 34 of UNDRIP specifies that “Indigenous Peoples have the right to promote, develop and maintain their institutional structures,” including their “juridical systems or customs, in accordance with international human rights standards.”

We would like to recall that international standards on the independence of the judiciary are closely linked to the rule of law and the separation of powers. In a 2009 report to the United Nations Human Rights Council (A/HRC/11/41), the mandate on Independence of Judges and Lawyers recalled that “[t]he principle of the separation of powers, together with the rule of law, are key to the administration of justice with a guarantee of independence, impartiality and transparency”. Furthermore, in a 2017 report to the Human Rights Council (A/HRC/35/31), the Special Rapporteur on that mandate highlighted that “respecting the rule of law and fostering the separation of powers and the independence of justice are prerequisites for the protection of human rights and democracy”.

Additionally, we would like to refer your Excellency’s Government to the Basic Principles on the Independence of the Judiciary[5], which establish that all governmental and other institutions must respect and conform to the independence of the judiciary and that judges will decide cases impartially, on the basis of the facts and in accordance with the law, "without any restriction and without undue influence, incitement, pressure, threat or interference, direct or indirect, from any sector or for any reason".

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.

[5] adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.