

International human rights perspectives on Ihumātao

A New Zealand Human
Rights Commission Report

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**NZ
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Human Rights Commission
Te Kāhui Tikā Tangata

International human rights perspectives on Ihumātao
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The Human Rights Commission was set up in 1977 and works under the Human Rights Act 1993. Our purpose is to promote and protect the human rights of all people in Aotearoa New Zealand. We work for a free, fair, safe and just New Zealand, where diversity is valued and human dignity and rights are respected.

For more information, please visit our website: www.hrc.co.nz

Table of Contents

<i>Executive Summary</i>	3
<i>Introduction</i>	7
<i>Background</i>	8
<i>Te Ao Māori - the Māori world view</i>	10
<i>The United Nations Declaration on the Rights of Indigenous Peoples</i>	11
The Declaration and Te Tiriti	11
The Declaration rights most relevant to Ihumātao	12
The Right to Land.....	12
The Right to Culture.....	13
The Right to Protection	13
The Right to Participation	14
The Right to Free, Prior and Informed Consent	14
The Principle of Good Faith	15
The Right to Redress.....	16
Fair, Independent, Impartial, Open and Transparent Processes	17
International Principles of Business and Human Rights.....	17
<i>Application of a human rights approach to Ihumātao</i>	19
<i>Scrutiny by the international human rights system</i>	20
<i>Conclusions</i>	22
<i>References</i>	25

Executive Summary

Whatungarongaro te tangata, toitū te whenua

As man disappears from sight, the land remains

The history of the land at Ihumātao and the events currently unfolding regarding its development pose significant and unique challenges for human rights in Aotearoa New Zealand. The land was confiscated in the 1860s by the New Zealand Government and is of major cultural, spiritual and historical significance to mana whenua. As one of the first sites where Māori landed in Aotearoa, it is also of historical significance for all New Zealanders.

These factors raise important human rights issues and challenges. Most specifically, they raise issues relevant to New Zealand's human rights commitments under the United Nations Declaration on the Rights of Indigenous Peoples ("the Declaration").

While much has been written to date on Ihumātao, the Human Rights Commission ("Commission") has developed this report to provide a distinctive perspective on how New Zealand's human rights commitments under the Declaration can provide, alongside Te Tiriti o Waitangi ("Te Tiriti"), a compelling and constructive framework within which the situation at Ihumātao can be considered.

We do so under our statutory mandate as New Zealand's national human rights institution and our statutory function to promote the human rights dimensions of Te Tiriti.

The Declaration itself is an international human rights document of great significance. It reflects a global consensus on the rights of indigenous peoples and complements the international law obligations contained in the UN human rights treaties that New Zealand is a party to. The New Zealand Government has endorsed the Declaration and by doing so has made a commitment to uphold the rights contained in it. Indeed, to demonstrate this commitment the Government has recently commenced work on a plan to progress the Declaration in Aotearoa New Zealand.

The Declaration also complements New Zealand's constitutional obligations under Te Tiriti. For example, at the core of the Declaration is the right of indigenous

peoples to self-determination. This right is also at the core of Te Tiriti as tino rangatiratanga and is found in international human rights treaties New Zealand has ratified, such as the International Covenant on Economic, Social and Cultural Rights.¹ The Declaration aligns with Te Ao Māori (the Māori worldview) including the inter-relationship between people and the natural world and kaitiakitanga (guardianship) of these natural resources.

In this report, the Commission has identified a number of rights and principles contained in the Declaration that flow from the right to self-determination and which we consider are of direct application to Ihumātao. These are:

- **The right to land** requires the Government to protect Māori rights to their lands, territories and resources which they have traditionally owned, occupied or used.
- **The right to culture** affirms the right of Māori to maintain, protect and develop the dignity of their culture.
- **The right to protection** requires the Government to recognise and protect the right of Māori to maintain, control, protect and develop their rights under the Declaration.
- **The right to participation** requires the Government to consult with Māori in good faith with the objective of obtaining their consent on measures that may affect them.
- **The right to free, prior and informed consent** is a central component of the right to participation. It involves the right of Māori to be fully informed, be appropriately consulted with, and to fully participate in, any decision-making relevant to their ancestral right to land, territories and resources.
- **The principle of good faith** requires consultations be carried out in the spirit of mutual trust and transparency.
- **The right to redress and restitution** requires that where lands have been confiscated without the free, prior and informed consent of Māori there should be redress in the form of restitution (return) in the first instance or when this is not possible, just, fair and equitable compensation.
- **Decision-making processes must be fair, independent, impartial, open and transparent** in particular, the Government has an obligation to guarantee mana whenua with access to justice including in respect of any claims they have regarding their dispossessed lands.

Together, these human rights standards recognise and affirm the fundamental importance of land to the identity, culture and rights of indigenous peoples. When translated into the context of Aotearoa New Zealand, they highlight the human rights commitments of the New Zealand Government to both protect Māori rights to land and culture and to provide a fully rights-consistent and participatory decision-making framework.

Central to the right to participation is the right of indigenous peoples to free, prior and informed consent – one of the most important procedural principles in the Declaration. Disagreements within indigenous communities about whether free, prior and informed consent has been achieved, should be resolved by the indigenous peoples, using their own laws, traditions, customs, and representative institutions.

The Government, for its part, should ensure that consultation processes support consensus building, are non-coercive and do not cause division.

The human rights principles set out in the Declaration also reinforce traditional Te Ao Māori values and concepts that apply to the land, its guardianship and its cultural and spiritual significance for mana whenua.

In summary, the Declaration provides a helpful lens through which the situation at Ihumātao can be viewed, including:

- Whether there are adequate legal protections or avenues to ensure that land of considerable cultural and heritage value to mana whenua is adequately protected.
- The nature and extent of consultation regarding decisions to approve the housing development under the Special Housing Act and the unavailability of a legal process to challenge the decision.
- The nature and extent of consultation regarding decisions to develop the land, particularly negotiations with Fletcher Building.
- The nature and extent of discussions about resolving the current situation and finding an appropriate way forward.
- Whether previous processes have enabled all mana whenua affected by the housing development to properly participate.

- The extent to which mana whenua have been able to have a meaningful say on the outcome of decisions, including the ability to influence the outcomes and be decision makers.
- Whether the current processes have been designed to support consensus.

This report concludes that a human rights approach, based on Te Tiriti and the Declaration, provides a compelling and constructive way forward for all parties. This approach should include the following elements:

1. Protection of mana whenua rights and a continuation of the current halt on development of the land while work towards a resolution is carried out.
2. Strengthened mana whenua participation in all decision-making processes to enable true free, prior and informed consent.
3. Provision for redress in a manner consistent with human rights standards.
4. A Government commitment to full engagement with the United Nations Special Rapporteurs on the Right to Adequate Housing and the Rights of Indigenous Peoples.

Ihumātao can be a turning point for the protection of indigenous rights in Aotearoa New Zealand and there is a real opportunity to move the nation forward in a constructive way. A resolution at Ihumātao that upholds the rights of mana whenua presents an opportunity for reconciliation, for harmonious relations and nation building – *hohou te rongo* establishing peace.

Introduction

The events currently unfolding at Ihumātao raise important human rights issues. The land, which was confiscated by the New Zealand Government in the 1860s and has been in private ownership ever since, is of considerable cultural, spiritual and historical significance to Māori.²

These issues are directly relevant to New Zealand's human rights commitments to Māori under the United Nations Declaration on the Rights of Indigenous Peoples ("the Declaration"). They also engage broader human rights commitments under international human rights treaties that New Zealand has ratified (signed up to).

The Human Rights Commission ("Commission") has developed this report to provide a human rights perspective on Ihumātao. We consider that New Zealand's human rights commitments under the Declaration can provide, alongside Te Tiriti o Waitangi ("Te Tiriti"), a compelling and constructive framework within which the dispute can be discussed, addressed and eventually resolved.

We issue this report under our statutory mandate under the Human Rights Act 1993 as New Zealand's national human rights institution and our statutory function to promote the human rights dimensions of Te Tiriti.

The report does not endeavour to provide a complete and comprehensive account of international human rights, including the Declaration on the Rights of Indigenous Peoples, in relation to Ihumātao. Nor does it seek to make findings or decisions about whether international human rights instruments are being adhered to. Given the complex factual background and the current fluidity of the situation on the ground, it would not be appropriate for us to do so. Instead it is intended to provide a distinctive, constructive contribution to public discussion about Ihumātao.

Background

The factual background concerning Ihumātao is complex and has been well documented. This report does not attempt to provide a detailed account of the events to date. Instead, it set out below a brief summary of the facts most relevant to the human rights issues addressed later in the report.

The current issue in dispute at Ihumātao relates to the proposed construction of 480 houses by Fletcher Building on Puketāpapa, a land plot of 32 hectares at the end of Ihumātao Peninsula, south Auckland.³

Puketāpapa has strong spiritual, cultural and archaeological meaning for local iwi and hapū (mana whenua). It was the site of the oldest known human settlement in Auckland and has been said to contain urupā (burial sites) and other evidence of early human occupation.⁴

The land at Puketāpapa was traditionally occupied by mana whenua until it was confiscated by the Crown in 1863.⁵ The Waitangi Tribunal in its Manukau Report of 1985 stated:⁶

... the inhabitants [were] attacked, their homes and property destroyed and their cattle and horses stolen, but then they were punished by confiscation of their lands, for a rebellion that never took place.

In 1866, the Crown subsequently sold Puketāpapa into private ownership.⁷ Mana whenua have maintained a presence, including at nearby Makaurau Marae and Ihumātao village.

In 2007, the Auckland Council recognised the cultural and historical significance of Ihumātao to local Māori and designated it an open space and unavailable for development.⁸ The designation was challenged in the Environment Court by the private landowners.⁹ At that time, the local Mārae Trust Board and Iwi Authority opposed any urban development on Ihumātao.¹⁰ In 2012, the Environment Court found in favour of the landowners and determined the land could accommodate urban development as well as the cultural significance of the land to Māori.¹¹

In 2014, the Auckland Council rezoned the land as a Special Housing Area to allow for intensified residential development. This decision was made under specific legislation that was designed to fast-track special housing developments. It

therefore bypassed the usual processes that would be required under the Resource Management Act. The land was later purchased by Fletcher Building in 2016, following approval by the Government's Overseas Investment Office (OIO). A claim relating to the land was made in the Waitangi Tribunal in 2015. However, in 2017 a request to have the claim heard urgently was denied by the Tribunal as at that stage development was not imminent.¹²

Upon purchasing the land, Fletcher Building engaged in consultations with representatives of local iwi and hapū, about their planned construction of 480 houses. As a result of these consultations Fletcher Building agreed, among other things, to relinquish 25% of the land closest to the historic site and not to build on any archeologically significant site.¹³ However, there has been, and there remains, disagreement between stakeholders over whether proper representation and consultation took place. One disagreement relates to the assertion that other iwi and hapū who have strong ties to Ihumātao were not consulted or included in the decision-making process for the development.¹⁴

The situation at Ihumātao has been brought to the attention of the United Nations (UN) by SOUL (Save Our Unique Landscape), a group established to raise awareness of the Special Housing Area decision on the rights of mana whenua and advocate for the return of the land to mana whenua.¹⁵ UN bodies have considered (and are currently considering) the matter.

For more information on the background to Ihumātao, see the Report of the Māori Affairs Select Committee on the Petition to Save Ihumātao;¹⁶ the Shadow Report on Special Housing Area 62 in Ihumātao, presented by Pania Newton on behalf of SOUL;¹⁷ the letter by the UN Special Rapporteurs on the Right to Adequate Housing and the Rights of Indigenous Peoples to the New Zealand Government;¹⁸ and Advice to the Select Committee by Te Arawhiti, the Office for Māori-Crown Relations.¹⁹

Te Ao Māori - the Māori world view

Te Ao Māori (the Māori world view) is also of fundamental importance to understanding the human rights dimensions of Ihumātao. There is synergy between the fundamental tenets of Te Ao Māori, Te Tiriti and the Declaration. The Commission also acknowledges that tikanga, kawa, customs and practices vary between iwi and hapū. Indeed, it is for mana whenua to determine how their customs and practices are interpreted and applied in different circumstances.

Central to Te Ao Māori is the spiritual belief that human beings descend from Papatūānuku (the earth) and elements of the natural world. Standards of conduct according to tikanga Māori (Māori system of values, practices and norms that regulate social behaviour)²⁰ vary among different hapū and iwi but are underpinned by core common values such as whakapapa, whanaungatanga, kaitiakitanga and mana.²¹

Whakapapa (genealogy) and whanaungatanga (kinship, relationships and responsibilities) have been described as “the glue holding the Māori world together”.²² They underpin a world view where humans are genealogically connected to the natural world, and relationships – between people (past, present and future generations), and between people and natural resources – are of central importance. Kaitiakitanga (stewardship, guardianship) is a system of reciprocal rights and responsibilities that stem from those relationships, and which entail intergenerational obligations and also spiritual dimensions.²³ The exercise of mana (authority, power, leadership) is also tied to the maintenance of these relationships and responsibilities. These core values speak to an indivisible relationship between Māori and whenua and are reinforced by the principles of the Declaration.

Many of these Māori values are also shared by other indigenous peoples around the world and have been reflected in the Declaration. The collective nature of Māori and other indigenous societies, the sense of spiritual and genealogical connection to land, and emphasis on responsibilities to the land and to future generations, are all reflected in the Declaration’s provisions. The Declaration explains how international human rights standards should be interpreted and applied to the specific circumstances of indigenous peoples, in light of these common core features of indigenous societies, as well as the shared histories of colonisation and discrimination.

The United Nations Declaration on the Rights of Indigenous Peoples

The Declaration is the most comprehensive, globally supported and legitimate international legal instrument setting out the rights of indigenous peoples.²⁴ The Waitangi Tribunal has described the Declaration as “*perhaps the most important international instrument for Māori people*”²⁵ and has taken its articles into account when assessing State actions.²⁶ The Supreme Court of New Zealand has also referred to the Declaration when interpreting the way New Zealand law affects Māori legal rights and interests.²⁷

The Declaration reflects human rights expressed in a range of international treaties which are binding on New Zealand. These rights include: the rights of indigenous peoples to their culture²⁸ and customs,²⁹ lands and territories,³⁰ as well as their distinctive spiritual relationship with traditionally owned lands.³¹

The Declaration also affirms the right to non-discrimination and self-determination of indigenous peoples. In this way, it builds upon existing rights and freedoms of indigenous peoples under international, domestic and customary law.

The Declaration also recognises that indigenous peoples have historically been denied the benefit of many human rights and it places an obligation on States to not only provide for redress for historical grievances³² but also encourage practices, supported by legislation, which prevent such grievances from recurring in the future.³³

The Declaration and Te Tiriti

The Declaration complements and reinforces both the text of Te Tiriti as well as the principles developed by the Waitangi Tribunal. New Zealand courts and the Waitangi Tribunal have interpreted Te Tiriti and the Declaration alongside one another.³⁴

In recent times, the Waitangi Tribunal has considered how the Declaration and Te Tiriti interrelate. The Tribunal has considered that while its role is not to make findings about whether the Crown has acted inconsistently with the Declaration, it can use the Declaration as a tool in assessing Crown actions.³⁵

The Tribunal has compared the articles of the Declaration alongside the texts and principles of Te Tiriti. In some instances, the Tribunal has considered that Crown obligations go beyond mere consultation with Māori and instead require consensus and consent. Further, the Tribunal has indicated that in some circumstances the decision-making power should rest ultimately with Māori.³⁶

The Declaration rights most relevant to Ihumātao

This section sets out an overview of the rights contained in the Declaration that the Commission considers to be most relevant to Ihumātao. These rights are inter-related.

The Right to Land

The Declaration provides that indigenous peoples have the right to the lands, territories and resources they have traditionally owned, occupied or used.³⁷ This includes a right to develop their lands.³⁸ It also protects the right to maintain and strengthen the distinctive spiritual relationship indigenous peoples have with lands, territories, waters, coastal seas and other resources and to uphold this for future generations.³⁹ It is apparent that this is a fundamental concern for mana whenua at Ihumātao.

These rights align with the Treaty principles of tino rangatiratanga - Māori self-determination and authority over their own taonga,⁴⁰ and active protection where the Crown has a duty to actively protect Māori rights including regarding customary use of their lands.

The Declaration specifically provides for a right to redress where lands have been confiscated from indigenous peoples without their free, prior and informed consent.⁴¹ In recent years, United Nations treaty bodies have focussed on this issue. For example, the UN Committee on the Elimination of Racial Discrimination called 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 and informed consent, to take steps to return those lands and territories”.⁴²

The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) has also emphasised that indigenous peoples whose land has been confiscated are entitled

to restitution or other appropriate redress for land taken, occupied or damaged without consent.⁴³ EMRIP has also found that indigenous perspectives must be taken into account when considering redress, in recognition that the spiritual and cultural value of the land transcends economic values.⁴⁴ Scholars have also supported this approach.⁴⁵

Concerns over contemporary and historical land claims in New Zealand and the settlement processes with tangata whenua in this regard were also raised as a remaining challenge during the country visits by the UN Special Rapporteur on the Rights of Indigenous Peoples to New Zealand in 2005⁴⁶ and 2010.⁴⁷

The Right to Culture

A number of articles within the Declaration guarantee indigenous peoples the right to maintain, protect and develop the dignity of their culture.⁴⁸

The link between culture and land, particularly for indigenous peoples, has long been recognised internationally.⁴⁹ The Declaration provides that indigenous peoples have the right to practise their traditions and customs and maintain, control, protect and develop their cultural heritage, including significant sites.⁵⁰ This aligns with tikanga Māori as well as Māori understandings of whenua and kaitiaki responsibilities to Papatūānuku.⁵¹

The UN Human Rights Committee has emphasised the importance of the use of land by indigenous peoples on the right to culture in a General Comment⁵² and when determining complaints made to it.⁵³ The right to culture is also protected under section 20 of the New Zealand Bill of Rights Act and has been considered by the New Zealand Supreme Court.⁵⁴

Concerns have been raised recently that Māori heritage sites, such as Puketāpapa, have not been recognised to the same degree as non-Māori (colonial) sites.⁵⁵ The right to culture is non-discriminatory and indigenous peoples should have equal protection of the right to culture as non-indigenous peoples.

The Right to Protection

In order that indigenous peoples may enjoy their rights to land and culture, the Declaration provides that States must take effective measures to recognise and protect indigenous peoples' exercise of their rights.⁵⁶ This right is also found in international human rights treaties ratified by New Zealand.⁵⁷

The UN Committee on Economic, Social and Cultural Rights states that governments must respect the rights of indigenous peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with ancestral land indispensable to their cultural life,⁵⁸ including taking steps to return these lands and territories.⁵⁹

The Right to Participation

The Declaration also provides that the state must consult with indigenous peoples in good faith and endeavour to obtain their consent on measures that may affect them.⁶⁰

The right of indigenous peoples to participation has been recognised as essential to the realisation of their human rights. EMRIP has stated that the right:⁶¹

...forms the fundamental basis for the enjoyment of the full range of human rights...Without this foundational right, the human rights of indigenous peoples, both collective and individual, cannot be fully enjoyed.

The Right to Free, Prior and Informed Consent

Central to the right to participation is the right of indigenous peoples to free, prior and informed consent, one of the most important procedural principles in the Declaration.⁶² It is also an issue central to the dispute at Ihumātao. The decisions regarding the zoning of the Puketāpapa plot of land to a Special Housing Area and the sale of the land to Fletcher Building were both overseen by public bodies.

The UN Committee on Economic Social and Cultural Rights has declared that States “should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights”.⁶³

The principle of free, prior and informed consent operates as a safeguard for the collective rights of indigenous peoples.⁶⁴ It is also an aspect of the right of indigenous peoples to self-determination. It therefore links closely to Te Tiriti principle of tino rangatiratanga.

EMRIP has provided guidance on what is required of participation processes in order to meet the minimum standards under the Declaration. EMRIP has found that where disagreements arise within indigenous communities about whether free, prior and informed consent has been achieved, such disagreements should be resolved

by the indigenous peoples themselves, in accordance with their own laws, traditions and customs, and through their own representative institutions.⁶⁵

Where an activity or action might result in a breach of rights, judicial and administrative review should be available and reflect indigenous peoples' rights in the Declaration, including their rights to self-determination and effective remedies, their rights under international law, domestic law, and their own laws, customs and protocols.⁶⁶

This means that the Government should ensure that consultation processes are non-coercive, are designed to support consensus building within the indigenous peoples' community and that they avoid practices that might cause division.⁶⁷

The Government should also establish preconditions for achieving free, prior and informed consent. These preconditions should be aimed at building trust, take a good faith approach, and reflect culturally appropriate methods of negotiation and recognition and respect for human rights.⁶⁸

The Principle of Good Faith

EMRIP has observed that the principle of good faith under the Declaration requires that consultations with indigenous peoples are carried out in a climate of mutual trust and transparency.⁶⁹ This is also an issue at the heart of the current dispute over the land at Puketāpapa.

The Declaration provides that indigenous peoples must be given sufficient time to engage in their own decision-making process and to participate in decisions taken in a manner consistent with their cultural and social practices.⁷⁰ The objective of consultations should be to achieve agreement or consensus.⁷¹

The Declaration does not envision a single moment or action but a process of dialogue and negotiation over the course of a project, from planning to implementation and follow-up.⁷²

The obligation of the State under the Declaration to "consult and co-operate" with indigenous peoples also implies that they have the right to influence the outcome of decision-making processes affecting them, not just the right to be involved in such processes or have their views heard.⁷³ This would support direct engagement by the Government with all mana whenua. Efforts should be made to include and understand the specific impacts on women, children, youth and disabled people.⁷⁴

The Government should also ensure that mana whenua have the resources and capacity to effectively engage in consultation processes by supporting the development of their own independent representative bodies.⁷⁵

The Right to Redress

The Declaration specifically provides for a right to redress where lands have been confiscated from indigenous peoples without their free, prior and informed consent.⁷⁶ The right to redress is one of the underlying issues in the Ihumātao dispute, given the Waitangi Tribunal's finding that the land was confiscated from mana whenua by the Crown over 150 years ago.⁷⁷

The right to redress has, of course, been recognised by the Waitangi Tribunal as a principle of Te Tiriti.⁷⁸ Where Māori have been disadvantaged, the principle of equity in conjunction with the principles of active protection and redress, require active measures to be taken to restore the balance.⁷⁹

The Declaration states that this should be in the form of restitution (return) in the first instance. This mirrors the *whakataukī*: *I riro whenua atu, me hoki whenua mai* - where land is taken, land must be returned. When this is not possible, the Declaration promotes just, fair and equitable compensation.⁸⁰

The right to restitution of land back to indigenous peoples from third parties has been upheld internationally. This includes the UN Human Rights Committee,⁸¹ the Inter-American Court of Human Rights⁸² and the African Commission on Human and Peoples' Rights.⁸³ The UN Committee on the Elimination of Racial Discrimination has also found that only when restitution is not possible should it be substituted by other forms of compensation.⁸⁴ EMRIP has provided guidance on redress including:

- States should ensure that, when relevant, indigenous peoples are provided with redress, which may include restitution.⁸⁵
- States should ensure that indigenous peoples whose land has been confiscated are entitled to restitution or other appropriate redress for land taken, occupied or damaged without consent.⁸⁶

If follows from the recognition that the Government confiscated the land at Ihumātao, that the Government has an obligation to ensure that the outcome of the

Ihumātao dispute provides mana whenua with redress that reflects human rights principles and protects their kaitiakitanga rights as guardians of the land.

Fair, Independent, Impartial, Open and Transparent Processes

The processes used to designate the land at Puketāpapa as a Special Housing Area and the subsequent sale to Fletcher Building, as well as the judicial decisions that related to them, were significant factors leading to the current situation at Ihumātao.

Under the Declaration, States are expected to establish and implement - in conjunction with indigenous peoples - fair, independent, impartial, open and transparent processes for resolving issues that affect the rights of indigenous peoples, including issues regarding land traditionally owned or otherwise occupied or used by indigenous people. Such processes should give due recognition to the laws, traditions and customs of indigenous people.⁸⁷

EMRIP prepared a study on access to justice in the promotion and protection of the rights of indigenous peoples.⁸⁸ EMRIP considered that long-standing historical injustices and discrimination in relation to colonisation and dispossession of lands are an affront to rights. If left unremedied, these factors created further mistrust between indigenous peoples and the State.⁸⁹

The study also recognised the contribution that historical injustices can have on the contemporary disadvantage of indigenous peoples and it encouraged States to consider the impact that law and policy has on indigenous peoples' ability to access processes and reform as well as the full enjoyment of their rights.⁹⁰

In summary, the Government has an obligation to guarantee mana whenua with access to justice in respect of any claims they have regarding their dispossessed lands. This right to access justice should apply regardless of whether the land is in public or private ownership and should recognise and respect indigenous laws and processes.⁹¹

International Principles of Business and Human Rights

Ihumātao also raises issues of corporate responsibility and human rights. The United Nations Guiding Principles (UN Guiding Principles) on Business and Human Rights are a set of non-binding principles which have been endorsed by the UN Human Rights Council. They establish a minimum, modest threshold of human rights principles designed to provide guidance to businesses and governments. The

UN Guiding Principles are built around the following three pillars known as the Protect, Respect and Remedy framework:

- The State duty to **protect** human rights
- The corporate responsibility to **respect** human rights
- The need for rights and obligations to be matched to appropriate and effective **remedies** when breached.⁹²

In addition to the UN Guiding Principles, the UN Global Compact, which is the world's largest corporate sustainability initiative,⁹³ has developed a Practice Note for how businesses should obtain free, prior and informed consent from indigenous peoples.⁹⁴ The Practice Note states that companies should conduct an analysis of lands and resources that indigenous peoples have traditionally controlled or used.⁹⁵ It further states that in order to obtain consent that is free, prior and informed, companies must engage in meaningful, good faith consultations with indigenous peoples.

EMRIP has also provided guidance on this issue, noting that States are responsible for ensuring the adequacy of consultation and consent procedures between indigenous peoples and private companies.⁹⁶ To this end, EMRIP has found that States should establish procedures for regulating, verifying and monitoring such consultation processes.⁹⁷

The Government has agreed to initiate a National Plan of Action on the UN Guiding Principles.⁹⁸ This initiative will be an important measure towards promoting best practice approaches to human rights among the business community.

Application of a human rights approach to Ihumātao

The human rights principles set out in the United Nations Declaration on the Rights of Indigenous Peoples resonate throughout the Ihumātao dispute. They help us understand the human rights implications of past events. They reinforce traditional Te Ao Māori values and concepts that apply to the land, its guardianship and its cultural and spiritual significance for mana whenua.

In summary, the Declaration provides a helpful lens through which the situation at Ihumātao can be viewed, including:

- Whether there are adequate legal protections or avenues to ensure that land of considerable cultural and heritage value to mana whenua is adequately protected.
- The nature and extent of consultation regarding decisions to approve the housing development under the Special Housing Act and the unavailability of a legal process to challenge the decision.
- The nature and extent of consultation regarding decisions to develop the land, particularly negotiations with Fletcher Building.
- The nature and extent of discussions about resolving the current situation and finding an appropriate way forward.
- Whether previous processes have enabled all mana whenua affected by the housing development to properly participate.
- The extent to which mana whenua have been able to have a meaningful say on the outcome of decisions, including the ability to influence the outcomes and be decision makers.
- Whether the current processes have been designed to support consensus.

The Declaration also provides a compelling and constructive framework to address the current dispute and work towards a solution that respects and upholds the rights of all parties. The Commission encourages all parties, including public decision-makers, to use the Declaration as a vital reference point in their efforts towards reaching a solution.

The Commission is also deeply concerned that lands of significant heritage value to Māori are adequately protected. The cultural significance of Ihumātao for mana

whenua, tangata whenua - and indeed all New Zealanders - must not be underestimated.

The importance of this land arises from its archaeological history as an early Māori settlement, where the first Māori gardeners lived and worked, using the stones and the microclimates they created to grow their crops. It is also one of the last surviving places where the land and stone walls used by Māori for growing new crops, such as the wheat and European vegetables that were cultivated and supplied to the Auckland markets prior to 1863, still exist. The land is connected to one of New Zealand's oldest continuously inhabited papakāinga. Despite not having possession of the land, mana whenua at Ihumātao have maintained a close physical and spiritual connection to the area and continue to demonstrate that connection through their current residence on the land at Ihumātao.

Scrutiny by the international human rights system

It is also significant that the human rights situation at Ihumātao has been scrutinised - and is currently being scrutinised - by international human rights bodies. In recent years, United Nations treaty bodies have made recommendations to the New Zealand Government aimed at strengthening compliance with indigenous human rights, particularly free, prior and informed consent in development activities. For example, in 2018 the UN Committee on Economic Social and Cultural Rights recommended that the Government:

“Take effective measures to ensure compliance with the requirement of obtaining the free, prior and informed consent of indigenous peoples, notably in the context of extractive and development activities, and conduct social, environmental and human rights impact assessments prior to granting licences for extractive and development activities and during operations.”

In 2017 the UN Committee on the Elimination of Racial Discrimination also made the following recommendation after submissions from groups involved in the dispute at Ihumātao:

“The Committee recommends that the State party review, in consultation with all affected Maori, the designation of Special Housing Area 62 to evaluate its conformity with the Treaty of Waitangi, the United Nations Declaration on the Rights of Indigenous Peoples and other relevant international standards, and

that the State party obtain the free and informed consent of Maori before approving any project affecting the use and development of their traditional land and resources.”

Furthermore, the UN Special Rapporteurs on the Right to Adequate Housing and the Rights of Indigenous Peoples recently wrote to the New Zealand Government, drawing its attention to potential human rights breaches in relation to Ihumātao and requesting that interim measures are taken so any potential breaches are halted until a response is received.⁹⁹ It is notable that within their communications, the Special Rapporteurs specifically raised concerns about the fast-track procedure of the Housing Accords and Special Housing Area Act 2013 and the inadequate consultations with Māori both in regard to the Act and in regard to the unavailability of judicial review.

The scrutiny of the international human rights institutions provides another important reason for the Government to constructively apply the Declaration in supporting parties to achieve a resolution.

Conclusions

The events at Ihumātao present a challenge for human rights in Aotearoa New Zealand. In responding to the events, our public and private institutions should uphold the rights of Māori to their land, their culture and cultural heritage, their rights to participation and access to justice under the Te Tiriti, the Declaration and international human rights treaties to which New Zealand is a party.

The Commission is encouraged that the Government has signalled a willingness to address the human rights impacts on Māori of colonisation. In particular the Commission notes the recent acknowledgment before the UN by the Minister of Justice that the impacts of colonisation continue to be felt today, through entrenched structural racism and poorer outcomes for Māori.¹⁰⁰ The Commission also notes the commitment the Government has made to developing a national plan to align law, policy and practice with the Declaration.¹⁰¹ These are important steps towards achieving equitable human rights outcomes for Māori and indeed all New Zealanders.

The Commission recommends that the Government commit to supporting the parties at Ihumātao to work towards a solution through promoting a human rights-based approach to the resolution of the dispute in a manner consistent with New Zealand's international human rights commitments under the Declaration.

The Commission recommends that this approach should contain the following elements:

- 1. Protection of mana whenua rights and a continuation of the current halt on development of the land while work towards a resolution is carried out.**

While the Ihumātao dispute remains unresolved, the Commission recommends that the Government ensures that the rights of mana whenua under the Declaration are protected and upheld. As such, any developments of the Puketāpapa site should continue to be subject to the halt announced by the Prime Minister until a resolution is freely and fairly reached between all parties.

2. Strengthen mana whenua participation in all decision-making processes to enable free, prior and informed consent

At the core of free, prior and informed consent is the ability for indigenous peoples to not only be included, but also to be enabled to them to have meaningful influence in the outcomes. In order to do this, the Commission recommends that the processes that are used to resolve the Ihumātao dispute fully reflect the right of mana whenua under the Declaration to free, prior and informed consent regarding any decisions that take place. Mana whenua have the right to participate through their own representative institutions and to be involved in decision-making processes from the beginning, including decisions on:

- How these consultation and negotiation processes are undertaken;
- How disputes or issues can be resolved without creating further division.

The Commission recommends that the Government ensures that mana whenua are provided with sufficient time and resources to enable such matters to be resolved within culturally appropriate timeframes that respect Māori customs and practices.

Ihumātao also highlights the way in which public policies, like special housing policies, engage the rights and interests of Māori. The Commission encourages the Government to take action to ensure that in the future Māori rights and interests are safeguarded in all decisions that impact on land of cultural, historic and spiritual significance to Māori.

3. Provision for redress in a manner consistent with human rights standards.

The Declaration clearly envisages that the priority form of redress for the confiscation of land is restitution, in line with indigenous values and perspectives. Where this is not possible, human rights principles call for just, fair and equitable redress that is agreed to by the indigenous peoples whose land was lost through confiscation.

The specific circumstances of Ihumātao highlight the limitations of current processes for providing redress and restitution for historic confiscations of land from Māori. However, it also provides an opportunity for the Government to

review current legislative and policy settings given the particular issues concerning the right to redress that have been brought to light.

4. A Government commitment to full engagement with the United Nations Special Rapporteurs on the Right to Adequate Housing and the Rights of Indigenous Peoples.

Engagement with the UN Special Rapporteurs is not only essential for New Zealand's reputation as a responsible international citizen, it can assist in ensuring that systemic issues are properly addressed, and that robust and effective processes are developed to avoid future or ongoing problems and disputes.

More generally, the Commission encourages the Government to continue to acknowledge the impact that colonisation and historical injustices have had on the mana whenua of Ihumātao and on all Māori as a whole. In particular, it is important to recognise the impact this has had on the rights of Māori to maintain and enjoy their rights under the Declaration in relation to land and culture.

Ihumātao can be a turning point for the protection of indigenous rights in Aotearoa New Zealand and it provides a real opportunity to move the nation forward in a constructive way. The Declaration has a compelling, constructive and vital role to play in this critically important process. A resolution at Ihumātao that upholds the rights of mana whenua presents an opportunity for reconciliation, for harmonious relations and nation building – *hohou te rongo* establishing peace.

Kia tau te rangimārie ki runga i a tātou katoa

Ruia, ruia, ruia, ruia

Ruia ki runga, ruia ki raro

Ruia ki waho, ruia ki roto

Ruia ki uta, ruia ki tai

Hū ana ki te rangi, turu ana ki nuku

Nā, kua tau, kua mau, kua ea

Tīhei mauri ora

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- ³ Māori Affairs Committee, [Petition of Pania Newton for Save Our Unique Landscape: Protect Ihumātao – Report of the Māori Affairs Committee](#) (July 2019), at 12
- ⁴ *Ibid* (July 2019), at 13.
- ⁵ *Ibid* (July 2019), at 12.
- ⁶ Waitangi Tribunal, [Report of the Waitangi Tribunal on the Manukau Claim](#) (WAI-8, 1985) at 35.
- ⁷ Māori Affairs Committee, [Petition of Pania Newton for Save Our Unique Landscape: Protect Ihumātao – Report of the Māori Affairs Committee](#) (July 2019), at 13.
- ⁸ Manukau City Council Notice of Requirement dated 18 October 2007, referenced at *Gavin Wallace Ltd v Auckland Council* [2012] NZEnvC 120 at [8].
- ⁹ *Gavin Wallace Ltd v Auckland Council* [2012] NZEnvC 120.
- ¹⁰ At [29] – [30].
- ¹¹ At [209].
- ¹² Waitangi Tribunal *The Special Housing Areas Act (Ihumātao) claim* (Wai 2547, 2017), #2.5.5.
- ¹³ Letter from Fletcher Building Chief Executive, Residential Land and Development to the Chair of the Committee on Economic, Social and Cultural Rights, 21 March 2018.
- ¹⁴ Māori Affairs Committee [Petition of Pania Newton for Save Our Unique Landscape: Protect Ihumātao – Report of the Māori Affairs Committee](#) (July 2019), at 15.
- ¹⁵ See Save Our Unique Landscape - <https://www.protectihumatao.com/>.
- ¹⁶ Māori Affairs Committee, [Petition of Pania Newton for Save Our Unique Landscape: Protect Ihumātao – Report of the Māori Affairs Committee](#) (July 2019).
- ¹⁷ [Shadow Report to the Committee on the Elimination of All Forms of Racial Discrimination on Special Housing Area 62 in Ihumātao, Mangere, Aotearoa](#), presented by Pania Newton on behalf of Save Our Unique Landscape (SOUL), 6 July 2017.
- ¹⁸ [Mandates of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context and the Special Rapporteur on the rights of indigenous peoples](#), (AL NZL 1/2019, 22 March 2019).
- ¹⁹ Te Arawhiti, [Advice for the Māori Affairs Committee regarding the Petition of Pania Newton for Save Our Unique Landscape: Protect Ihumātao](#) (24 June 2019).
- ²⁰ The Independent Working Group on Constitutional Transformation, [He Whakaaro Here Whakaumu Mo Aotearoa: The Report of Matike Mai Aotearoa](#) (2016), at 40 states “tikanga may be defined as both a law and a discrete set of values. As a practical law it influenced everything from the political organisation of Iwi and Hapū to the social interactions of individuals. As a set of values it summed up what was important in the Māori world view – it is the “ought to be” of Māori existence.”
- ²¹ Te Aho, L., ‘Tikanga Māori, Historical Context and the Interface with Pākehā Law in Aotearoa/New Zealand’, in (2007) 10 *Yearbook of New Zealand Jurisprudence*.
- ²² Justice Joseph Williams, Harkness Henry Lecture https://www.courtsofnz.govt.nz/speechpapers/Williams%20J%20Harkness%20Henry%20Lecture%20Lex%20Aotearoa.pdf/at_download/file.
- ²³ Waitangi Tribunal, [Ko Aotearoa Tenei – Vol 1](#), (Wai 262, 2011) at 244.

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- ²⁴ Waitangi Tribunal, *In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) [Doc A10 Dr Claire Charters Brief of Evidence](#), at [9].
- ²⁵ Waitangi Tribunal, [Ko Aotearoa Tenei – Vol 1](#), (Wai 262, 2011) at 233.
- ²⁶ Waitangi Tribunal, [In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim](#) (Wai 2417, 2015) at 38.
- ²⁷ Ngāti Whātua Ōrākei Trust v Attorney-General [2018] NZSC 84, Wakatu v Attorney-General [2017] NZSC 17, New Zealand Māori Council v Attorney-General [2013] NZSC 6 at [92]; see also Paki v Attorney-General (No 2) [2014] NZSC 118; Takamore v Clarke [2012] NZSC 116.
- ²⁸ The Declaration, Article 1.
- ²⁹ Ibid, Article 11.
- ³⁰ Ibid, Article 26.
- ³¹ Ibid, Article 25.
- ³² Ibid, Article 28.
- ³³ Ibid, Article 19.
- ³⁴ New Zealand Māori Council v Attorney-General [2013] NZSC 6.
- ³⁵ Waitangi Tribunal, *In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at [2.5.4(3)].
- ³⁶ Waitangi Tribunal, [He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993](#), (Wai 2478, 2016) at 236; Waitangi Tribunal, [Ko Aotearoa Tenei: Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity](#) (Wai 262, 2011), at 237; Waitangi Tribunal, [Tū Mai te Ranqi! Report on the Crown and Disproportionate Reoffending Rates](#) (Wai 2540, 2017).
- ³⁷ The Declaration, Article 26.
- ³⁸ Ibid, Article 32.
- ³⁹ Ibid, Article 25, see also Claire Charters, “Indigenous Peoples’ Rights to Lands, Territories and Resources in the United Nations Declaration on the Rights of Indigenous Peoples” in J. Hohmann, M. Weller (eds) *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, Oxford, 2018) at 25.
- ⁴⁰ Things of importance to Māori including language, culture, land, natural resources.
- ⁴¹ The Declaration, Article 28.
- ⁴² Committee on the Elimination of Racial Discrimination, *General Recommendation 23 Rights of indigenous peoples*, 55th Session, UN Doc A/52/18, (22 August 1997) at [5].
- ⁴³ Expert Mechanism on the Rights of Indigenous Peoples, [Free, prior and informed consent: a human rights-based approach – Study of the Expert Mechanism on the Rights of Indigenous Peoples](#), UN Doc A/HRC/39/62, (10 August 2018) Annex at [20] – [21].
- ⁴⁴ EMRIP, (2019), *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation*, A/HRC/EMRIP/2019/3, at para 40. Accessible at: <https://www.undocs.org/a/hrc/emrip/2019/3>.
- ⁴⁵ Claire Charters “The Rights of Indigenous Peoples under International Law and their Domestic Relevance in Aotearoa New Zealand” in M Bedggood, K Gledhill and I McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017) at 809 - Associate Professor Claire Charters states that in some cases, maintenance and strengthening of indigenous peoples’ spiritual relationship may require Indigenous peoples to access and/or possess the lands in question irrespective of whether they possess or own those lands presently. However, notes any claim would be subject to balancing with competing rights to the land under art 46 which provides for justified limitations on the rights in the UNDRIP.
- ⁴⁶ United Nations Economic and Social Council, [Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. Addendum Mission to New Zealand](#), UN Doc E/CN.4/2006/78/Add.3, (13 March 2006) at [22] – [42].

⁴⁷ United Nations Human Rights Council, [Report of the Special Rapporteur on the rights of indigenous people James Anaya Addendum, The Situation of Maori people in New Zealand](#), UN Doc A/HRC/18/35/Add.4, (31 May 2011).

⁴⁸ The Declaration, Articles 8, 11, 15 and 31.

⁴⁹ Human Rights Committee *General Comment 20*, UN Doc HRI/GEN/1/Rev.1 at 38 (1994) at [1]. The HRC in its General Comment on article 27 interprets culture to include ways of life associated with the use of land resources, particularly in the case of indigenous peoples.

⁵⁰ The Declaration, Article 11 and Article 31; Committee on Economic, Social and Cultural Rights, [General Comment No. 21: Right of everyone to take part in cultural life \(art. 15, para. 1 \(a\), of the International Covenant on Economic, Social and Cultural Rights\)](#), UN Doc E/C.12/GC/21, (21 December 2009); Committee on the Rights of the Child, [General Comment No. 11: Indigenous Children and their Rights under the Convention](#), UN Doc CRC/C/GC/11 (12 February 2009).

⁵¹ The Independent Working Group on Constitutional Transformation, [He Whakaaro Here Whakaumu Mo Aotearoa: The Report of Matike Mai Aotearoa](#) (2016), at 40. Note Professor Margaret Mutu was Working Group Chair and Moana Jackson its Convener.

⁵² Human Rights Committee, [General comment No. 23\(50\) \(art 27\)](#), 1994, UN Doc CCPR/C/21/Rev.1/Add.5, at [7].

⁵³ *Bernard Ominayak, Chief of the Bion Lake Band v Canada*, HRC Communication No 167/1984, 26 March 1990, UN Doc CCPR/C/38/D/167/1984; *Sandra Lovelace v Canada*, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977; *Ivan Kitok v Sweden*, Human Rights Committee, Communication No. 197/1985; UN Doc CCPR/C/33/D/197/1985; *Mahuika v New Zealand* HRC Communication No 547/1992, 13 October 1995, UN Doc CCPR/C/55/D/547/1993, reported in (2000) 7 HRNZ 629.

⁵⁴ *Takamore v Clarke* [2012] NZSC 116. There, it accepted that Māori custom according to tikanga is part of the common law [94] and it was the role of the courts not to validate tikanga but to resolve disputes which required the Court's intervention [97]. The Chief Justice also acknowledged the importance of Māori thinking in their ability to appropriately enjoy their culture. To this end it engaged s 20 of NZBORA and made the wishes of the whānau a proper matter to be weighed by the Court [100]. She went on to say that the loss to the culture was grave because it loosened links of whakapapa, not only for the individual concerned but also their descendants [102].

⁵⁵ Sally Blundell, *What Ihumātao reveals about NZ's protection of Māori heritage sites*, 31 January 2019, <https://www.noted.co.nz/currently/social-issues/ihumatao-maori-heritage-sites-nz-protection/>.

⁵⁶ This includes cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

⁵⁷ This includes the International Covenant on Civil and Political Rights 1966 Article 27 which states that "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language"; the International Covenant on Economic, Social and Cultural Rights 1966 Article 27 which states that "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language"; and the Convention on the Rights of the Child 1989 Article 15 which urges States to take steps to ensure the realization of the right to cultural life for everyone, including steps necessary for the conservation of culture. The right is also reinforced by the International Labour Organisation Convention 169 which affirms the special importance for indigenous peoples of their lands to their culture and spiritual values in Article 13 where it states "In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship" and in Article 14 which states "indigenous peoples have the right to "use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities".

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- ⁵⁸ Committee on Economic, Social and Cultural Rights, [General Comment No. 21: Right of everyone to take part in cultural life \(art. 15, para. 1 \(a\), of the International Covenant on Economic, Social and Cultural Rights\)](#), UN Doc E/C.12/GC/21, (21 December 2009).
- ⁵⁹ *Ibid.*, (21 December 2009) at [36].
- ⁶⁰ Articles 19 and 32(2) of the Declaration.
- ⁶¹ Expert Mechanism on the Rights of Indigenous Peoples, [Progress report on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples](#), UN Doc A/HRC/EMRIP/2010/2, (23 August 2010) at [2].
- ⁶² Expert Mechanism on the Rights of Indigenous Peoples, [Final study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples](#), UN Doc A/HRC/EMRIP/2011/2 (26 May 2011) at Annex [3]. Expert Mechanism on the Rights of Indigenous Peoples, [Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples](#), UN Doc A/HRC/18/42 (17 August 2011) at [3].
- ⁶³ Committee on Economic, Social and Cultural Rights, [General Comment No. 21: Right of everyone to take part in cultural life \(art. 15, para. 1 \(a\), of the International Covenant on Economic, Social and Cultural Rights\)](#), UN Doc E/C.12/GC/21, (21 December 2009) at [37].
- ⁶⁴ Expert Mechanism on the Rights of Indigenous Peoples, [Free, prior and informed consent: a human rights-based approach – Study of the Expert Mechanism on the Rights of Indigenous Peoples](#), UN Doc A/HRC/39/62, (10 August 2018) at [13].
- ⁶⁵ *Ibid.*, (10 August 2018) at [40].
- ⁶⁶ *Ibid.*, (10 August 2018) at [41].
- ⁶⁷ *Ibid.*, (10 August 2018) at [12].
- ⁶⁸ *Ibid.*, (10 August 2018) at [5].
- ⁶⁹ Expert Mechanism on the Rights of Indigenous Peoples, [Final report of the study on indigenous peoples and the right to participate in decision making: Report of the Expert Mechanism on the Rights of Indigenous Peoples](#), UN Doc A/HRC/18/42 (17 August 2011) Annex at [9].
- ⁷⁰ *Ibid.*, (17 August 2011) Annex at [9].
- ⁷¹ *Ibid.*, (26 May 2011) at [9].
- ⁷² Expert Mechanism on the Rights of Indigenous Peoples, [Free, prior and informed consent: a human rights-based approach – Study of the Expert Mechanism on the Rights of Indigenous Peoples](#), UN Doc A/HRC/39/62, (10 August 2018) at [15].
- ⁷³ *Ibid.*, (10 August 2018) at [15].
- ⁷⁴ *Ibid.*, (10 August 2018) Annex at [11].
- ⁷⁵ *Ibid.*, (10 August 2018) Annex at [9].
- ⁷⁶ The Declaration, Article 28.
- ⁷⁷ Waitangi Tribunal, Report of the Waitangi Tribunal on the Manukau Claim (WAI-8, 1985) at 35.
- ⁷⁸ Waitangi Tribunal [Report on the Crown's Foreshore and Seabed Policy](#) (Wai 1071, 2004).
- ⁷⁹ Waitangi Tribunal, Principles of the Treaty, (19 September 2016).
<<https://www.waitangitribunal.govt.nz/treaty-of-waitangi/principles-of-the-treaty/>>
- ⁸⁰ The Declaration, Article 28.
- ⁸¹ *Hopu and Bessert v France*, Human Rights Committee, Communication No. 549/1993, UN Doc CCPR/C/60/D/549/1993/Rev.1. (29 July 1997) found that the construction of the hotel complex that would destroy indigenous peoples ancestral burial ground breached their rights and they were entitled to an appropriate remedy.
- ⁸² *Sawhoyamaya Indigenous Community v Paraguay (Merits, reparations and costs)* (2006) 146 IACHR (Series C) (IACtHR) at [128]. Here the Court held the right to restitution of lands not possessed by indigenous persons continued so long as spiritual and material basis for indigenous identity is mainly supported by their

unique relationship with their lands. See also C Charters “The Rights of Indigenous Peoples under International Law and their Domestic Relevance in Aotearoa New Zealand” in M Bedggood, K Gledhill and I McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017) at 810.

⁸³ Centre of Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (2010) ACHPR 276/2003, found indigenous peoples continued to have a right to property that they had not possessed for two and a half decades.

⁸⁴ Committee on the Elimination of Racial Discrimination, [General Recommendation No. 23: Indigenous Peoples](#) 51st Session, UN Doc U.N. Doc. A/52/18, annex V at 122 (18 August 1997) at [5].

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⁸⁶ Ibid, (10 August 2018) at [21].

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⁹² Human Rights Council, [Guiding Principles on Business and Human Rights](#) UN Doc A/HRC/71/31 (21 March 2011) Annex.

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⁹⁴ Amy K Lehr, [Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent – A Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labour Working Group on 20 February 2014](#), (20 February 2014).

⁹⁵ Ibid, (20 February 2014).

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⁹⁷ Ibid at [17].

⁹⁸ Report of the Working Group on the Universal Periodic Review: New Zealand, A/HRC/41/1/Add.1, 17 June 2019, paragraph 20.

⁹⁹ [Mandates of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context and the Special Rapporteur on the rights of indigenous peoples](#), (AL NZL 1/2019, 22 March 2019).

¹⁰⁰ Hon Andrew Little, Minister of Justice, *Andrew Little speech to United Nations Human Rights Council for the third Universal Periodic Review*, Delivered at the United Nations at Geneva, 21 January 2019 at 9.00am local time and 9.00pm New Zealand time, p 3.

¹⁰¹ Report of the Working Group on the Universal Periodic Review: New Zealand, A/HRC/41/1/Add.1, 17 June 2019, paragraph 59.



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