KO NGĀ TAKE TURE MĀORI

What a Difference a 'Drip' Makes: The Implications of Officially Endorsing the United Nations Declaration on the Rights of Indigenous Peoples

KIRI RANGI TOKI*

I INTRODUCTION

On 13 September 2007, the United Nations General Assembly (GA) adopted the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration).[1] Hailed as a triumph,[2] the Declaration provides an international standard for indigenous peoples' human rights. Only four states opposed adoption: Australia, Canada, the United States of America and New Zealand. The reasons given for New Zealand's position included doubts over the legal effect that adopting the Declaration would have on New Zealand's legal system, and a belief that the Declaration's articles were "fundamentally incompatible with the constitution and legal norms in New Zealand".[3]

Māori expressed their disappointment at the New Zealand Government's failure to adopt the Declaration, and questioned its stance after Australia reversed its position and officially endorsed the Declaration on 3 April 2009.[4] However, on 20 April 2010, New Zealand followed suit and also officially endorsed the Declaration. The Hon Dr Pita Sharples MP, Minister of Māori Affairs, announced the endorsement in the General Assembly of the Ninth Session of the United Nations Permanent Forum on Indigenous

* He uri tēnei nō Ngāti Wai me Ngā Puhi. The author would like to thank her Public Law Honours Seminar class and the class supervisor, Professor Bruce Harris of The University of Auckland Faculty of Law, for their critique, engaging debates and the knowledge of the law they have instilled in me. The author would also like to acknowledge and thank Kerensa Johnston and Treasa Dunworth from The University of Auckland Faculty of Law for their guidance and support. A special thank you also to Benedict Tompkins, Raymond Chu, Kellie Arthur and Edwina Hughes for their assistance. Engari, he pepa tēnei mō tōku whānau me tōku whaiāipo. Ehara he kupu hei whakatinana tō aroha ki ahau. Tēnei te mihi.

1 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007) [the Declaration].

2 Ban Ki-moon "Statement on the adoption of the United Nations Declaration on the Rights of Indigenous Peoples" (United Nations General Assembly, New York, 17 September 2007).

3 Rosemary Banks "Explanation of Vote by HE Rosemary Banks, New Zealand Permanent Representative to the United Nations" (2007) New Zealand Ministry of Foreign Affairs and Trade <www.mfat.govt.nz>. See also Parts II and III below.

4 (31 March 2009) 653 NZPD 2195.

Issues (UNPFII), and Hon Simon Power MP, Minister of Justice, simultaneously announced it in the New Zealand Parliament.[5]

This is a monumental achievement, with some claiming it as the most significant event since the signing of the Treaty of Waitangi (the Treaty).[6] As monumental as the endorsement of the Declaration is, the initial question as to what effect the Declaration will have on New Zealand's legal system remains significant. This article concludes that the Declaration does not substantially alter the New Zealand legal landscape, but rather complements and assists Māori judicial and political action, adding another layer to the existing indigenous rights regime. The article begins with an overview of the Declaration in Part II. It then discusses the rights contained in the Declaration, in particular the meaning and application of 'self-determination' in Part III. Part IV discusses the implications of officially endorsing the Declaration, and concludes that while the Declaration imports no overt international or domestic obligations into the New Zealand legal system, it nevertheless creates moral obligations, and more notably, could become a mandatory relevant consideration in judicial review or an aid in statutory interpretation. Finally, Part V discusses whether New Zealand should take the further step of incorporating the Declaration into statute, and considers the implications of such a move, particularly for the status of the Treaty of Waitangi.

II BACKGROUND TO THE DECLARATION

The Declaration is the most significant indigenous milestone reached in the international arena. For the first time, "human rights are contextualised within the situation of Indigenous peoples, where the rights are clear and certain".[7] Despite its significance, the development of the Declaration was highly controversial. For some indigenous peoples, the final Declaration is considerably weaker than envisioned; for some states, the Declaration's rights are too strong to support. The discussion below provides background to the Declaration, explaining both the significance of, and the controversy behind, the Declaration.

---

5 See Pita Sharples "Supporting UN Declaration restores NZ's mana" (press release, 20 April 2010) and (20 April 2010) 662 NZPD 10229, respectively.

6 As articulated by former New Zealand High Court Justice and Waitangi Tribunal Chairperson Sir Eddie Durie. See Karen Johansen "Commissioner Karen Johansen's address to the Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, Third Session, July 12–16 2010, Geneva" (2010) New Zealand Human Rights Commission <www.hrc.co.nz>.

7 Rainforest Foundation US "Promoting Indigenous Rights Worldwide: S. James Anaya" (2009) Blogging the Rainforest <rainforestfoundationus.wordpress.com>.

Development of the Declaration

The Declaration was the initiative of the Working Group on Indigenous Populations (WGIP). Established in 1982, the WGIP was charged with elaborating international standards concerning indigenous peoples' rights. The Declaration was intended to fulfil the WGIP's mandate and provide a clear articulation of international standards on the rights of indigenous peoples.

In 1985, the WGIP began drafting the Declaration's text.[8] In 1993, a finalised draft (the Sub-Commission text) was submitted to WGIP's parent body, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (the Sub-Commission), where it was unanimously adopted and sent to the then United Nations Commission on Human Rights (CHR) for consideration in 1994.[9] In 1995, the CHR established an open-ended working group (WGDD) to finalise the Draft Declaration for adoption in the GA. The intent was to finalise a draft within the first International Decade of the World's Indigenous Peoples. State and indigenous politics, however, stalled progress. It was only after an extension of WGDD's mandate in 2004 that Chairperson Luis-Enrique Chavez submitted a reworded text to the Human Rights Council (the Chair's text), which was subsequently accepted in June 2006 and passed to the Third Committee. It was intended that the Declaration would pass to the GA for adoption, but the concerns of the "African Group"[10] stalled progress at the final hour. After a deferral of the Declaration and extensive lobbying, the text changed once again. Following 25 years of work, it was this final text that the GA adopted in September 2007.

Significance of the Declaration

The Declaration is significant in three respects. First, the Declaration provides indigenous peoples with an international standard to measure state action. State breach of this standard provides indigenous peoples with a means of appeal in the international arena.[11] This is noteworthy where there is a lack of adequate domestic human rights for indigenous peoples, or where the rights have been ignored.[12]

---

8 See generally Claire Charters "The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples" (2007) 4 NZYIL 121 at 207 ["The Road to Adoption"].

9 Note that the CHR is the parent body of the Sub-Commission. It has been replaced with the new Human Rights Council.

10 The "African Group" is made up of Central-East African states that are newly decolonised. They voiced concerns that the right of self-determination was too strong. See Megan Davis "Indigenous Struggles in Standard-Setting" (2008) 9 MJIL 439 at 456.

11 It should be noted that Māori appeals to international fora have dramatically increased in the last decade. See, for example, the UN Human Rights Committee case of *Apirana Mahuika v New Zealand* CCPR/C/70/D/547/1993 (2000). Māori have also historically voiced concern internationally: in the 1920s, Tahupotiki Wiremu Ratana petitioned the League of Nations to recognise the Treaty of Waitangi.

12 The Declaration has much significance for Australian Aboriginals and Torres Strait Islanders in this respect.

Secondly, the Declaration codifies the amalgam of indigenous international rights into one document. Prior to the Declaration, with the exception of the 1989 International Labour Organisation Convention 169,[13] international indigenous rights were primarily sourced from a range of Conventions known as the "United Nations Bill of Human Rights" (UNBOHR).[14] The UNBOHR consists of the Charter of the United Nations, the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination,[15] the International Covenant on Civil and Political Rights (ICCPR)[16] and the International Covenant in Economic, Social and Cultural Rights.[17] This range of sources created uncertainty surrounding the nature of indigenous rights. By articulating rights in one document, the Declaration remedies this concern.

Finally, it is the only UN document dedicated to indigenous rights, and addresses indigenous-specific concerns. The UNBOHR, on the other hand, contains general human rights; on their own, the rights of self-determination, equality and freedom from discrimination as expressed in the UNBOHR did not meet the cultural and political concerns of indigenous peoples.[18] Articles in the UNBOHR had to be coupled with favourable general comments of treaty monitoring bodies' decisions to advance indigenous rights indirectly. For example, in its General Comment 23, the UN Human Rights Committee extended the reach of human rights to protect indigenous peoples' land rights, principally through the reach of art 27 of the ICCPR.[19] But despite the apparent significance of General Comment 23, it was still discussed within a general human rights framework. For some indigenous peoples it was not specific enough. By declaring indigenous peoples and their communities as the sole right-bearers,[20] the Declaration

13 The ILO Convention 169 (Convention Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991)) was established, among other purposes, to remedy the integrationist concerns of the ILO Convention 107 (Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (adopted 26 June 1957, entered into force 2 June 1959)). Arguably the ILO Convention 169 contains greater rights for indigenous peoples than the Declaration, requiring states to recognise and protect indigenous peoples' ownership and possession of land that they traditionally occupy.

14 This term is taken from Alison Quentin-Baxter "The UN Draft Declaration on the Rights of Indigenous Peoples — the International and Constitutional Contexts" (1999) 29 VUWLR 85 at 87.

15 International Convention on the Elimination of All Forms of Racial Discrimination (opened for signature 21 December 1965, entered into force 4 January 1969).

16 International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR].

17 International Covenant in Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976).

18 Such as indigenous group rights or claims for self-governance. See generally Claire Charters "Development in Indigenous Peoples' Rights Under International Law and Their Domestic Implications" (2005) 21 NZULR 511 at 533 ["Development in Indigenous Rights"].

19 *General Comment No. 23: The Rights of Minorities (Art 27)* at [3.2] and [7] CCPR/C/21/Rev.1/Add.5 (1994). At [7] the Human Rights Committee stated that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law". See also *Chief Bernard Ominayak and Lubicon Lake Band v Canada* CCPR/C/38/D/167 (1990).

20 See art 1 of the Declaration.

addresses and elaborates only the human rights concerns of indigenous peoples, alleviating this concern.

The Final Text of the Declaration

The final text of the Declaration is extensive, outlining aspirational rather than prescriptive rights. It creates no new rights; rather, it recognises "putative international norms as well as evolving human rights standards pertaining to indigenous peoples".[21] It has 46 articles, with 23 preambular paragraphs. The preambular paragraphs are broad and general in scope, while the substantive articles are specific, elaborating aspects of self-determination and its exercise. The Declaration provides for the following:[22]

- Indigenous rights to self-determination, equality and freedom from discrimination;
- Indigenous rights in political, social, economic and other welfare areas;
- Indigenous peoples' cultural integrity, especially in fields of education, the arts, and literature;
- The recognition of indigenous peoples' customary laws and collective rights;
- The rights to traditional knowledge and the right to redress for the taking of indigenous intellectual property;
- Rights of ownership and development rights over lands and (natural) resources;
- State duties to consult with indigenous peoples and seek their free, informed and prior consent, and on failure to provide lands or territories, fair and equitable compensation;
- State duties to respect treaties and other constructive agreements with indigenous peoples; and
- The territorial integrity of states.

The Declaration's Reception

1 The Indigenous Position on the Rights

In light of the significance discussed above, many indigenous peoples hailed the adoption of the Declaration as a landmark achievement. For some

21 Davis, above n 10, at 465.

22 Paraphrased from Claire Charters "The Rights of Indigenous Peoples" [2006] NZLJ 335 at 335. See also James Anaya *Indigenous Peoples in International Law* (2nd ed, Oxford University Press, Oxford, 2004) at 8 [*Indigenous Peoples*].

indigenous peoples, however, the adoption was bittersweet.[23] While it was a positive step, the Declaration no longer contained the rights originally envisaged in the draft. With each step up the UN hierarchy, rights were progressively weakened. For example, art 28 of the Sub-Commission text read as follows:[24]

> Military activities *shall not* take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

In the Chair's text this was modified in art 30(1):[25]

> Military activities shall not take place in the lands or territories of indigenous peoples, *unless justified by a significant threat* to a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

The final art 30(1) of the Declaration was further modified to the following:

> Military activities shall not take place in the lands or territories of indigenous peoples, *unless justified by a relevant public interest* or otherwise freely agreed with or requested by the indigenous peoples concerned (emphasis added).

While the nature of the UN standard-setting process requires compromise, for some indigenous peoples the compromise was too great. Despite this, many indigenous peoples, including many Māori, accept the Declaration, and look now to its possible use in their own legal systems.

2 The New Zealand Position on the Rights

Along with other "CANZUS states",[26] New Zealand did not adopt the Declaration in the final vote. In New Zealand's explanation of the vote, Rosemary Banks, New Zealand's Permanent Representative to the United Nations, objected to four articles: art 26 (the right to "lands, territories and resources"), art 28 (the right to redress or fair, just and equitable

---

23 Charters "The Road to Adoption", above n 8, at 207. In particular, Charters describes the Declaration as "the outcome of political tactics". For a Māori perspective, see Archie Taiaroa "The Context For Māori (1)" in Alison Quentin-Baxter (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Wellington, 1998) 54 at 56. Taiaroa believes the Draft Declaration was tapu and had its own mauri. Consistent with tikanga Māori, the Declaration would have to become 'noa' before any amendments could be made.

24 "Draft United Nations Declaration on the Rights of Indigenous Peoples" (1994) Peace Movement Aotearoa <www.converge.org> (emphasis added).

25 "United Nations Declaration on the Rights of Indigenous Peoples — Annex to Human Rights Council Resolution 2006/2" (2006) Peace Movement Aotearoa <www.converge.org> (emphasis added).

26 The 'CANZUS states' is a term used to refer to the four objectors: Canada, Australia, New Zealand and the United States of America.

compensation), and arts 19 and 32 (the right(s) of obtaining "free, prior and informed consent").[27] She characterised these articles as "fundamentally incompatible with the constitution and legal norms in New Zealand".[28] Such conclusions echoed former Minister in charge of Treaty of Waitangi Settlement Negotiations Doug Graham, who, in 1997, stipulated that the Declaration must be clear and consistent with domestic constitutional norms before New Zealand would support it.[29]

Many Māori questioned this position.[30] Both Megan Davis and Kerensa Johnston saw New Zealand as "already complying with a number of the Declaration's provisions".[31] Examples include the following:

- The current Treaty settlement process, which complies with art 28 by requiring states to provide redress and compensation for land and resources lost;[32]
- The Māori Language Act 1987, the establishment of Te Taurawhiri i te Reo Māori (Māori Language Commission), kōhanga reo, kura kaupapa, whare kura and the Māori Television Service, which comply with arts 13, 14 and 16 by allowing for the promotion of indigenous language and education;[33] and
- A fiduciary duty to negotiate in good faith (coupled with rights to consultation) and kaitiakitanga, already expressed in the Resource Management Act 1991, which are similar to the consent articles (arts 19 and 32).[34]

In early 2009, government statements suggested New Zealand was rethinking its official position. Power said this in Parliament:[35]

> [T]he Prime Minister has indicated that he would like to see New Zealand move to support the declaration, provided that we can protect the unique and advanced framework that has been developed for the resolution of issues related to indigenous rights.

---

27 Banks, above n 3.

28 Ibid.

29 Doug Graham "The New Zealand Government's Policy" in Quentin-Baxter (ed), above n 23, 3 at 6.

30 See the comments made by Hone Harawira at (31 March 2009) 653 NZPD 2195.

31 Kerensa Johnston "The Treaty of Waitangi" [2008] NZ Law Rev 609 at 619. A discussion critiquing New Zealand's position is beyond the ambit of this article. For such a discussion, see generally Charters "The Rights of Indigenous Peoples", above n 22, and Charters "The Road to Adoption", above n 8. Note that Charters argues that politics heavily underlay New Zealand's position.

32 Kerensa Johnston "The Treaty of Waitangi" [2007] NZ Law Rev 551 at 562. The Treelords Treaty settlement is a recent example of the Treaty settlement process.

33 Ibid. Note that the Declaration's provisions oblige state action to enable indigenous education in their language, which is analogous to the Treaty principle of active protection of the language as a taonga.

34 The status of such a fiduciary duty is debatable in New Zealand. See generally Alex Frame "The Fiduciary Duties of the Crown to Māori: Will the Canadian Remedy Travel?" (2005) 13 Wai L Rev 71 at 78. The author questions Paul McHugh's position that the fiduciary duty on the Crown "failed to take root in New Zealand public law".

35 (31 March 2009) 653 NZPD 2195.

With Australia officially endorsing the Declaration in April 2009, Māori saw real hope that New Zealand would follow suit.

Approximately one year later, on 20 April 2010, the dual announcement of endorsement mentioned above was made.[36] While some were sceptical of the way in which New Zealand made its announcement,[37] for Māori, it was the resolution for which many had been waiting.

3 The International Reception

The Declaration has received widespread support internationally. Notably, 143 member states voted in favour of adoption. Since the vote, further progress has been made.

In 2007, the Supreme Court of Belize made landmark statements about the Declaration. Conteh CJ in *Cal v Attorney-General*[38] held that the Declaration is "of such force that the ... Government of Belize, will not disregard it".[39] Coming from a common law jurisdiction, the decision provides persuasive authority for our courts, should reliance ever be placed on the Declaration.

Further, Bolivia and Ecuador have incorporated the Declaration into municipal law. The new Bolivian Constitution builds on some of the rights outlined in the Declaration and supports indigenous self-determination.[40] Indigenous people, organised in an autonomous territory, now have the ability to write their own statutes,[41] decide how to manage development,[42] administer local natural resources[43] and levy some taxes.[44] Ecuador has also incorporated the Declaration into its new Constitution, the Constitution of the Republic of Ecuador 2008. Notable articles of the Ecuadorian Constitution recognise indigenous peoples' collective rights,[45] provide for an indigenous judicial system based on their ancestral traditions,[46] and also

36 This dual announcement is significant when considering the legal effect of the Declaration. See Part IV below.

37 See Tracy Watkins "NZ Does U-Turn on Rights Charter" (2010) Stuff <www.stuff.co.nz> for various media comments regarding Sharples' "secret" visit to the General Assembly.

38 *Cal v Attorney-General* SC Belize Claim 171/2007, 18 October 2007, cited in Claire Charters "Indigenous Peoples Rights Under International Law" (2007–2008) 5 NZYIL 199 at 204 ["Rights Under International Law"].

39 Ibid, at 205.

40 New Political Constitution of the State 2009 (Bolivia), art 2.

41 Ibid, art 304I(1).

42 Ibid, art 304I(2).

43 Ibid, art 304I(3).

44 Ibid, art 304I(13). Other examples include the ability to practise and implement traditional legal and dispute resolution mechanisms (art 304I(8)), the decisions resulting from which may bind public authorities and may be enforced through the support of the State (art 192). See also art 30 for general rights conferred on indigenous peoples.

45 Constitution of the Republic of Ecuador 2008, art 57.

46 Ibid, art 171. This system would probably be confined to a specific territorial area.

the ability to exercise forms of self-government.[47] This article will consider whether New Zealand should follow a similar approach in Part V.

III THE RIGHTS OF THE DECLARATION: A CASE STUDY OF SELF-DETERMINATION

The right of self-determination is the "cornerstone" of the Declaration.[48] Article 3 provides for the right of self-determination. It reads as follows:

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The Declaration does not define "self-determination", and while international law provides for multiple forms of self-determination, nowhere outside of the Declaration is it defined.[49] As a result, the meaning of self-determination and what the right to it confers on indigenous peoples is uncertain.

In light of this tension it is appropriate to consider the interpretation of what self-determination means, what self-determination will give to Māori, and its relationship with the existing Māori principle of tino rangatiratanga, before analysing the effect that officially endorsing the Declaration may have for New Zealand.

What does Self-Determination Mean?

There are two schools of interpretation on the meaning of self-determination. The first school believes that self-determination may provide for secession, or 'external' self-determination. In contrast, the second school believes that self-determination provides only for 'internal' self-determination.

1 A Right of Secession?

Many indigenous scholars believe that self-determination, although not primarily sought by indigenous peoples, may allow for a right of secession. And throughout the Declaration's development, the CANZUS states felt that self-determination may provide a unilateral right to secede under international law.[50] The realisation of this fear, based on the use of self-

47 Ibid, art 257. Despite the apparent appeal of the Ecuadorian Constitution, recent media reports suggest that there is some concern regarding the rights. See the Confederation of Indigenous Nationalities of Ecuador "CONAIE Presents Demands of Indigenous Peoples at National Assembly of Ecuador" (press release, June 22 2010), reporting that indigenous peoples have been requesting constitutional protection of indigenous rights.

48 Davis, above n 10, at 458.

49 Self-determination is mentioned in the Charter of the United Nations, art 1 at [2]; the ICCPR, art 1 at [1]; and the African Charter on Human and Peoples' Rights (also known as the "Banjul Charter"), art 20.

50 Charters "The Rights of Indigenous Peoples", above n 22, at 336.

determination as a decolonising mechanism,[51] would have consequences for state sovereignty and political unity, particularly so for unitary states and states in which the indigenous population is mingled with the non-indigenous population, such as New Zealand.

While many indigenous peoples admit that this is a "legitimate" concern, they do not believe secessionist connotations are improper.[52] This is because, in contrast to the CANZUS view, self-determination provides a range of meanings, of which secession is but one. Furthermore, self-determination does not confer a unilateral right of secession: secession is limited by existing international law norms, and as advocated by Anaya, available only in certain forms.

International law confines the right of secession to particular peoples. Such peoples include those who are subject to "alien domination", or are members of a disintegrating state.[53] The Declaration, in its application to indigenous peoples, does not modify these categories.[54] Unless indigenous peoples fall within the recognised international law categories, the ability to secede is unavailable.[55]

A second limitation, as advocated by Anaya, is that secession is available where remedial in nature.[56] Anaya distinguishes between the *substance* and the *remedial* aspects of self-determination. Anaya believes that states and indigenous peoples alike confuse the substance of self-determination with its remedial aspects, the classic example being the decolonisation examples to which states often refer.[57] In its *substantive* form, self-determination is a human *right*.[58] It carries with it notions of equality and is to be enjoyed by all peoples. When the right of self-determination (that is, the substantive form of self-determination) is denied, as was the case for many indigenous peoples under colonial regimes, a breach occurs. Accordingly, remedies are available. In this respect, self-determination can be a *remedy*, and it is in its remedial form that self-determination allows for the remedy of secession.

---

51 The concept of self-determination was used as early as the American Declaration of Independence of 1776 and the French Revolution of 1789, and by leaders such as Vladimir Lenin, Woodrow Wilson and Winston Churchill. See Antonio Cassese *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1995) at 11–15 [*Self-Determination of Peoples*]. It was more recently that self-determination became a decolonising mechanism. Pursuant to the Charter of the United Nations, art 1 at [2], colonised territories were given the option to become new, independent states. Between 1945 and 1979, 70 countries invoked self-determination and successfully ceded from colonial rule, including the Cook Islands in 1965, Niue in 1974 and Belize in 1981.

52 Charters "The Rights of Indigenous Peoples", above n 22, at 337.

53 Ibid.

54 Ibid.

55 Ibid.

56 Anaya *Indigenous Peoples*, above n 22, at 106. Note that Anaya's distinction differs from the internal–external distinction used by Cassese and McHugh. See Cassese *Self-Determination of Peoples*, above n 51, at 101 and Paul McHugh *The Māori Magna Carta* (Oxford University Press, Oxford, 1991) at 199.

57 James Anaya "The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era" in Claire Charters and Rodolpho Stavenhagen (eds) *Making the Declaration Work* (IWGIA, New Brunswick, 2009) 184 at 189.

58 Ibid, at 186.

Appreciating the remedial form of secession, Anaya stresses two points. First, secession is but one remedy. Other remedies include recognising indigenous peoples as "full and equal participants" functioning at all levels of institutions in which they live; recognising and implementing coexisting political and social orders; and even maintaining the status quo.[59] Secondly, in the application of the secession remedy, a proportionality principle must be observed.[60] The remedy must be proportionate to the violation of the (substantive) right of self-determination. This means secession is only available when the violation of the right to self-determination warrants secession. What level of "violation" is needed to secede is uncertain. What is certain, however, is that secession will be rarely invoked.[61] Therefore, when a state does not meet the secession threshold, alternatives such as pluralism would be the more appropriate and common remedy.

2 *'Internal' Self-Determination?*

The less controversial approach is that self-determination provides for 'internal' self-determination. Internal self-determination has been defined as the "the right to authentic self-government";[62] that is, "the right for a people to really and freely choose its own political and economic regime".[63] Similarly to Anaya's analysis above, internal self-determination allows for pluralism and forms of indigenous self-governance. The key distinction is that internal self-determination operates within the existing legal framework of the state. It will not provide an "external" right of self-determination, or secession. It is thus of no surprise that many states prefer this interpretation, and expressly advocated for the term "self-determination" to be replaced with "self-management" to reflect this intention.[64]

Arguments in support of this interpretation begin with art 46. Article 46 adamantly affirms territorial integrity, representing a major barrier to exercising secession, even where international law norms and Anaya's approach are met. Article 46(1) reads as follows:

> Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

---

59 Ibid.

60 Ibid.

61 Ibid.

62 See Cassese *Self Determination of Peoples*, above n 51, at 101.

63 Ibid.

64 Charters "The Road to Adoption", above n 8, at 127.

In working within state sovereignty, internal self-determination does not contravene territorial integrity.

The 'internal' interpretation is also supported with reference to art 4. Article 4 provides:

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

The definition of internal self-determination is remarkably similar to art 4, which is seen to be the "thrust" of the Declaration.[65] The drafting history of art 4 is also significant in its support of the 'internal' interpretation. In the Sub-Commission text, art 4 was originally art 31.[66] States pushed heavily for art 31 to follow art 3, thus implying that autonomy and self-government are the expression of art 3.

Considering the two alternative schools together, it can thus be seen that there are sound arguments for either interpretation: self-determination may provide for secession, and, at the very least, it should provide for forms of 'internal' self-governance. In light of these interpretations, the question crystallises into that of what self-determination will provide for Māori.

Self-Determination: Application to Māori

Even if Anaya's remedial approach to self-determination is accepted, it is uncertain whether secession would be available to Māori. Applying his proportionality principle, one must ask: to what extent is secession warranted? On the one hand, reference can be made to various discriminatory and assimilationist legislative provisions, such as ss 7 and 42 of the Constitution Act 1852,[67] as clear examples of the interference with, if not violation of, the right to self-determination. On the other hand, secession is a radical and extreme remedy. Secession would have major repercussions on the New Zealand socio-political landscape, to the extent it may even cause unwarranted harm.

Despite the uncertainty as to whether secession is available, it is submitted that pursuant to art 3, Māori do have, at least, the option of institutional change and a serious attempt of pluralism. For some iwi and hapu, this may be the preferred option. Internal self-determination is indeed consistent with historical movements such as the Kīngitanga/

65 Charters "The Rights of Indigenous Peoples", above n 22, at 336.

66 Davis, above n 10, at 460–461.

67 These property requirements disenfranchised Māori from the early political process in New Zealand.

Kauhanganui[68] and Kotahitanga movements,[69] which, as noted by McHugh, either sought to work with the Crown or within the territorial integrity of New Zealand, rather than against or outside of it.[70]

Extending this line of analysis, it is submitted that self-determination can, and should, provide Māori with the ability to pass by-laws, especially over natural tribal resources. Māori already exercise self-determination in analogous ways.[71] The passing of by-laws should apply not only to iwi members but to members of society in general. Iwi should be able to police these rules through a system of fines. Whether this would include imprisonment is less certain, but to have by-laws that are not enforced would render them nugatory. This is consistent with the Declaration's intent and will ensure that the rights work. Iwi could thus act in much the same way as local governments. Self-determination must also mean that elements of custom law are incorporated and recognised by our legal system,[72] and that current policies that encourage pluralism, such as the Māori seats, remain, until Māori themselves determine when it is appropriate to remove them.

This exercise of self-determination appears to supplement what many Māori would seek under the rubric of tino rangatiratanga. It is thus necessary to consider the relationship between self-determination and tino rangatiratanga.

Relationship with Māori Tino Rangatiratanga: Complementary or Opposing Rights?

Pursuant to art 2 of the Treaty (Māori text) Māori retain "tino rangatiratanga". Kawharu, in his translation of the Māori text, defines tino rangatiratanga as

68 The Kīngitanga was a response to the disenfranchisement of Māori from the early government in New Zealand and vast land purchases in the early 1800s. It sought to unite Māori under a Māori monarch, and parallel the early New Zealand settler government. The Kīngitanga, officially beginning with the crowning of Tāwhiao Matuteaera Pōtatu Te Wherowhero, continues today, albeit confined to the Tainui region. See Robert Mahuta "Tainui, Kīngitanga and Raupatu" in Margaret Wilson and Anna Yeatman (eds) *Justice & Identity* (Bridget Williams Books Ltd, Wellington, 1995) 18 at 22. The Kauhanganui, established by Tāwhiao, is the King's Convention of Chiefs: Lindsay Cox *Kotahitanga* (Oxford University Press, Auckland, 1993) at 48–59.

69 The Kotahitanga movement was the Māori Parliament (Pāremata Māori) movement. The movement began in the 1870s and came to fruition in 1891. As with the Kīngitanga, the Kotahitanga was a further response to the alienation of land, and an attempt to secure a measure of tribal autonomy. Cox states, however, that the movement is distinct from the Kīngitanga as it crystallised earlier and made no direct reference to it: Cox, above n 68, at 61.

70 McHugh, above n 56, at 199. McHugh also notes that internal self-determination is precisely what the Māori version of the Treaty "sought to preserve".

71 See Ngāti Porou Foreshore and Seabed Deed of Agreement, Extended Fisheries Mechanism, Part B, Schedule 4. This allows Ngāti Porou to pass by-laws and place restrictions on fishing in the relevant area, subject to ministerial approval. See also "Negotiations Between The Crown And Te Rūnanga o Ngāti Porou" (2010) Terms of Negotiations <www.justice.govt.nz>. Despite the imminent (at the time of publication) repeal of the Foreshore and Seabed Act 2004, the Government has reassured Ngāti Porou that the deal still holds.

72 The difficulties of incorporating aspects of tikanga Māori are acknowledged. Examples of attempts include the incorporation of the Māori concept of kaitiakitanga through s 7 of the Resource Management Act 1991, but see also the trouble Fogarty J had in recognising tikanga Māori in *Clarke v Takamore* [2010] 2 NZLR 525 (HC) at [83] and [85].

the "unqualified exercise of their [rangatira] chieftainship".[73] In contrast, the English version provides for possession of lands and estates. Like self-determination, the precise nature of tino rangatiratanga remains subject to debate.[74]

Despite the uncertainty, recent commentators recognise that Māori "relinquished something less than sovereignty".[75] Orange has contended that the Crown only assumed "external" sovereignty or kāwanatanga, leaving Māori with "internal" sovereignty, or tino rangatiratanga.[76] Jackson has taken the stronger view that tino rangatiratanga is equivalent to sovereignty.[77] These statements bear clear resemblance to the right of self-determination. Given their prima facie similarities, are the two complementary or opposing rights?

Both tino rangatiratanga and self-determination are aspirational rights, representing ideals as opposed to fixed standards; both tino rangatiratanga and self-determination advocate legal pluralism, under which iwi practice internal self-government and manage their own affairs;[78] and both rights recognise and affirm forms of indigenous authority prior to colonisation.

There are differences, however, between the two rights. The first evident difference is that tino rangatiratanga is the more localised and meaningful concept. It is born from the Māori concept of 'rangatiratanga', has been the focus of attention throughout New Zealand's history and is unique to the Treaty and the Crown–Māori relationship. In contrast, self-determination is a generic, international law norm, relatively new in its application in New Zealand. A second difference centres on aspects of self-determination. Some aspects of self-determination may need to meet non-indigenous legal constructs to be available. For example, secession requires certain tests be met, either through international law or Anaya's remedial approach, before an indigenous group can secede. In contrast, tino rangatiratanga will always remain a Māori principle, exercised primarily through an indigenous perspective.

In contrast to the first two differences, two further differences reveal that self-determination may be the stronger right. The Waitangi Tribunal has held that, like sovereignty, tino rangatiratanga can be "extinguished".[79] In contrast, it appears that self-determination cannot be extinguished — it

---

73 See I H Kawharu "Literal Translation of the Māori Text" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on The Treaty of Waitangi* (Oxford, Oxford University Press, 2004) 388 at 391–392.

74 See Anne Salmond "Brief of Evidence" (presented to Waitangi Tribunal Ngāpuhi Claim 1040 hearing, Panguru, Northland, 13 August 2010).

75 Waitangi Tribunal *Manukau Harbour Report* (Wai 8 1985) at 64 [*Manukau Report*].

76 Claudia Orange *The Treaty of Waitangi* (Allen & Unwin, Port Nicholson Press, Wellington, 1987) at 89.

77 Moana Jackson "Where Does Sovereignty Lie?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) 196 at 196–197.

78 The Waitangi Tribunal referred to the draft Declaration land articles (aspects of self-determination) to support Taranaki Māori claims of tino rangatiratanga to land in Waitangi Tribunal *Taranaki Kaupapa Tuatahi Report* (Wai 143 1996) at 307 [*Taranaki Report*].

79 The Waitangi Tribunal found Māori claimants lost sovereignty as evinced from the surrounding circumstances in the *Manukau Report*, above n 75, at 64.

can only be repressed or denied. While self-determination may be difficult to identify, it is an ongoing right, which, if denied, allows for a remedy.[80] This may be significant for Māori when choosing under which right to pursue political or legal action.

Secondly, tino rangatiratanga may not entail the broad secessionist connotations that self-determination can carry with it. McHugh notes that Māori ceded "kāwanatanga" or their "external sovereignty" to the Crown. As such, any assertion by Māori of the right to secede "may be in conflict with the Treaty of Waitangi".[81]

On balance, the above analysis shows that despite some conceptual differences, self-determination seems to support and complement tino rangatiratanga and its goals. It does not facilitate radical change to the nature of existing indigenous Māori rights.

IV THE IMPLICATIONS OF OFFICIALLY ENDORSING THE DECLARATION

Having examined the nature of the rights contained in the Declaration, this section considers the effect that officially endorsing those rights will have for New Zealand. Officially endorsing the Declaration will not create any overt international or domestic obligations in New Zealand's legal system.[82] This is because declarations are coordinated statements in the GA, and are considered to be non-binding (or 'soft') international law. Unlike conventions, treaties or international statutes (or 'hard' law), which bind their signatories, declarations have no legal effect in international law.[83]

While the non-binding effect of official endorsement is settled, what constitutes official endorsement and whether states can selectively endorse aspects of the Declaration are questions that remain unresolved. Without straying too far from the focus of this section, it is necessary to discuss these issues briefly.

Because the Declaration is a General Assembly Resolution and not a treaty, initial disapproval cannot be rectified by a later act such as signature, ratification or accession. Accordingly, it is not possible to change New Zealand's position as evidenced by its vote against the adoption of the

80 This is particularly so for 'internal' self-determination. Cassese believes that unlike the external right of self-determination, internal self-determination is "an ongoing right". This description parallels the Waitangi Tribunal's statements that tino rangatiratanga, like external self-determination, can be extinguished. See Cassese *Self-determination of Peoples*, above n 51, at 101.

81 McHugh, above n 56, at 199.

82 New Zealand cannot adopt the Declaration: adoption only occurs during the GA process. To signal its intention to support the rights, New Zealand can only officially endorse the Declaration. For more information see Davis, above n 10, at 468.

83 Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2008) at 4. Note, however, that declarations may develop a normative character. See the discussion of customary international law below.

Declaration.[84] It is, however, possible to endorse the Declaration officially via a statement indicating a desire to do so. The issue thus becomes that of the appropriate official act.[85]

Some believe that official endorsement requires a clear, unequivocal statement of support, made on the floor of the Parliament with an opportunity for Parliament to vote and support the Declaration, followed with a statement in the GA indicating the changed position.[86] This high threshold has led commentators to question the nature of Australia's endorsement. The statement of the Australian Minister of Indigenous Affairs, the Hon Jenny Macklin MP, was not made in the GA, but in Parliament House; the speech itself was not on the floor of the House, nor is there any record of it in Hansard. Furthermore, the wording of her statement was equivocal:[87]

> On 17 September 2009, 143 nations voted in support of the Declaration. Australia was one of four countries that voted against the Declaration. Today, Australia *changes* its position. Today, Australia *gives our support* to the Declaration.

While Macklin signalled that Australia "change[d]" its position, she did not say that it 'reversed' its position. Furthermore, she stated that Australia "[gave its] support" to the Declaration rather than 'endorsed' it. For Rothwell, these features of Australia's endorsement create serious doubt as to whether it has legal effect.[88]

Similar concerns arise in the case of New Zealand. Prima facie, it may seem that New Zealand's endorsement is sound; closer analysis, however, casts doubt on its efficacy. New Zealand's support of the Declaration was intimated by way of a dual announcement, made in both the GA and in New Zealand's Parliament (the latter noted in Hansard). For Rothwell, the New Zealand practice seems to have been more express than that which occurred in Australia, and in his view it has greater effect.[89] While the New Zealand endorsement may indeed have been more express, however, its wording is remarkably similar to that of Jenny Macklin's statement:[90]

> In September 2007, at the United Nations, 143 countries voted in favour of the Declaration on the Rights of Indigenous Peoples. New Zealand was one of four countries that voted against the Declaration.
>
> Today, New Zealand *changes* its position: we are pleased to express our *support* for the Declaration.

---

84 Email from Don Rothwell to the author regarding the Declaration (23 August 2010).

85 Ibid.

86 Ibid.

87 Jenny Macklin "Statement on the United Nations Declaration on the Rights of Indigenous Peoples" (2009) The Hon Jenny Macklin MP <www.jennymacklin.fahcsia.gov.au> (emphasis added).

88 Email from Rothwell, above n 84.

89 Ibid.

90 Sharples, above n 5 (emphasis added).

As with the Australian endorsement, New Zealand did not say that it "reversed" its position, or that it "endorsed" the Declaration. The legal effect of the Declaration's endorsement, and whether it has in fact been effectively endorsed, thus becomes uncertain.

Despite concerns over what constitutes official endorsement, the second issue, which concerns the effect and role of the caveat New Zealand placed on the Declaration, is far more problematic for Māori. In his announcement to the UNPFII, Sharples qualified New Zealand's endorsement:[91]

> In moving to support the Declaration, New Zealand both affirms [the Declaration's] rights *and reaffirms the legal and constitutional frameworks that underpin New Zealand's legal system.* Those existing frameworks, while they will continue to evolve in accordance with New Zealand's domestic circumstances, *define the bounds of New Zealand's engagement with the aspirational elements of the Declaration.*

Sharples then identified two specific areas where New Zealand would not follow the Declaration, namely land and resources, and indigenous involvement in decision-making:[92]

> In particular, where the Declaration sets out aspirations *for rights to and restitution of traditionally held land and resources*, New Zealand has, through its well-established processes for resolving Treaty claims, developed its own distinct approach.
>
> That approach ... maintains, and *will continue to maintain, the existing legal regimes* for the ownership and management of land and natural resources.
>
> ...
>
> Further, where the Declaration sets out principles for indigenous involvement in *decision-making*, New Zealand has developed, and *will continue to rely upon its own distinct processes and institutions that afford opportunities to Māori for such involvement.* These range from broad guarantees of participation and consultation to particular instances in which a requirement of consent is appropriate.

An immediate question therefore arises as to the significance of the caveat. The caveat provides that New Zealand's legal and constitutional frameworks will "define the bounds of New Zealand's engagement" with the Declaration.[93] The Declaration itself, however, circumscribes its possible interpretation in art 46(1). This is also reaffirmed throughout the

91 Ibid (emphasis added).

92 Ibid (emphasis added).

93 Ibid.

preambular text. Accordingly, Sharples' statements merely reinforce art 46 of the Declaration.

The specific mention of the land settlements and decision-making processes, however, appears to constitute an implicit rejection of the Declaration's relevant articles. Unlike a treaty, it is uncertain whether a state can in fact selectively endorse a declaration. To be able to adhere to certain aspects of a declaration defeats the aspirational nature of the entire document. If it were possible for a state to do so, however, New Zealand may be exempt from the land, resource and political decision-making clauses of the Declaration. While a broad reading should be given to the official endorsement, it is difficult to go behind the specific wording and the specified content of the caveat: New Zealand's intention is strongly signalled.

This caveat is nothing new. Power's statements in 2009, Banks' statements in the Explanation of New Zealand's vote to the GA 2007, and even former Minister in charge of Treaty of Waitangi Settlement Negotiations, the Hon Doug Graham,[94] have all intimated that the Declaration would only be endorsed "provided that we can protect the unique and advanced framework that has been developed for the resolution of issues related to indigenous rights".[95] This historical theme may add weight to the intended effect of the caveat New Zealand placed on its endorsement of the Declaration.

The issues surrounding what is required for an official endorsement and the effect of the caveat remain unresolved. The effect of New Zealand's official endorsement of the Declaration is, however, clear: the only obligation that arises is a moral obligation to adhere to the rights. But as Davis contends, "while it is true that the Declaration is non-binding and has no effect in domestic law, there are ways in which the Declaration may have some effect".[96] What follows is a (by no means exhaustive) discussion of the Declaration's possible effect.

Moral Reliance

As mentioned above, the first effect of officially endorsing the Declaration is that New Zealand will be morally bound to act consistently with it. The Declaration thus provides another avenue for Māori political and judicial action.

The Waitangi Tribunal has used the draft Declaration to add moral weight to Māori claims of tino rangatiratanga. In the Taranaki Kaupapa Tuatahi Report, the Waitangi Tribunal referred to the draft Declaration to

94 Graham, above n 29, at 5.

95 (31 March 2009) 653 NZPD 2195.

96 See Davis, above n 10, at 468.

elaborate aspects of tino rangatiratanga, referring "positively to the draft Declaration".[97]

As Charters has observed, the Declaration has also influenced decisions of the courts.[98] Now that the Declaration has been endorsed, the courts may continue to refer to the Declaration and may even consider it to be persuasive.

Officially endorsing the Declaration will also allow references to other states and their use of the Declaration. In particular, as mentioned above, reliance can be placed on the Supreme Court of Belize's landmark statements in *Cal v Attorney-General.* Conteh CJ held that the Declaration is "of such force that the ... Government of Belize, will not disregard it".[99] This is a judicial statement respecting the moral force of the Declaration. Conteh CJ recognised that Belize, a fellow common law jurisdiction, must adhere to its promise. Such a statement is likely to be highly persuasive in our courts.

Judicial Use

In conjunction with its moral force, there are two further and more concrete possible judicial uses of the Declaration. First, the Declaration could be a mandatory relevant consideration in judicial review. Second, in accordance with the presumption of consistency, it could be an aid in statutory interpretation.[100]

1 Mandatory Relevant Consideration

Tavita v Minister of Immigration suggests that unincorporated treaties may be mandatory relevant considerations in executive decision-making, and

97 See Charters "The Rights of Indigenous Peoples", above n 22, at 336. In *Police v Abdulla* [1999] SASC 239, (1999) 74 SASR 337 at [37], Perry J notes that "Australia is not a party to the Convention. But it is an indication of the direction in which international law is proceeding. In the area of human rights particularly, Australian courts should always be prepared to take into account international instruments where they identify precepts of universal application, at least where they are in conflict with the domestic laws of this country."

98 "[T]he Declaration can be of some persuasive legal value, as we have seen: *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) and the Waitangi Tribunal both referred positively to the Draft Declaration": Charters "The Rights of Indigenous Peoples", above n 22, at 336. But it should be noted that the Court of Appeal case cited by Charters does not refer explicitly to the Declaration, but rather uses the term "international jurisprudence": see *Ngāi Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) at 560 [*Ngāi Tahu*].

99 Charters "Rights Under International Law", above n 38, at 205.

100 Depending on the circumstances, it can also be a legitimate expectation, as held in *Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20, (1995) 183 CLR 273 at 278. But see the decision of *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* [2003] HCA 6, (2003) 214 CLR 1 where, according to one commentator, the court "delivered strong obiter attacking the legal reasoning of the majority in *Teoh*", with the result that "the [latter] decision appears almost certain to be overturned (or at least significantly restricted) in a future decision" (Wendy Lacey "The Judicial Use of Unincorporated International Conventions in Administrative Law: Back-Doors, Platitudes and Window-Dressing" in Hilary Charlesworth and others (eds) *The Fluid State* (Federation Press, Sydney, 2005) 82 at 84).

this reasoning could be applied to the Declaration.[101] Whether the *Tavita* approach will apply is, however, uncertain in three respects.

First, the rule would have to be extended from unincorporated international treaties to international *moral obligations*.[102] It is submitted that the Declaration should be considered to be an international obligation, and so fall within the purview of *Tavita*. In *Huakina Development Trust v Waikato Valley Authority*, the Court described international obligations to include both conventions and declarations.[103] Similarly, *Van Gorkom v Attorney-General*[104] found that the Declaration of the Elimination of Discrimination Against Women was an international obligation, concluding that employment regulations were in breach of it.[105]

Furthermore, aside from its international effect, there is no substantive difference between the Declaration and an unincorporated treaty. The nature of the Declaration is "convention-like": it represents a major achievement in international law; it has received extensive and global support; the Waitangi Tribunal has referred to it;[106] and it took almost 25 years to finalise, with much scrutiny over each article. Such factors may persuade the courts to hold that the Declaration is an international obligation for the purposes of the *Tavita* approach.

The second concern surrounding the application of *Tavita* is uncertainty in this area of law in general.[107] As Geiringer has remarked, the courts have collapsed mandatory relevant considerations with the presumption of consistency test, creating doubt as to *Tavita*'s continued relevance. Additionally, the *Tavita* approach itself "remains to be settled".[108] *Puli'uvea v Removal Review Authority*, a case decided on remarkably similar facts, signals a retreat by the courts on the issue.[109] Furthermore, *Tavita* was only an interim decision. It should be noted, however, that despite these concerns, Geiringer still considered *Tavita* to be good law.[110]

The final issue strikes at the heart of judicial incorporation of international obligations, asking whether it is principally justified. Commentators argue that judicial incorporation of unincorporated international obligations through administrative law amounts to "backdoor

101 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

102 Claudia Geiringer "Tavita and All That" (2004) 21 NZULR 66 at 68 ["Tavita and All That"]. Geiringer describes international obligations as ratified treaties that create obligations in international law, but that have not been incorporated into New Zealand legislation.

103 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC).

104 *Van Gorkom v Attorney-General* [1978] 2 NZLR 387 (CA).

105 As with the Declaration, New Zealand had adopted the *Declaration on the Elimination of Discrimination against Women* GA Res 48/104, A/RES/48/104 (1993).

106 See Waitangi Tribunal *Taranaki Report*, above n 78, at 336.

107 See Geiringer "Tavita and All That", above n 102.

108 Ibid, at 67.

109 *Puli'uvea v Removal Review Authority* [1996] 3 NZLR 538 (CA).

110 Claudia Geiringer "International law through the Lens of Zaoui: Where is New Zealand At?" (2006) 17 PLR 300 at 320 ["Zaoui"].

incorporation",[111] remarking that it is the legislature that should incorporate international rules into domestic legal systems, not the judiciary.[112] In taking the *Tavita* approach, the courts indirectly place the executive above the legislature, overstepping their legitimate role in a constitutional scheme of a separation of powers.[113] While these concerns raise issues beyond the scope of this article, it can be argued to the contrary that the courts should be able to hold the executive to its promises in the international arena. As always, if the legislature disagrees, action could be taken in the form of legislation.

By way of conclusion, it is suggested that the courts may indeed apply the *Tavita* approach in this area, with two qualifications. First, whether the Declaration is a mandatory relevant consideration will turn on the facts of any given case. Secondly, while its applicability is theoretically possible, it should be noted that the effect of successful litigation of this kind is limited. Geiringer has remarked that the mandatory approach speaks to the process of decision-making: so long as the relevant consideration has been considered, "the process is complete".[114] Successful litigation merely results in the decision-maker having to take into account the mandatory consideration.[115] Accordingly, Geiringer regarded the presumption of consistency approach as providing greater impact in judicial claims. This approach speaks to the outcome, and is "analytically distinct" from mandatory considerations, "impact[ing] in different ways".[116] It is this approach, potentially more beneficial for Māori, that is now considered.

2 *Presumption of Consistency*

The presumption of consistency is a common law principle of statutory interpretation. Parliament is presumed not to intend to legislate in breach of its obligations.[117] *Zaoui v Attorney-General* applied this presumption using New Zealand's international law obligations.[118] In that case, the Supreme

111 David Dyzenhaus, Murray Hunt and Michael Taggart "The Principle of Legality in Administrative Law" (2001) 1 OUCLJ 22.

112 See also Lacey, above n 100, at 82–83. These arguments concern the dualism and monism approaches to international incorporation. For more on this topic, see Hilary Charlesworth and others (eds) *The Fluid State* (Federation Press, Sydney, Australia, 2005) at 1.

113 See Claire Nielsen "The Executive Treaty-Making Prerogative: A History and Critique" (2007) 4 NZYIL 173 at 204, where there is an overview of the nature of international incorporation and historical justifications.

114 See Dyzenhaus, Hunt and Taggart, above n 111, at 31 where Dyzenhaus and others describe the mandatory relevant consideration approach as merely a "ticking the box" exercise.

115 Ibid.

116 Geiringer "Tavita and All That", above n 102, at 67.

117 Phillip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 533. Treasa Dunworth states that this area is shrouded in much uncertainty ("Public International law" [2000] NZ Law Rev 217 at 225). See, for example, *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (HL).

118 *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 [*Zaoui*]. Note also Geiringer's comments that the application of the presumption in the context of administrative process may be more significant than elsewhere. It is not intended to make any such distinction, beyond noting that there may be differences of application in different contexts. See Geiringer "Zaoui", above n 110.

Court found New Zealand's obligations under the ICCPR constrained the exercise of discretionary power under s 72 of the Immigration Act 1987.[119]

If the courts applied this presumption using the Declaration, it would result in the Declaration having a potentially significant indirect impact on New Zealand's legal system. As with the *Tavita* approach outlined above, however, whether this will occur is uncertain. *Zaoui* can be distinguished on two grounds. First, the Court did not apply the principle of consistency in its own right; rather, it was invoked 'in tandem' with the interpretation of ss 4 and 6 of the New Zealand Bill of Rights Act 1990 (NZBORA). Second, unlike the Declaration, the international document relied on in *Zaoui*, the ICCPR, has been both ratified by New Zealand and partially incorporated through the NZBORA's long title.

On the former point, Geiringer has adamantly contended that the Supreme Court's 'in tandem' approach "does not weaken" the presumption's applicability.[120] According to her analysis of the case, the Court could have easily applied only the NZBORA and reached the same outcome. The Court employed the presumption, however, not only to support the application and interpretation of s 6 of the NZBORA to s 72 of the Immigration Act 1987,[121] but also to illustrate that had s 6 of the NZBORA not been available, the executive may still have been unable to exercise discretionary power contrary to its international obligations.[122] Accordingly, the presumption of consistency may apply in its own right.

On the latter point, the fact that the Declaration has not been ratified or incorporated into statute does not detract from its significance. Applying the *Huakina* and *Van Gorkom* cases mentioned above, and in light of the Declaration's other points of significances, the Declaration represents (at least) an international moral obligation. And the ICCPR and the Declaration are similar, in that they both promote human rights, albeit the latter with a focus on indigenous peoples. As a result, an argument that the ICCPR is fundamentally different from the Declaration may not sit well with the judiciary.

As New Zealand has officially endorsed the Declaration, the presumption of consistency may thus apply. As with other approaches, the success of its application will turn on the facts. In addition, it is prudent to note that this presumption is only a presumption: it can be rebutted by the words of the statute. The extent to which the words of the statute must displace the relevant obligation is debatable. Geiringer has noted that where human rights are concerned, only clear wording will rebut the presumption. This may be significant in the context of the Declaration.[123]

---

119 Ibid, at 314.

120 Ibid, at 300.

121 Ibid, at 314 and 317.

122 Ibid.

123 See discussion in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 699 of s 9 of the State-Owned Enterprises Act 1987.

In general, however, the presumption will only apply so far as the words of the statute allow.[124] Nevertheless, despite these issues, the effect of this approach for Māori is exciting: as seen in *Zaoui*, the presumption of consistency could possibly constrain executive action.

Customary International Law

Declarations can develop a normative character and become customary international law.[125] Pursuant to art 38(j) of the Statute of the International Court of Justice, customary international law is binding on states. Furthermore, principles of customary international law form part of New Zealand's common law and are a source of constitutional law.[126] It is therefore possible that the Declaration may become customary international law,[127] and New Zealand's endorsement of the Declaration may strengthen claims that the Declaration amounts to customary international law. Some commentators believe that aspects of the Declaration, particularly the rights to land and territories, already constitute customary international law.[128] If certain articles of the Declaration were customary international law, they would become part of the New Zealand common law. In contrast to the Treaty of Waitangi, which requires legislative incorporation into the legal system,[129] this would mean that certain indigenous rights are automatically part of New Zealand's legal system. This is an exciting take on indigenous international law, but appears to be limited at this stage for three reasons.

First, the test for establishing customary law is exacting, and takes time to be met. The test has two limbs: it requires "state practice" and "opinio juris" (what states think).[130] The effect of the test means that state action must be intentional, and this intention must manifest in action.[131] For indigenous peoples, it is difficult to satisfy the two limbs together so as to evince customary international law, in the Declaration or otherwise. Anaya argues that there is a more holistic approach to this test.[132] However

---

124 See Geiringer "Tavita and All That", above n 102. Geiringer believes *Zaoui*, above n 118, suggests that the more compelling the international obligation, the clearer express language must be to override it. She lists factors that the court will consider, including the obligations, its significance and its force. Reliance can be placed on *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) [*Sellers*], in which Keith J held that the presumption operated in the context of clearly worded legislation.

125 See, for example, the legality of nuclear weapons, or the Universal Declaration of Human Rights.

126 Joseph states that customary international law embodies the law of nations, citing Blackstone: "the laws of nations ... is here adopted in its full extent by the common law". See Joseph, above n 117, at 30.

127 Note that in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at [184] and [188] [*Nicaragua Case*], the International Court of Justice rejected the argument that customary international law may eventuate from a declaration alone.

128 Anaya *Indigenous Peoples*, above n 22, at 65.

129 *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (PC).

130 Treasa Dunworth "Hidden Anxieties: Customary International law in New Zealand" (2004) 2 NZJIPL 67 at 68 ["Hidden Anxieties"].

131 *North Sea Continental Shelf (Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands)* [1969] 169 ICJ Rep 3 at 44.

132 Anaya *Indigenous Peoples*, above n 22, at 61–62. Anaya justifies his approach in light of technological advances in communication.

even this 'new' test may be too high. Anaya's interpretation is consistent with the emerging 'modern' trend. As described by Roberts, the modern approach "emphasises opinio juris rather than state practice because it relies primarily on statements rather than actions".[133] The International Court of Justice has followed this approach. In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)*, the Court relaxed the first limb — state action — somewhat, stating that it did "not consider that for a rule to be to established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule".[134] Applying this approach in the context of indigenous peoples, reliance can be placed on state action, such as New Zealand's endorsement of the Declaration, rather than state intention. Despite this exciting interpretation of customary international law, it is recognised that at this time, neither the entire text of the Declaration nor its articles relating to lands can be said to meet this test and represent customary international law.[135]

Secondly, even if the test were satisfied, New Zealand could claim it has been a persistent objector and thus immune from any customary international law. New Zealand could rely on its many statements rejecting the Declaration throughout the course of its development.[136] Indeed, Canada, Australia and the United States clearly articulated in their explanations of their votes that the Declaration has "no legal effect" and that "its provisions do not represent customary international law".[137] For New Zealand, however, persistent objector status is debatable. Its explanation of its vote contained equivocal elements:[138]

> New Zealand fully supports the principles and aspirations of the Declaration on the Rights of Indigenous Peoples. New Zealand has been implementing most of the standards in this declaration for many years. We share the belief that a Declaration on the rights of indigenous peoples is long overdue, and the concern that, in many parts of world, indigenous peoples continue to be deprived of basic human rights.

Furthermore, New Zealand has now officially endorsed the Declaration. What constitutes persistent objector status is uncertain, however: if a strict

---

133 A E Roberts "Traditional and Moderns Approaches to Customary International Law" (2001) 95 AJIL 757, at 758.

134 The *Nicaragua Case*, above n 127, at [186].

135 Davis, above n 10 at 465. Charters notes that while the traditional approach is "outmoded", "at best, a broad indigenous peoples' right to land is probably only on the cusp of achieving the status of customary international law". Further, she states that a "broad indigenous peoples' right to land is not yet customary international law". See Charters "Development in Indigenous Rights", above n 18, at 426, 548.

136 New Zealand could rely on statements such as its explanation of New Zealand's vote in the 2007 General Assembly. See Banks, above n 3.

137 Words taken from John McNee "Statement by Ambassador McNee to the General Assembly on the Declaration on the Rights of Indigenous Peoples" (2007) Statement on Human Rights <www.canadainternational.gc.ca>.

138 Banks, above n 3.

approach is taken, the above statements and action may not be enough to overcome claims that New Zealand is a persistent objector.

Finally, Dunworth suggests a "pedigree" approach to customary international law, "whereby not all norms would be received in the same manner to the same extent".[139] Accepted norms with a high "pedigree" such as sovereign immunity[140] or rules governing maritime matters,[141] easily become customary international law. Less legitimate norms, which may include indigenous norms, may not. Again, this point is arguable. Any debate will turn on the specific examples, and any further discussion is beyond this article.

While it appears uncertain whether officially endorsing the Declaration will establish it as customary internationally law, what is clear is that over time, aspects of the Declaration may possibly develop into customary international law, much in the same way that the Universal Declaration of Human Rights has done.

Guidance for the Legislature

Geiringer believes that all three branches of government have a responsibility to uphold New Zealand's international obligations.[142] The New Zealand Cabinet Manual requires Ministers to vet Bills for consistency with New Zealand's international obligations.[143] The Declaration could be an international standard with which legislation must be consistent. As discussed above, this would turn on whether the Declaration is an international obligation. Even if the Declaration is not an international obligation, appeals could be made to its moral status during the legislative process. Furthermore, as Davis suggests, the Declaration provides for a legislative framework: states can adopt or use the Declaration as a guide in the development of domestic law and policy.[144] While the Declaration's significance in Māori judicial claims has been emphasised, after having been officially endorsed, the Declaration should become something legislators are generally aware of, especially in light of potential application of a judicial presumption that all legislation is consistent with international obligations.

139 Dunworth "Hidden Anxieties", above n 130, at 69.

140 Examples include *Controller and Auditor-General v Davison* [1996] 2 NZLR 278 (CA) (also known as the 'Winebox Case').

141 See Dunworth "Hidden Anxieties", above n 130, at 72. Dunworth contends that *Sellers*, above n 124, is an example of the court considering maritime issues to be customary international law.

142 See Geiringer "Tavita and All That", above n 102, at 310.

143 Cabinet Office *Cabinet Manual 2008* at [7.60]–[7.61].

144 Davis, above n 10, at 465.

V FINAL THOUGHTS: WHAT FURTHER STEPS SHOULD NEW ZEALAND TAKE?

New Zealand's official endorsement of the Declaration is a significant achievement. As outlined above, the endorsement creates moral obligations and may also have a legal effect, especially if deemed a mandatory relevant consideration or applied pursuant to the presumption of consistency. The significance of New Zealand's endorsement and the prospect of the Declaration's possible legal use cannot be undervalued. Nevertheless, the impact of the Declaration can be seen as limited. For a declaration so significant, some see this as unacceptable.[145] Thus, the question of what further steps could be taken in addition to endorsing the Declaration arises.

It is suggested that there are two potential routes forward. The first option is to develop the Declaration into a convention. This is both undesirable and unlikely to eventuate.[146] Given that it took over 25 years to develop a "morally binding" declaration, it is unlikely that a "legally binding" convention will achieve consensus. Furthermore, indigenous peoples themselves do not wish to see the Declaration become an internationally binding convention. There is a risk that if it became a convention, the rights would become frozen and subject to judicial interpretation. Instead, indigenous peoples prefer the Declaration's aspirational status, which allows the rights to be able to evolve naturally, in much the same way as the rights contained in the Treaty of Waitangi.

The second option is to incorporate the Declaration into domestic law. As mentioned above, Bolivia and Ecuador have recently incorporated aspects of the Declaration into their constitutional frameworks. The new Bolivian Constitution builds on some of the rights outlined in the Declaration and supports indigenous self-determination by allowing indigenous people organised in an autonomous territory to have the ability to write their own statutes, decide how to manage development, administer local natural resources and levy some taxes.[147] Similarly, the new Ecuadorian Constitution recognises indigenous peoples' collective rights and provides indigenous peoples with forms of self-government, including the ability to implement a traditional legal system.[148]

New Zealand could follow Bolivia and Ecuador and incorporate the Declaration into municipal law. Māori have advocated for such a move. As attractive as legislation may be, however, it is submitted that New Zealand should not be hasty in taking this step. There are many issues that can arise as a result of legislative incorporation.

---

145 See above n 30.

146 See Davis, above n 10, at 467.

147 See above notes 40–44.

148 See above notes 45–47.

First, there is no guarantee that incorporating the Declaration will automatically render it more effective. During the legislative process, certain rights such as self-determination may be omitted. The selected rights themselves may be watered down or redefined.[149] Further, the legislative provisions will become subject to judicial interpretation, and the judiciary too may read down the effects of the rights.[150]

Secondly, legislation may be contrary to the intent of the Declaration. While art 31 requires states to take legislative measures to realise the intent of the Declaration, the intent of the Declaration was to *express* rather than *prescribe* rights.[151]

Thirdly, legislating to incorporate the Declaration may detract from the Treaty. Writing extrajudicially, Lord Cooke has remarked that while the Declaration was promising, the Treaty must retain its significance in our legal system.[152] The Treaty is a unique agreement between Māori and the Crown, which has developed significance throughout New Zealand's history. Its development reflects New Zealand's growth as a nation. Legislating to incorporate the Declaration may erase this development. It may also inadvertently limit the Treaty's growth as a constitutional document. Māori may also prefer to source their rights from the Treaty, which recognises their rangatiratanga, rather than a generic international document recognising self-determination. This is especially so in light of the analysis of the relationship between tino rangatiratanga and self-determination in Part III. If it is tino rangatiratanga that provides greater rights than self-determination, then legislating the Declaration could mean that tino rangatiratanga may in fact be read down to be more consistent with self-determination.

With these concerns in mind, it is submitted that legislative measures should still be considered, if only to stimulate discussions on the place of the Treaty in New Zealand's wider constitutional framework. What then is the appropriate legislative measure? The proposal outlined below is in no way meant to be conclusive: it is merely intended to generate discussion on this issue.[153]

New Zealand effectively has four options: to incorporate the Declaration into statute completely; to incorporate the Declaration partially; to amend existing legislation so that it is consistent with the Declaration; or to use and refer to the Declaration in a specific Treaty statute. Full or partial incorporation of the Declaration into statute may undermine the place of the Treaty. Similarly, amending statutes to recognise or to 'give effect' to

149 See for example the incorporation of kaitiakitanga in s 7(a) of the Resource Management Act 1991.

150 See for example *Ngāi Tahu*, above n 98, in which the Court read the effect of s 4 of the Conservation Act 1987 from "effect must be given to the principles of the Treaty" down to "principles may be taken into account".

151 See Davis, above n 10, at 462. In this regard it is similar to the Treaty of Waitangi: the rights can naturally evolve without the rigours of legislation and judicial interpretation.

152 Lord Cooke of Thorndon "A Postscript" in Quentin-Baxter (ed), above n 23, 198 at 199.

153 For discussion on this, see Bruce Harris "The Treaty of Waitangi and the Constitutional Future of New Zealand" [2005] NZ L Rev 189 at 216.

the Declaration may be time-consuming and may result in Treaty principles being interpreted consistently with the Declaration, reducing the primacy of the Treaty yet again. Accordingly, it is submitted that the appropriate course is the fourth option, namely to use the Declaration in the development of a specific Treaty statute. Whether this is politically realistic or the most appropriate development of the Treaty is beyond the scope of this article. It is hoped, however, that the current status of the Declaration will at least engender much needed discussion about the status of the Treaty.[154]

A Treaty statute would simply be an Act that incorporates the Treaty into legislation. It would outline all relevant Treaty matters, such as the place of the Treaty, its use and to whom it applied.[155] In a future Treaty statute, the Treaty should be the focal point. Any reference to the Declaration must be carefully worded. As mentioned above, references to the Declaration may jeopardise the primacy of the Treaty. When interpreting the statute, the judiciary may interpret provisions of the Treaty statute consistently with the Declaration's generic international principles, potentially watering down certain rights such as tino rangatiratanga.

Alternatively, the Declaration may form a blueprint on which certain provisions are based. This would be a practical implementation of the suggestions raised above in Part IV. In this way the Declaration may meaningfully assist the legislature in the development of a Treaty statute, without appearing formally in the statute itself.

These conclusions and recommendations are necessarily general, and the issues raised should be the topic of further debate. Their aim is to generate discussion and propose ideas as to the future of indigenous Māori rights generally in New Zealand. Despite the uncertainty surrounding the nature of any potential legislation, the place of the Declaration, its future and its relationship with the Treaty should at least be considered.

VI CONCLUSION

The Declaration represents 25 years of indigenous struggle in the UN. It is the first international document dedicated to the rights of indigenous peoples. This article draws three conclusions with respect to this landmark declaration.

---

154 For an example of such discussion, see the comments of James Anaya in his capacity as Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, reporting from his trip to New Zealand in July 2010: "From what I have observed, the Treaty's principles appear to be vulnerable to political discretion, resulting in their perpetual insecurity and instability." ("New Zealand: More to be done to improve indigenous people's rights, says UN Expert" (2010) Peace Movement Aotearoa <www.converge.org.nz>).

155 The statute could be an ordinary Treaty statute, or could be entrenched as a constitutional statute. Note that as an ordinary statute it may be deemed to be a 'constitutional statute'. Following the United Kingdom case of *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] 1 QB 151, the courts may find that as a "constitutional statute" a simple Treaty statute is not subject to implied repealed. For more on the Treaty and legislation, see Matthew Palmer "The Treaty of Waitangi in Legislation" [2001] NZLJ 207 at 209–210.

First, the right of self-determination is similar to rights already exercised by Māori. Accordingly, the right of self-determination complements, rather than replaces tino rangatiratanga. Secondly, while official endorsement of the Declaration does not create any legally binding obligations for New Zealand, supporting the Declaration could render it an international obligation. It may thus become a mandatory relevant consideration, or be used in the application of the presumption of consistency. Finally, it is advocated that New Zealand should consider incorporating the Declaration into legislation. Legislation is not a quick-fix solution; carefully considered legislative action will, however, signal New Zealand's commitment to rights of self-determination for Māori.

This article has attempted to canvas a wide range of issues relating to the Declaration and its official endorsement. Returning to the title of the article, it was asked whether officially endorsing the Declaration will make a 'difference' for New Zealand's legal system and the place of Māori therein. In light of the issues raised and conclusions drawn above, there is great hope that it will indeed do so, even if only incrementally.