

INDIGENOUS RIGHTS – HOLLOW RIGHTS?

BY VALMAINE TOKI*

I. INTRODUCTION

The Declaration on the Rights of Indigenous Peoples (“the Declaration”) was the initiative of the Working Group on Indigenous Populations (“WGIP”). Established in 1982, the mandate of the WGIP was to develop international standards concerning Indigenous peoples’ rights. The Declaration was a manifestation of this mandate and a clear articulation of international standards on the rights of Indigenous peoples. It was not until 25 years later, in September 2007, that the final text was adopted by the General Assembly with a majority of 143 states in favour. Eleven states offered abstentions.¹ Four states opposed adoption: Australia, Canada, the United States of America (“the United States”) and New Zealand.

This position has now changed with Australia,² New Zealand,³ Canada⁴ and the United States⁵ all signalling their support of the Declaration. While perceived as a major moral victory, a closer analysis of the wording provides concern about intentions to meaningfully recognise the Indigenous rights articulated in the Declaration. This undermines the nature of the rights and questions whether these are mere hollow rights.

To ascertain whether these rights are indeed hollow, after providing a background to the genesis of the Declaration and highlighting the key provisions, including that of self-determination and participation, this paper will analyse the wording of the support that has been offered by Australia, New Zealand, Canada and the United States. Part two will address the legal effect of the Declaration. In conclusion some thoughts will be provided as to a creative way forward to realise the Indigenous rights articulated in the Declaration.

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1 Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine.

2 Jenny Macklin “Statement on the United Nations Declaration on the Rights of Indigenous Peoples” (2009) <www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx>.

3 “Announcement of New Zealand’s Support for the Declaration on the Rights of Indigenous Peoples” <www.converge.org.nz/pma/NZ%20UNDRIP%20statements.pdf>.

4 “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples” (2010) <www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp#tphp>.

5 Susan E Rice “Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples” (2010) Available also at <usun.state.gov/briefing/statements/2010/153009.htm>.

II. PART ONE

A. *Indigenous Peoples – Indigenous Rights*

The Declaration provides no definition of Indigenous peoples. Sha Zukang offers this definition:⁶

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

The rights of Indigenous peoples that have been recognised are essentially those associated with, and intrinsic to, their custom and culture, such as control over their lands and resources.⁷ For the Sami peoples, it was the watershed *Alta* case that provided the catalyst for recognition of their Indigenous rights to resources.⁸ In Australia the Aboriginal peoples have sought recognition of title to their land in a series of cases illustrated by *Mabo*,⁹ and in Canada recognition was sought through the *Calder* case.¹⁰ In New Zealand the *Attorney General v Ngāti Apa* case¹¹ also centred on determining land and resource rights and the rights of due process.¹²

B. *Declaration on the Rights of Indigenous Rights*

Perceived as a major triumph the Declaration¹³ is the only international instrument that views Indigenous rights through an Indigenous lens.¹⁴ As a Declaration, the orthodox view is that it will not be legally binding upon the states.¹⁵ However, it provides a benchmark as an international standard, against which Indigenous peoples can measure state action, and a means of appeal in the

6 Sha Zukang “State of the World’s Indigenous Peoples” ST/ESA/328 (Department of Economic and Social Affairs, Division for Social Policy and Development, United Nations, New York, 2009) at v.

7 The realisation of these rights are recognised as a form of self-determination.

8 Henry Minde “The Challenge of Indigenism: The Struggle for Sami Land Rights and Self-Government in Norway 1960–1990” in S Jentoft, H Minde and R Nilsen (eds) *Indigenous Peoples, Resource Management and Global Rights* (Eburon, Netherlands, 2003) at 75.

9 *Mabo v Queensland* (No 2) (1992) 175 CLR; *Wiks Peoples v Queensland* (1996) 121 ALR 129.

10 *Calder v Attorney General of British Columbia* [1973] SCR 313.

11 *Attorney General v Ngāti Apa* [2003] NZCA 117.

12 These instances of progress have sometimes been reversed: for example, the ensuing Foreshore and Seabed Act 2004 vested ownership of the foreshore in the Crown, limiting any customary claim. Although this Act has now been repealed, with the Takutai Moana Act, customary claims are still limited.

13 “United Nations Declaration on the Rights of Indigenous Peoples: Adopted by the General Assembly 13 September 2007” (2007) <www.un.org/esa/socdev/unpfii/en/declaration.html>.

14 It is acknowledged that ILO Conventions 107 and 169 also recognise Indigenous rights. However, unlike ILO Conventions 107 and 169, the Declaration has been adopted and/or endorsed by the majority of States.

15 Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2008) at 4.

international arena.¹⁶ Portions may also represent binding international law. According to Professor James Anaya:¹⁷

the Declaration may be understood to embody or reflect, to some extent, customary international law. A norm of customary international law emerges – or crystallizes – when a preponderance of states ... converge on a common understanding of the norm’s content and expect future behaviour to conform to the norm [emphasis added].

The Declaration opens with general statements. Articles 4 and 5 then provide fundamental additions from the perspective of Indigenous people’s rights:

Article 4

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

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State

The Declaration clarifies and places Indigenous peoples within a human rights framework.¹⁸ It recognises Māori, the Indigenous peoples of New Zealand, as a collective, not just as individuals.

The Declaration contains more than 20 provisions affirming Indigenous peoples’ right to participate, as a group, in decision making. It emphasises Indigenous peoples’ right to participate as a core principle and right under international human rights law. In particular Article 18 provides:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions.

Further articles supporting this right to participate as Indigenous peoples are articles 19 and 20 of the Declaration. Article 19 states:

States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

The more significant right is contained in article 20. This provides:

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

16 See generally Megan Davis “United Nations Reform and Indigenous Peoples” (October 2005) 6(14) *Indigenous Law Bulletin* at 12.

17 S James Anaya *International Human Rights and Indigenous Peoples* (Aspen Publishers, New York, 2009) at 80. Kiri Toki “What a Difference a Drip Makes: The Implications of Officially Endorsing the United Nations Declaration on the Rights of Indigenous Peoples” (2010) 16 *Auckland UL Rev* at 243; Claire Charters “Developments in Indigenous Peoples’ Rights under International Law and Their Implications” (December 2005) 21 *NZULR* at 519; and Paul McHugh *The Māori Magna Carta* (Oxford University Press, Auckland, 1991) contains a general discussion on the development of Indigenous rights through international instruments at 203–227.

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

Article 3, the Declaration's most notable, provides:

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

The principle of participation in decision-making has a clear relationship with Indigenous peoples' right to self-determination, which includes more particularly the right to autonomy or self-government, and the state's obligation to consult Indigenous peoples in matters that may affect them based on the principle of free, prior and informed consent. These legal concepts are integral to the right of Indigenous peoples to participate in decision-making.

C. *Endorsement*

1. *Australia*

Initially New Zealand, together with Canada, Australia and the United States, did not adopt the Declaration during the final vote in 2007.¹⁹ Australia was the first to reverse its position and officially endorsed the Declaration on the 3 April 2009.

Official endorsement requires a clear, unequivocal statement, which preferably takes place in the General Assembly.²⁰ Applying this standard questions the nature of Australia's endorsement.

The statement made by Jenny Macklin was not delivered in the General Assembly, but in Parliament House.²¹ However, Jenny Macklin's speech was not delivered on the floor of the House of Representatives so, correspondingly, there is no recognition in Hansard.

A closer examination of the wording of her statement reveals ambivalence. Jenny Macklin stated:²²

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 [emphasis added].

Rather than announce that Australia endorses the Declaration Macklin noted that Australia "changes its position" and "gives [its] support" to the Declaration. For academics, including Rothwell, "these features of Australia's announcement cast serious doubts as to whether any legal effect will arise".²³ Academics assert that in light of these facts the High Court of Australia would not hold this statement as legally binding.²⁴

2. *New Zealand*

In 2007 New Zealand objected to four articles within the Declaration: article 26 (the right to land and resources), article 28 (the right to redress or fair, just and equitable compensation) and articles 19 and 32 (the right to obtain free prior and informed consent and the right of veto over the state). The then New Zealand Labour government viewed these articles as fundamentally incompatible

19 United Nations Department of Public Information "General Assembly Adopts Declaration on the Rights of Indigenous Peoples: 'Major Step Forward Towards Human Rights for All', says President" (2007) General Assembly GA/10612 < www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

20 Toki, above n 17.

21 Jenny Macklin was the Minister of Indigenous Affairs in Australia at the time of Australia's endorsement.

22 Macklin, above n 2.

23 Toki, above n 17.

24 Ibid, for discussion on Rothwell.

with its constitutional and legal norms.²⁵ In particular there was reluctance to accept Article 19, which provides for meaningful participation in decision-making. Rosemary Banks, the New Zealand Permanent Representative to the United Nations, stated that New Zealand's existing measures were adequate:²⁶

We strongly support the full and active engagement of Indigenous peoples in democratic decision-making processes – 17% of our Parliament identifies as Māori, compared to 15% of the general population. We also have some of the most extensive consultation mechanisms in the world, where the principles of the Treaty of Waitangi, including the principle of informed consent, are enshrined in resource management law. But these Articles imply different classes of citizenship, where Indigenous have a right of veto that other groups or individuals do not have.

Following Australia's announcement of support, approximately year later, on 20 April 2010, Minister Pita Sharples, from the General Assembly in New York during the ninth session of the United Nations Permanent Forum on Indigenous Issues, and Hon Minister Simon Power, from Parliament, announced that New Zealand would be reversing its position and officially endorsing the Declaration.²⁷

Unlike Australia this announcement was made in the General Assembly and in New Zealand's Parliament (so, unlike Australia, it was noted in Hansard),²⁸ however the wording of the endorsement is parallel to Jenny Macklin's statement. In his address to the United Nations Permanent Forum on Indigenous Issues, Minister Sharples stated:²⁹

In September 2007, at the United Nations, 144 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 [emphasis added].

New Zealand used similar terms to Australia in that it did not state it "reversed" its position, nor that it "endorsed" the Declaration. This raises questions on the intention of the statement and the nature of the endorsement. Minister Sharples then proceeded to outline two specific areas where New Zealand would not follow the Declaration: land and resources, and Indigenous involvement in decision-making:³⁰

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.

....

25 Rosemary Banks "Declaration on the Rights of Indigenous Peoples: Explanation of Vote" (2007) New Zealand Ministry of Foreign Affairs & Trade <www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2007/0-13-September-2007.php>.

26 Ibid.

27 Simon Power (2010) 662 NZPD 10229 or <www.parliament.nz/en-NZ/PB/Debates/Debates/6/5/a/49HansD_20100420_00000071-Ministerial-Statements-UN-Declaration-on.htm>.

28 Minister Pita Sharples announced New Zealand's support in the General Assembly to the United Nations Permanent Forum on Indigenous Issues. The accompanying announcement was made by Hon Simon Power in Parliament in the form of a Ministerial Statement. This dual announcement was legally significant.

29 Power, above n 27.

30 Power, above n 27.

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 Maori for such involvement*. These range from broad guarantees of participation and consultation to particular instances in which a requirement of consent is appropriate [emphasis added].

Minister Sharples is identifying two areas where New Zealand held reservations; Article 26 (the right to land and resources) and Article 19 (the rights of obtaining free prior and informed consent). However, it is unclear whether states can place reservations or caveats on their endorsements, supporting some articles, but reserving support on others.³¹

Minister Sharples statement is consistent with the previous comments from Rosemary Banks in 2007 when stating the position for New Zealand. The reluctance of the New Zealand government to acknowledge fully the rights of Indigenous peoples is consistent with its earlier position on the League of Nations.³²

It was the opinion of the government that these provisions were fundamentally incompatible with New Zealand's constitutional and legal arrangements, the Treaty of Waitangi, and the principle of governing for the good of all our citizens.³³ However, unlike ratifying an international treaty or covenant, it is unclear whether selective endorsement is acceptable.

Reservations to human rights treaties are contentious, particularly where the extent of a reservation undermines the goals of the treaty.³⁴ To selectively endorse an aspirational human rights declaration contradicts the principles of indivisibility and interdependence of all human rights. Selective endorsement would appear to be the antithesis of what a morally aspirational document, such as a Declaration, seeks to achieve.

Despite concerns over what constitutes official endorsement, the issue, concerning the effect and role of the reservation or caveat New Zealand placed on the Declaration, is far more problematic. In his announcement to the United Nations Permanent Forum on Indigenous Issues, Minister Sharples qualified New Zealand's endorsement. He stated:³⁵

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 [emphasis added].

31 The International Law on Treaties Art 2(1)(d) states that a "reservation" means a unilateral statement ... made by a State, when signing, ratifying, accepting, approving or acceding to a treaty whereby it purports to exclude or modify the legal effects of certain provisions of the treaty in their application to that State. See also Malcolm Evans and Patrick Capps (eds) *International Law* (Ashgate Publishing, England, 2009) particularly Jonathan Charney "Universality or Integrity: Some Reflections on Reservations to General Multilateral Treaties".

32 Warrick A McKean "The International Law of Non-Discrimination" in Warrick A McKean (ed) *Essays on Race Relations and the Law in New Zealand* (Sweet & Maxwell, Wellington, 1971) at 1, where the then New Zealand Prime Minister Massey was concerned that the treatment of Māori would come under international scrutiny.

33 For full discussion Banks, above n 25.

34 N Baird "To Ratify or Not: An Assessment of the Case for Ratification of International Human Rights Treaties in the Pacific" (paper presented to 10th Pacific Islands Political Studies Association (PIPSA) Conference, Port Vila, Vanuatu, 2007) at 18, where Baird notes that reservations to Declarations can also be a way of "parking" an issue which may disappear off the radar for years. See also United Nations Yearbook of the International Law Commission (1997) 2(2). A/CN.4/SER.A/1997/Add 1 (Part 2) at 44–157. Available also <untreaty.un.org/ilc/summaries/1_8.htm>.

35 United Nations Yearbook of the International Law Commission (1997) *ibid*.

This reservation or caveat provides that New Zealand’s legal and constitutional frameworks will “define the bounds of New Zealand’s engagement” with the Declaration. However Article 46(1) of the Declaration provides that:³⁶

Nothing in this Declaration may be interpreted 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.

Further, the preambular text reaffirms this position and the statements by Minister Sharples merely reinforce Article 46 of the Declaration. However, it is the specific mention by Minister Sharples of the land settlements and decision-making processes that indicate a clear rejection of the relevant articles in the Declaration.

To be able to “adhere to certain aspects of a Declaration and not others defeats the aspirational nature of the entire document, however, if a State could, this would mean that New Zealand may be exempt from the land, resource and political decision-making clauses of the Declaration”.³⁷

Whilst official endorsement signals a degree of support, the nature of the specific wording and the caveat depict New Zealand’s intention. This caveat appears in past New Zealand statements. Minister Power’s statements in 2009, Rosemary Banks’ statements in the Explanation of New Zealand’s vote to the General Assembly 2007, and former Minister in Charge of Treaty of Waitangi Settlement Negotiations, Doug Graham,³⁸ were all consistent in indicating 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”.³⁹ This historical line may “add weight to the caveat New Zealand has placed on the Declaration”.⁴⁰

The issues surrounding the nature of the wording, what constitutes an official endorsement, and the effect of the caveat are far from clear.⁴¹ However New Zealand’s official endorsement of the Declaration provides a clear moral obligation on the New Zealand government to adhere to the rights contained in the Declaration.

3. *Canada and United States*

On 12 November 2010, the Canadian Government announced its support for the Declaration.⁴² One month later, on 16 December 2010, the United States⁴³ also lent its support to the Declaration.

The terminology does not include the term “endorsement” but instead that of “statements”, endorsements being the stronger language. Both refer to the Declaration as being not legally binding and not a statement of current international law⁴⁴ or, similarly, that it does not reflect customary international law nor change Canadian laws.⁴⁵ Both refer to the aspirational nature of the Decla-

36 Article 46(1) of the Declaration.

37 Toki, above n 17.

38 Doug Graham “The New Zealand Government’s Policy” in Alison Quentin-Baxter (ed) *Recognising the Rights of Indigenous Peoples* (Institute of Policy Studies, Wellington, 1998) at 6.

39 Ibid.

40 Toki, above n 17.

41 United Nations Yearbook of the International Law Commission (1997) above n 34.

42 “Canada’s Statement of Support”, above n 4.

43 Rice, above n 5.

44 Ibid, at [2].

45 “Canada’s Statement of Support”, above n 4, at [4].

ration.⁴⁶ The language of the statements employs terms such as “reaffirming” or “continuing” the states’ commitment to Indigenous people.⁴⁷

The nature of this language “qualifies” Canadian and United States’ support of the Declaration. Similar to New Zealand and Australia, the support of the Declaration comes with reservations or caveats.

According to the Government of Canada:⁴⁸

...[Canada’s] concerns with various provision of the Declaration, including provisions dealing with lands, territories and resources; free, prior and informed consent when used as a veto; self government without the recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of Indigenous peoples, member States and third parties.

Nonetheless it is the opinion of the International Organisation of Indigenous Resource Development, and Wilton Littlechild that:⁴⁹

These concerns are a result of a mischaracterization of the relevant articles of the Declaration ... these concerns can be addressed in a positive way through the application of relevant Treaty principles between the Crown and Indigenous peoples in Canada. These include the principles of sharing, mutual consent, inherent rights, peaceful co-existence and partnership... the preambular paragraph 15 states:

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between Indigenous peoples and States

On this analysis the “support” of the Declaration elicited by these four countries is problematic, compromising the rights contained within. This questions whether these rights are mere hollow rights. Nevertheless the Declaration continues to have a legal effect in different jurisdictions.

III. PART TWO

A. *Legal effect of the Declaration*

The orthodox view is that the Declaration is soft law⁵⁰ and will not be legally binding upon the state⁵¹ unless it is incorporated into domestic legislation. The doctrine of state sovereignty provides a restriction on international instruments, such as the Declaration, to regulate matters within the realm of the state.⁵²

46 Ibid, at [3]; Rice, above n 5, at [2].

47 “Canada’s Statement of Support”, above n 4, at [1] and last para; Rice, above n 5, at [1].

48 “Canada’s Statement of Support”, above n 4, at [13].

49 Wilton Littlechild on behalf of International Organization of Indigenous Resource Development, submission to the United Nations Permanent Forum on Indigenous Issues pre-sessional meeting, Ottawa, Canada April 2011.

50 The term “soft law” refers to quasi-legal instruments that do not have any legally binding force. The term is traditionally associated with international law including most resolutions and declarations of the United Nations General Assembly.

51 Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2008) at 4.

52 S James Anaya “The Rights of Indigenous People to Self-determination in the Post-Declaration Era” in Claire Char- ters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Working Group for Indigenous Affairs, Copenhagen, 2009) at 194. See also International Law Association “The Hague Conference (2010): Rights of Indigenous Peoples” Interim report (2010) <www.ila-hq.org/.../9E2AEDE9-BB41-42BA-9999F0359E79F62D>.

1. Incorporation

In Bolivia, the recently promulgated Constitution has fully incorporated the collective rights of Indigenous peoples, including those rights contained in the Declaration.⁵³ Bolivia's Electoral Transition Law created seven special Indigenous electoral districts and, for the first time, Indigenous peoples in Bolivia have direct representation in the Legislative Assembly. Nonetheless Indigenous leaders believe that the current number of electoral districts does not give Indigenous peoples enough voice in the Assembly. The intention is that the new electoral law will propose a fairer representation system.⁵⁴ Ecuador has also incorporated the Declaration into its new Constitution, the Constitution of the Republic of Ecuador 2008.

If New Zealand followed this approach and incorporated the Declaration into domestic legislation the onus would be on the New Zealand government to provide to Māori the ability to fully participate in decision-making matters that would affect them socially, politically and economically. As in Bolivia, discrete legislation could be enacted to ensure meaningful Indigenous representation in government.⁵⁵

2. Legal reception

How the Declaration is received depends, in part, on the respective jurisdictions of the area. For instance, notwithstanding the current status of the Declaration as soft law, Chief Justice Conteh in the Supreme Court of Belize found that:⁵⁶

Given the Government's support of the *Declaration on the Rights of Indigenous Peoples*... which embodies the general principles of international law relating to Indigenous peoples... *the Government will not disregard the Declaration* [emphasis added].

Belize is a common law jurisdiction. Should reliance be placed on the Declaration this decision provides persuasive authority to, for example, establish the ability for Māori to fully participate in decision-making affairs.

In New Zealand the utilisation of the Declaration in a judicial forum is not novel. The Waitangi Tribunal has positively referred to the then Draft Declaration in respect to claims of tino rangatiratanga.⁵⁷ The High Court in *Ngāi Tahu Māori Trust Board v Director General of Conservation* also referred to the Draft Declaration.⁵⁸

If Māori engaged in a judicial challenge to realise their right to participate fully in the decision-making process, reliance could be placed on Conteh CJ's comments in *Cal & Ors v the Attorney*

53 United Nations High Commissioner for Human Rights "Report of the United Nations High Commissioner for Human Rights on the Activities of Her office in the Plurinational State of Bolivia" (2010) United Nations Human Rights Council A/HRC/13/26/Add.2 18 at [4] <access-dds-ny.un.org/doc/UNDOC/GEN/G09/120/56/PDF/G0912056.pdf?OpenElement>.

54 Ibid, at [16].

55 Also see discussion by Naomi Kupuri "The UN Declaration on the Rights of Indigenous Peoples in the African Context" in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (International Working Group for Indigenous Affairs, Copenhagen, 2009) at 255, on the Ilchamus (Indigenous) community who successfully took a case to claim that their rights to political representation were violated. The presiding Judge took into consideration the then draft Declaration to determine this case in favour of the Ilchamus community.

56 *Cal & Ors v the Attorney General of Belize & Anor* (2007) Claim Nos 171 and 172 of 2007, Conteh CJ (Belize Sup Ct) at [132].

57 "The Taranaki Report: Kaupapa Tuatahi" (Waitangi Tribunal, Wellington, 1996) Wai 143 <www.waitangi-tribunal.govt.nz/reports/view.asp?reportid=3FECC540-D049-4DE6-A7F0-C26BCCDAB345>.

58 *Ngāi Tahu Māori Trust Board v Director General of Conservation* [1995] 3 NZLR 553.

General of Belize & Anor. Māori could argue that, as New Zealand has endorsed the Declaration, the government should not disregard these general principles therein.

In the absence of direct incorporation by statute there are different methods of recognising international human rights instruments including recourse through administrative law. First, the (outdated) concept of legitimate expectation in Australia,⁵⁹ and mandatory relevant consideration in New Zealand,⁶⁰ have been utilised to treat unincorporated international obligations as considerations for the decision maker. Also, the presumption of consistency, a common law principle of statutory interpretation, recognises that Parliament is presumed not to legislate intentionally in breach of its obligations.⁶¹ *Zaoui v Attorney-General* applied this presumption using New Zealand's international law obligations.⁶²

If Māori were to appeal against the recent granting by the New Zealand Government of mining licences to Petrobas,⁶³ reliance could be placed on Article 32 of the Declaration for the protection of their land rights. Article 32 states:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall *consult and cooperate in good faith with the Indigenous peoples* concerned through their own representative institutions in order to *obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources* [emphasis added].

This reliance contextualises the right provided for in s 4 of the Crown Minerals Act, where the Minister shall have regard to the principles of the Treaty including that of partnership. Māori would need to prove that the New Zealand Government, as the decision-maker and Treaty partner, had failed to take into account this provision of obtaining free and informed consent, as a mandatory consideration, when granting the mining licences.

Notwithstanding the success in the application of administrative law to recognise international obligations in *Zaoui*, Gieringer expresses some concern in the application of the principle of mandatory relevant considerations.⁶⁴ It should be noted, however, that despite these concerns, Gieringer still considers *Tavita* to be good law,⁶⁵ and recourse to the principle of mandatory relevant consideration to recognise the Declaration's provision for full participation of Māori in decision-making is available.

59 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (HCA).

60 *Tavita v Minister of Immigration* [1994] 2 NZLR 257; (1993) 11 FRNZ 508; (1993) 1 HRNZ 30 (CA).

61 Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 533; Treasa Dunworth "Public International Law" [2000] NZLR 217, 225, states this area is shrouded in much uncertainty. See for example, *Brind v Secretary of State for the Home Department* [1991] 1 All ER 720 (UK).

62 [2004] 2 NZLR 339. See also Claudia Gieringer "International Law Through the Lens of Zaoui: Where is New Zealand At?" (2006) 17 PLR 318.

63 Gerry Brownlie "Petrobas to Go Ahead as Planned" (2010) Guide2 <www.guide2.co.nz/politics/news/petrobras-exploration-to-go-ahead-as-planned-minister/11/17548>.

64 Gieringer, above n 62.

65 Gieringer, above n 62.

B. Application of the principles of the Treaty of Waitangi – an aid?

Wilton Littlechild proposes that application of Treaty principles, such as partnership, can assist to bridge the gap between the recognition of an Indigenous right and the relevant article in the Declaration. *Is this a viable perspective for Maori?*

1. Treaty of Waitangi

Viewed as a simple nullity,⁶⁶ the orthodox view on the legal status of the Treaty is that, unless it has been adopted or implemented by statute, it is not part of our domestic law and creates no rights enforceable in Court. In *Te Heu Heu Tukino v Aotea District Māori Land Board* (1941) Viscount Simon LC, Privy Council ruled that:⁶⁷

[I]t is well settled that any rights purported to be conferred by such a Treaty of cession cannot be enforced by the Courts, except so far as they have been incorporated in municipal law.

It is the “Principles of the Treaty”⁶⁸ that are referred to in legislation⁶⁹ and policy documents⁷⁰ rather than the *text* of the Treaty itself.

2. Principles of the Treaty

Partnership reflects the purpose of the Treaty, where Māori and the Crown have equal roles with “responsibilities analogous to fiduciaries.”⁷¹ The principle of partnership is arguably the most important principle. In *New Zealand Māori Council v Attorney-General* the Court of Appeal unanimously held that:⁷²

The Treaty signified a partnership between races ...”

... *the issue becomes what steps should have been taken by the Crown, as a partner acting towards the Māori partner with the utmost good faith* which is the characteristic obligation of partnership ... [emphasis added].

The principle of partnership acknowledges both parties and requires the Pakeha and Māori partners to act towards each other reasonably and with the utmost good faith. Justice Casey noted that the partnership principle required the Crown to recognise and actively protect Māori interests. In his view, to assert this was “to do no more than assert the maintenance of ‘the honour of the Crown’ underlying all its treaty relationships.”⁷³ Justice Richardson also agreed that an emphasis on the honour of the Crown was important, stating that the concept of the honour of the Crown:⁷⁴

... [C]aptures the crucial point that the Treaty is a positive force in the life of the nation and so in the government of the country. What it does not perhaps adequately reflect is the core concept of the reciprocal obligations of the Treaty partners. *In the domestic constitutional field ... there is every reason for*

66 *Wi Parata v Bishop of Wellington* (1877) 3 NZJur (NS) 72 at 78 per Prendergast CJ. However see also *The Queen v Symonds* (1847) NZPCC(SC) per Chapman J at 390 for earlier recognition of native title at common law and consideration of the Treaty.

67 [1941] 2 All ER 93 at 98; also [1941] NZLR 590.

68 See decision of Cooke P in *NZMC v AG* [1987] 1 NZLR 641.

69 For example, Conservation Act 1987, s 4; State Owned Enterprises Act 1986, s 9.

70 For example, Office for Disability Issues “New Zealand Disability Strategy Discussion Document: Incorporating the Treaty of Waitangi” <www.odi.govt.nz/resources/publications/nzds/discussion-document/tow.html>.

71 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR at 664 per Cooke P (CA).

72 *Ibid*, at 641 per Cooke P (CA).

73 *Ibid*, at 703 per Casey J (CA).

74 *Ibid*, at 682 per Richardson J (CA).

attributing to both partners that obligation to deal with each other and with their Treaty obligations in good faith. That must follow both from the nature of the compact and its continuing application in the life of New Zealand and from its provisions [emphasis added].

Referring to Richardson J's comments, Gendall J stated:⁷⁵

The Lands case recognises that the Treaty created a continuing relationship of a fiduciary nature, akin to a partnership, and that there is a positive duty to each party to act in good faith, fairly, reasonably and honourably towards the other.

The Treaty principle of partnership requires the Crown to act in utmost good faith, with reasonableness, and to actively protect Māori interests in order to uphold the honour of the Crown.⁷⁶ Partnership is not determined in a numeric sense, rather, the intention of this principle is to promote greater protection of, and participation by, Māori.

Sir Robin Cooke (as he was then) also noted that the Treaty must be viewed as a living document capable of adapting to new circumstances. In this sense the Treaty partnership status of Māori is given a range of legislative expressions, but the reality is that political power is not shared equally.⁷⁷ The Treaty partnership is subject to the constitutional norm of Parliamentary sovereignty,⁷⁸ which gives little status to rangatiratanga (Māori self-determination). New Zealand Deputy Solicitor-General Matthew Palmer summarises the position at the constitutional level:⁷⁹

Because of the political nature of the New Zealand constitution, I conclude that Māori political representation is the most significant manifestation of the Treaty of Waitangi in New Zealand's constitution in reality. This accords with representative democracy and parliamentary sovereignty being fundamental norms of New Zealand's constitution. Māori political representation relies on representative democracy to access influence over the exercise of parliamentary sovereignty. Māori have managed to convert a pragmatic Pākehā⁸⁰ initiative, the Māori seats, into a symbolic representation of their own identity and political relationship with the State. MMP has broadened that representation and given it real political power. This ensures that Māori have a voice in the constitutional dialogue in New Zealand – in the branch of government that speaks the loudest, Parliament.

Palmer does, however, sound a note of caution:⁸¹

However loudly Māori voices are heard within Parliament, that institution is ultimately ruled by the majority and Māori do not now constitute a majority in New Zealand. A group of people that consistently forms the majority [i.e. Pakeha] has few incentives not to exploit, or ignore a group of people that consistently forms a minority.

As a minority in Parliament, Māori concerns are at the whim of Parliament and, depending on political mood, Māori may suffer. High Court Justice David Baragwanath echoes this point, commenting that:⁸²

75 *New Zealand Māori Council v Attorney-General* HC Wellington CIV-2007-485-95, 4 May 2007 at [62].

76 Mason Durie *Te Mana, Te Kāwanatanga: The Politics of Māori Self-Determination* (Oxford University Press, Melbourne, Australia, 1998) 183. See also discussion in Kelly Russ "Modern Human Rights: The Aboriginal Challenge" (LLM Thesis, The University of British Columbia, 2006) at ch 2.

77 Matthew S R Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 85 for an overview of this material.

78 Constitution Act 1986, s 15(1) which states "[t]he Parliament of New Zealand continues to have full power to make laws."

79 Palmer, above n 77, at 291.

80 "Pākehā" is a Māori word used to describe New Zealanders of European descent.

81 Palmer, above n 77, at 292.

82 David Baragwanath "The Evolution of Treaty Jurisprudence" (2007) 15 Wai L Rev 1 at 10.

The Treaty should like any other treaty be a mandatory consideration when it is relevant to decision-making, including adjudication ... it is an expression of the rule of law: a statement that Western norms do not exhaust the values of society: that even in the absence of entrenched rights we cannot tolerate any tyranny of the majority.

Further, Professor James Anaya, United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People recently noted:⁸³

From what I have observed, the Treaty's principles appear to be vulnerable to political discretion, resulting in their perpetual insecurity and instability.

Nevertheless this does not detract from the ability of the Treaty principles to provide clarity to the rights articulated in the Declaration. The principles of the Treaty could be imported to provide clarity and a bridge between the recognition of a right for Māori and the relevant article within the Declaration.

Chillwell J noted that⁸⁴ “the Treaty is a part of the fabric of New Zealand society” and can provide judicial aid in interpreting statutes “when it is proper, in accordance with the principles of statutory interpretation, to have resort to extrinsic material”.

During a recent United States Senate Committee meeting Professor James Anaya noted:⁸⁵

[T]he courts should take account of the Declaration in appropriate cases concerning Indigenous peoples, just as federal courts, including the Supreme Court, have referred to other international sources to interpret statutes, constitutional norms, and legal doctrines in a number of cases.

It would then follow that the principles of the Treaty could also, where appropriate, as an aid, provide clarity and support to the rights articulated in the Declaration.⁸⁶

C. *Status Quo*

The Declaration does not create any new rights⁸⁷ but it is the only international instrument that views Indigenous rights through an Indigenous lens.⁸⁸

The Declaration... will go a long way in consolidating gains made by Indigenous peoples in the international arena toward rolling back inequities and oppression. It builds upon numerous decisions and other standard setting measures over recent decades by a wide range of international institutions that are favourable to Indigenous peoples demands...

There should not have been a Declaration on the Rights of Indigenous Peoples, because it should not be needed. But it is needed. The history of oppression cannot be erased, but the dark shadow that history has continued to cast can and should be lightened.

83 “New Zealand: More to be Done to Improve Indigenous Peoples’ Rights Says UN Expert [James Anaya]” (2010) Office of the High Commissioner for Human Rights <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10229&LangID=E>.

84 *Huakina v Waikato Valley Authority* [1987] 2 NZLR 188 at 210.

85 “US Senate Committee Holds Controversial Hearing on UN Indigenous Declaration” (10 June 2011) <bsnorrell.blogspot.com/2011/06/us-senate-committee-holds-controversial.html>.

86 Despite the requirement for domestic legislative recognition, the Waitangi Tribunal established under the Treaty of Waitangi Act 1975 can hear and make recommendations as to claims relating to acts or omission of the Crown that breach the promises made in the Treaty.

87 The rights affirmed are those derived from human rights principles that are deemed of universal application, such as those contained in the Universal Declaration on Human Rights.

88 S James Anaya “*International Human Rights and Indigenous Peoples*” (Aspen Publishers, New York, 2009) at 63.

The Declaration simply affirms rights derived from human rights principles such as equality and self-determination. The Declaration seeks to recognise Indigenous peoples' rights and contextualises those rights in light of their particular characteristics and circumstances, and promotes measures to remedy the rights' historical and systemic violation.⁸⁹

The significance of the Declaration lies in its effect. The Declaration provides a benchmark, as an international standard, against which Indigenous peoples may measure state action. State breach of this standard provides Indigenous peoples with a means of appeal in the international arena.

Recognised and supported by United Nations member states,⁹⁰ the Declaration contains norms that are already binding in international law. So, the Declaration provides an additional international instrument for Indigenous peoples when their rights, such as the right to participate fully in decision-making, have been breached. Indigenous peoples can now argue that not only have international treaties been broken, but a breach of a right in the Declaration has occurred. The available remedy is uncertain, nonetheless it would be reasonable to conclude that this would provide an avenue to engender effective dialogue between the state and Indigenous peoples. It does however provide Indigenous peoples with an international arena to shame or embarrass a government as happened on 11 March 2005, when the United Nations Committee on Elimination of Racial Discrimination concluded in its 66th session that New Zealand's Foreshore and Seabed Act 2004 contained discriminatory aspects against Māori.⁹¹

IV. CONCLUSION

The recent support of the Declaration by Australia, New Zealand, Canada and the United States is significant. However, a closer examination of the wording of their official statements undermines the nature of the rights, and questions whether these rights are mere hollow rights. Despite this, their actions contribute a moral air of robustness to the Indigenous rights articulated in the Declaration.

The orthodox position on the Declaration is that it will not be legally binding upon the state⁹² unless it is incorporated into domestic legislation. Notwithstanding this position, principles of administrative law provide a window to import these rights. Adopting the perspective of Wilton Littlechild, the principles of the Treaty can be employed to provide clarity and a bridge to the rights articulated in the Declaration.

According to Sir Taihākurei (Eddie) Durie:⁹³

We have completed the trilogy. The 1835 Declaration acknowledged Indigenous self-determination. The 1840 Treaty upheld it within the structures of a State. This Declaration now confirms it and says how it should be applied. As rights go, that's a big step. It fills the gaps in the Treaty of Waitangi. It is something, to famously, applaud.

⁸⁹ Ibid, at 63.

⁹⁰ 148 member states have adopted/supported the Declaration. Columbia and Samoa have reversed their abstention leaving nine states still abstaining. See <www.un.org/esa/socdev/unpfii/en/declaration.html>.

⁹¹ "Committee on the Elimination of Racial Discrimination: Decision on Foreshore and Seabed Act 2004" Sixty Sixth session Decision 1 (66): New Zealand CERD/C/DEC/NZL/1. <www.converge.org.nz/pma/fs110305.htm>.

⁹² Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, Oxford, 2008) at 4.

⁹³ Eddie Taihākurei Durie "Address on the Declaration" statement given May 2010, Parliament Buildings.

Already it has had practical effect. Last week it was the basis for submissions before the Waitangi Tribunal in North Auckland, to support a more principled approach to managing Treaty settlements, and before the Maori Affairs Select Committee in Wellington, to support a greater Maori role in Maori policy development.

Irrespective of the concerns on the wording of support given to the Declaration, and the legal effect of the Declaration, it is without doubt the most significant document that recognises and acknowledges the rights of Indigenous peoples. The current perspective of States and United Nations Agencies⁹⁴ is one of support and willingness to engage and implement these rights. The challenge ahead will be the practical manifestation of these rights for Indigenous peoples.

94 For example a recommendation from the recent 10th session of the United Nations Permanent Forum on Indigenous Issues noted “The Permanent Forum welcomes the World Intellectual Property Organization facilitating a process, in accordance with the Declaration, to engage with Indigenous peoples on matters including Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore”.