

## THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AND THE COURTS

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The United Nations Declaration on the Rights of Indigenous Peoples is the first universally accepted text setting out the rights of indigenous peoples. This article first places the Declaration into its international context and in particular discusses its relationship with environmental, labour and human rights treaties. It then examines the Declaration in the domestic New Zealand context, concluding that it is becoming increasingly embedded in Aotearoa's legal framework.

### *1 Introduction*

The process leading to the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration)<sup>1</sup> began in 1982. The Declaration went through various drafts until it was passed by the Human Rights Council (the United Nations' human rights body) in 2006.<sup>2</sup> This put it on the agenda of the General Assembly of the United Nations (UN), which eventually passed the Declaration in September 2007.

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

2 On the drafting of the Declaration, see S James Anaya and Luis Rodríguez-Piñero "The Making of the UNDRIP" in Jessie Hohmann and Marc Weller (eds) *The UN Declaration on the Rights of Indigenous Peoples* (Oxford University Press, Oxford, 2018) 38; and Asbjørn Eide "The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples" in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Transaction Publishers, Copenhagen, 2009) 32. For a personal account, see Moana Jackson "A personal reflection on the drafting of the United Nations Declaration on the Rights of Indigenous Peoples" in Selwyn Katene and Rawiri Taonui (eds) *Conversations About Indigenous Rights: The UN Declaration on the Rights of Indigenous Peoples in Aotearoa New Zealand* (Massey University Press, Auckland, 2018) 47.

The Declaration is the first universally accepted text setting out the rights of indigenous peoples. The rights recognised are comprehensive — ranging from rights to land, to education, to development, to environmental protection. But the Declaration is not just about rights, whether individual or collective. It is also about redress for past wrongs. Perhaps most importantly, however, it is about the significance of being indigenous. It is about cultural and spiritual identity. And, it is about self-determination generally. At the same time, it is about the value of diversity. So all in all it is a very special document.

## *II International Context*

Given that the Declaration is an international document, I turn first to the significance of the Declaration in the international context as that necessarily colours the significance of the Declaration to New Zealand. The easy answer is that the Declaration is not a treaty at international law and therefore is not binding on states.<sup>3</sup> At most, as a resolution of the General Assembly, it has moral force for those states that voted for it or later endorsed it, like Australia, Canada, the United States and New Zealand.<sup>4</sup> But that would be far too glib for at least three reasons.

First, there has been a trend in recent years to move towards promoting declarations rather than trying to negotiate multilateral treaties on contentious topics, which are difficult to deal with in a formal binding instrument like a treaty. For example, as well as the Declaration on the Rights of Indigenous Peoples, we have seen the 2016 New York Declaration on Refugees and Migrants and two subsequent global compacts dealing with those two groups.<sup>5</sup>

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3 A “treaty” is defined in the Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 2(1).

4 Resolutions of the United Nations General Assembly are recommendatory rather than binding on states. Charter of the United Nations, art 11.

5 *New York Declaration for Refugees and Migrants* GA Res 71/1 (2016); *Global Compact on Refugees* GA Res 73/151 (2018), adopting the *Report of the United Nations High Commissioner for Refugees* UN Doc A/73/12 (17 August 2018); and *Global Compact for Safe, Orderly and Regular Migration* GA Res 73/195 (2018). See also Susan Glazebrook “The Refugee Convention in the 21st Century” (2018) 49 VUWLR 477.

The work that was undertaken on declarations such as these, and the consultation processes adopted, must at least make these types of declarations what we call soft law — in other words, not strictly binding, but nevertheless having legal significance.<sup>6</sup> And because the Indigenous Declaration was formally adopted by the General Assembly — one of the only international bodies with universal membership — and by so many positive votes, I would suggest a very strong form of soft law.<sup>7</sup> There were only 11 abstentions and only four negative votes and those four states all later endorsed the Declaration.<sup>8</sup>

Secondly, there is a possibility that the Declaration is already or may become customary international law and therefore binding on all states, whether they voted in favour of it or not.<sup>9</sup> Customary international law, as the name suggests, is law based on the custom of states — a custom that is near universally practised and one that is practised because states believe they are bound by law to do so. It binds all states, regardless of whether they have agreed to be bound by it.<sup>10</sup>

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6 On the potential of the Declaration as soft law, see Mauro Barelli *Seeking Justice in International Law: The significance and implications of the UN Declaration on the Rights of Indigenous Peoples* (Routledge, Abingdon (UK), 2016); and Stephen Allen “The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project” in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford, 2011) 225. See also Claire Charters “The Legitimacy of the UN Declaration on the Rights of Indigenous Peoples” in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Transaction Publishers, Copenhagen, 2009) 280.

7 On the relationship between General Assembly resolutions and customary international law, see Emmanuel Voyiakis “Voting in the General Assembly as Evidence of Customary International Law?” in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford, 2011) 209.

8 See United Nations Department of Economic and Social Affairs: Indigenous Peoples “United Nations Declaration on the Rights of Indigenous Peoples” <[www.un.org](http://www.un.org)>.

9 Customary international law is automatically part of New Zealand domestic law unless inconsistent with statute. James Crawford *Brownlie’s Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012) at 67–68; and Kiri Toki “Māori Rights and Customary International Law” (2012) 18 Auckland U L Rev 250 at 265. See also International Law Association *Resolution on the Rights of Indigenous Peoples* (No 5/2012, 26–30 August 2012) at [3]. And see postulation by the Waitangi Tribunal in Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 672.

10 On the formation of customary international law, see Malcolm Shaw *International Law* (8th ed, Cambridge University Press, Cambridge, 2017) at 53–69. There is an exception and states that have persistently objected to the custom from the start of the custom will not be bound. At 68.

I doubt that the whole of the Declaration meets the test for being customary international law quite yet but certainly some parts of it may do so.<sup>11</sup> And there is the possibility that other parts will follow.<sup>12</sup> Indeed, the more that states introduce measures to implement the Declaration and the more courts in various jurisdictions refer to it, the more likely it is that it will become customary international law.

And finally, the Declaration has to be considered in the context of various treaties that cover some of the same ground as the Declaration. In that sense the Declaration can be seen as a formal acknowledgment and articulation of state obligations to indigenous peoples already covered by those treaties.<sup>13</sup> I include in this the various human rights treaties and many of the labour and environmental treaties, including those dealing with climate change. Many of the states that voted for the Declaration or that subsequently endorsed it are parties to those treaties.

Starting with the environmental treaties, I include these because of the special relationship indigenous peoples have to their environment and the link between the environment and their cultural and spiritual identity. Stewardship of the environment is a quintessentially indigenous value, as is the care for and duty to future generations. These values are also the foundation of many of the environmental treaties, particularly those relating to climate change and conservation.<sup>14</sup> Indeed, at the Climate Action Summit in New York in September 2019 it was recognised that indigenous peoples'

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11 Associate Professor Claire Charters, for example, argues that if customary international law does exist in this area, it may be limited to a narrow duty to respect and protect indigenous peoples' relationship to their land. Claire Charters "Developments in Indigenous Peoples' Rights under International Law and Their Domestic Implications" (2005) 21 NZULR 511 at 526. Even before the Declaration was passed, the United Nations Special Rapporteur on the rights of indigenous peoples suggested there was emerging customary international law recognising the rights of indigenous peoples' to their traditional lands. S James Anaya *Indigenous Peoples in International Law* (2nd ed, Oxford University Press, Oxford, 2004) at 61.

12 See Toki, above n 9.

13 S James Anaya "The Right of Indigenous Peoples to Self-determination in the Post-Declaration Era" in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Transaction Publishers, Copenhagen, 2009) 184 at 193.

14 For instance, the preamble to the Paris Agreement acknowledges that climate change "is a common concern of humankind" and that states when taking action should consider, among other things, "intergenerational equity". Paris Agreement (opened for signature 12 December 2015, entered into force 4 November 2016).

knowledge is essential to curbing the effects of climate change — and thus that it is crucial that indigenous peoples' rights be protected, including their rights to participate fully in policy decisions.<sup>15</sup>

The main rights on environmental issues in the Declaration are covered in arts 25, 26 and 29. Article 25 provides for the right to maintain and develop the distinctive spiritual relationship with traditionally owned and occupied lands, seas and resources, in light of responsibilities to future generations. Article 26(3) provides that legal protection must be given to land, with due respect to the customs and traditions of indigenous peoples. Article 29 provides that indigenous peoples have the right to the conservation and protection of the environment.

There is also alignment with existing labour treaties. The eight fundamental International Labour Organization (ILO) treaties, which are almost universally ratified, cover freedom of association, the elimination of all forms of forced labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.<sup>16</sup> The Declaration in art 17 covers the right of indigenous peoples to enjoy all rights established under international and domestic labour law and their right not to be subjected to any discriminatory conditions of employment. Article 17 also specifically protects indigenous children from economic exploitation, including

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15 Office of the United Nations High Commissioner for Human Rights “United Nations Climate Action Summit New York, 23 September 2019” <[www.ohchr.org](http://www.ohchr.org)>.

16 Convention (No 87) concerning freedom of association and protection of the right to organise 68 UNTS 17 (opened for signature 9 July 1948, entered into force 4 July 1950); Convention (No 98) concerning the application of the principles of the right to organise and to bargain collectively 96 UNTS 257 (opened for signature 1 July 1949, entered into force 18 July 1951); Convention concerning forced or compulsory labour 39 UNTS 55 (opened for signature 28 June 1930, entered into force 1 May 1932); Convention (No 105) concerning the abolition of forced labour 320 UNTS 291 (opened for signature 25 June 1957, entered into force 17 January 1959); Convention (No 138) concerning minimum age for admission to employment 1015 UNTS 297 (opened for signature 26 June 1973, entered into force 19 June 1976); Convention (No 182) concerning the prohibition and immediate action for the elimination of the worst forms of child labour 2133 UNTS 161 (opened for signature 17 June 1999, entered into force 19 November 2000); Convention (No 100) concerning equal remuneration for men and women workers for work of equal value 165 UNTS 303 (opened for signature 29 June 1951, entered into force 23 May 1953); and Convention (No 111) concerning discrimination in respect of employment and occupation 362 UNTS 31 (opened for signature 25 June 1958, entered into force 15 June 1960). For easy access to these treaties, see International Labour Organization “Conventions and Recommendations” <[www.ilo.org](http://www.ilo.org)>.

hazardous conditions and work that interferes with their right to education and development.

More generally it is worth noting at this point that the ILO has been at the forefront of indigenous issues<sup>17</sup> and created its own Convention concerning indigenous and tribal peoples in independent countries in the early 1990s.<sup>18</sup> Going beyond the usual ILO focus on labour-related rights, this Convention sets out general policies (a right to development, recognition of traditional values and practices, that the full measure of rights are to be accorded to indigenous and tribal peoples, and special measures to safeguard the persons, institutions, property, labour, cultures and environment of indigenous and tribal peoples), rights to land, rights in employment, and rights to education that upholds the culture and traditions of the peoples. While only 23 countries have ratified it, it remains the only treaty specifically on indigenous rights, and so holds value in that respect.

Turning now to the human rights treaties,<sup>19</sup> the first article of the Declaration provides explicitly:

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Subsequent articles explicitly provide for particular rights. Article 21 provides for indigenous peoples' right to improvement of economic and social conditions, with

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17 See generally Andrew Erueti "The International Labour Organization and the Internationalisation of the Concept of Indigenous Peoples" in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford, 2011) 93.

18 Convention (No 169) concerning indigenous and tribal peoples in independent countries 1650 UNTS 383 (opened for signature 27 June 1989, entered into force 5 September 1991). This was a revision of an earlier treaty that entered into force in 1959 and was eventually ratified by 27 countries: Convention (No 107) concerning the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries 328 UNTS 247 (opened for signature 26 June 1957, entered into force 2 June 1959).

19 The twin core human rights treaties are the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976) [ICCPR] and the International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1966, entered into force 3 January 1976) [ICESCR].

particular attention to be paid to the rights of women, children and persons with disabilities — incidentally three groups of people who fall under separate human rights treaty regimes.<sup>20</sup> Another example is art 14 of the Declaration, which provides that indigenous children have the right to all levels and forms of state education, without discrimination — a right also contained in art 28 of the Convention on the Rights of the Child.

### *III Need for Specialist Regime*

I should make it clear that when I say the Declaration to an extent may merely articulate state obligations that already exist under treaties, this is not to say that it is unimportant or that this is the complete picture. As recognised in the preamble to the Declaration, indigenous peoples around the world have suffered from historic injustices arising in particular from colonisation and loss of their traditional lands. They have, as the Declaration acknowledges, therefore been prevented from enjoying the full exercise of their rights and in particular their right to development.

Beyond the loss of land, other notable examples of past injustice include the stolen generation policies in Australia,<sup>21</sup> abuse of indigenous children in state care in New Zealand<sup>22</sup> and the disproportionate violence against indigenous women in Canada.<sup>23</sup>

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20 Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981), arts 3, 5, 11, 13 and 14; Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), arts 26, 27 and 32; and Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 13 December 2006, entered into force 3 May 2008), preamble.

21 See Australian Institution of Aboriginal and Torres Strait Islander Studies <<https://aiatsis.govt.au>>.

22 Tamariki Māori comprise 59 per cent of all children in care and custody but 71 per cent of those with findings of harm. Oranga Tamariki — Ministry for Children “Safety of Children in Care: Quarter One – July to September 2018” <[www.orangatamariki.govt.nz](http://www.orangatamariki.govt.nz)>. The Waitangi Tribunal recently accepted an urgent inquiry into whether the legislation, policy and practice of state care of tamariki Māori is consistent with the principles of the Treaty of Waitangi 1840 and the Crown’s Treaty duties to Māori. Waitangi Tribunal *Oranga Tamariki urgent inquiry: Decision on Applications for an Urgent Hearing* (Wai 2915, 2019). There is also the current Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions, which will focus on historical abuse but has discretion to consider people currently in care. Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions Order 2018, sch, cl 10.1.

23 See Government of Canada “Truth and Reconciliation Commission of Canada” <[www.rcaanc-cirnac.gc.ca](http://www.rcaanc-cirnac.gc.ca)>; and *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019).

Linked to this is the weakening or destruction of traditional authority, loss of control over resources, lower socio-economic status, loss of languages, poor health outcomes and the disproportionate presence of indigenous peoples in criminal justice systems around the world.

Historic grievances have modern-day repercussions and this too is recognised in the Declaration — arts 8, 11, 20 and 28 all address redress for past injustices. For instance, art 11 relates to redress for cultural, intellectual and spiritual property taken without consent and art 28 relates to redress for loss of lands.<sup>24</sup>

Where groups have been marginalised or need special protection, it is not enough to rely on general human rights instruments, particularly where the issue concerns redress for past wrongs. An instrument that concentrates on their particular needs and requires states to focus on those groups is required. This has long been recognised in the international human rights system through, for example, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities. And this is now recognised, through the Declaration, with regard to indigenous peoples.<sup>25</sup>

One of the advantages of the Declaration is that it has brought indigenous rights clearly onto the agenda of the UN's human rights body: the Human Rights Council. A special body, called the Expert Mechanism on the Rights of Indigenous Peoples, was set up as a subsidiary body of the Human Rights Council in 2007.<sup>26</sup> The Expert Mechanism's role is to advise the Council on the rights of indigenous peoples as set out in the Declaration

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24 For more on these articles, see generally Federico Lenzerini "Reparations, Restitution, and Redress: Articles 8(2), 11(2), 20(2), and 28" in Jessie Hohmann and Marc Weller (eds) *The UN Declaration on the Rights of Indigenous Peoples* (Oxford University Press, Oxford, 2018) 573.

25 On the need for separate protection for indigenous peoples beyond existing protection for minorities' rights, see Will Kymlicka "Beyond the Indigenous/Minority Dichotomy?" in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford, 2011) 181.

26 See Office of the United Nations High Commissioner for Human Rights "Expert Mechanism on the Rights of Indigenous Peoples" <[www.ohchr.org](http://www.ohchr.org)>. The Expert Mechanism was established soon after the Declaration was passed, in conjunction with the Declaration.

and to assist states to achieve the goals of the Declaration.<sup>27</sup> This connection means that reports from the Expert Mechanism are also on the agenda for other UN human rights monitoring bodies. There is not, however, unlike for other human rights bodies, a regular reporting requirement on states with regard to the Declaration. Rather, states or indigenous groups can request a report.<sup>28</sup>

For completeness, I also mention that other UN bodies, predating the Declaration, were also established to progress indigenous rights. One is the UN Permanent Forum on Indigenous Issues, a high-level advisory body to the Economic and Social Council, established in 2001. Another is a Special Rapporteur on the rights of indigenous peoples, appointed by the Human Rights Council in 2001. The Special Rapporteur carries out fact-finding missions in specific countries, conducts thematic studies, and provides expert testimony before regional human rights courts and policy advice to development-centred and other non-UN international organisations.<sup>29</sup>

Having these various and multiple mechanisms dealing with indigenous peoples gives rise to a common criticism facing the UN (and other large organisations): the silo effect.<sup>30</sup> One possible consequence of the silo effect is that agencies do not talk to each other and end up doing the same work twice, but potentially inconsistently. Another is that particular issues that seem to be on various bodies' agendas are not advanced or progressed under the false assumption that the other silos are doing something

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27 Its mandate was extended in 2016 to include, among other things, preparing an annual study on the rights of indigenous peoples worldwide in the achievement of the Declaration; providing technical advice to member states or indigenous peoples upon request; facilitating dialogue between governments, indigenous groups and the private sector again upon request; and making changes to how the Expert Mechanism operates and how experts are appointed. *Resolution adopted by the Human Rights Council on 30 September 2016: Expert Mechanism on the Rights of Indigenous Peoples* GA Res 33/25 (2016).

28 For example, in April 2019, the Aotearoa Independent Monitoring Mechanism, the National Iwi Chairs Forum and the Human Rights Commission requested a review to advise on the development of a National Plan of Action to achieve the ends of the Declaration in New Zealand. Office of the United Nations High Commissioner for Human Rights "End of mission statement by the United Nations Expert Mechanism of the Rights of Indigenous Peoples to its visit in New Zealand" (26 April 2019) <[www.ohchr.org](http://www.ohchr.org)>.

29 Office of the United Nations High Commissioner for Human Rights "Ms Victoria Tauli Corpuz" <[www.ohchr.org](http://www.ohchr.org)>.

30 See, for example, in relation to sustainable development, United Nations Economic and Social Council *Breaking the Silos: Cross-sectoral partnership for advancing the Sustainable Development Goals (SDGs)* (31 March 2016).

about it. This effect is partially mitigated by measures to achieve coordination.<sup>31</sup> For example, one of the Permanent Forum's roles is to promote integrated and coordinated activities related to indigenous issues within the UN system.<sup>32</sup>

Having various bodies in the international system concerned with indigenous issues and rights does, however, have the advantage of putting indigenous rights clearly on the international agenda.<sup>33</sup> Another advantage is that it leads to the development of what can be termed international indigenous rights "jurisprudence". One example is that the body monitoring the International Covenant on Economic, Social and Cultural Rights (ICESCR) has authoritatively interpreted art 15(1)(a) of the ICESCR — the right to take part in cultural life — as comprising indigenous peoples' collective right to take part in cultural life, including the right to lands traditionally owned or used.<sup>34</sup> Another example is the recognition of the importance of indigenous people in relation to climate change by the Climate Action Summit referred to above. What these examples have in common is the growing recognition of the collective nature of indigenous rights and the importance of the protection of indigenous rights not only for indigenous peoples but for the world more generally.

#### ***IV Collective Rights***

Another very significant feature of the Declaration is that the rights protected under the Declaration are not just individual rights but also collective rights. A bit of history is in order to explain why I see this as significant.

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31 For example, the Inter-Agency Support Group and the United Nations Indigenous Peoples' Partnership. See United Nations Department of Economic and Social Affairs: Indigenous Peoples "Inter-Agency Support Group (IASG)" <[www.un.org](http://www.un.org)>; and Office of the United Nations High Commissioner for Human Rights "United Nations Indigenous Peoples' Partnership" <[www.ohchr.org](http://www.ohchr.org)>.

32 United Nations Department of Economic and Social Affairs: Indigenous Peoples "Permanent Forum" <[www.un.org](http://www.un.org)>.

33 See generally Julian Burger "Making the Declaration Work for Human Rights in the UN System" in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Transaction Publishers, Copenhagen, 2009) 304.

34 United Nations Committee on Economic, Social and Cultural Rights *General Comment No 21: Right of everyone to take part in cultural life (art 15, para 1(a), of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C12/GC/21 (21 December 2009) at [7] and [36]–[37].

The modern human rights system arose out of the atrocities of the Second World War. The foundational human rights document, the Universal Declaration on Human Rights,<sup>35</sup> does not contain any specific collective rights and does not even refer to self-determination.<sup>36</sup> During the drafting process of the Universal Declaration, there was some push for some collective rights to be included but this did not get much traction.<sup>37</sup> In any event, the types of collective rights envisaged were not those of indigenous peoples.<sup>38</sup>

The right to self-determination did, however, make its way into the two main human rights instruments that followed the Universal Declaration: the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR.<sup>39</sup> The self-determination right must encompass collective rights and this means that collective rights are recognised under these human rights treaties. In this sense, therefore, the Declaration arguably contains nothing new on this point, although it certainly gives more substance to what collective rights encompass.<sup>40</sup>

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35 *Universal Declaration of Human Rights* GA Res 217A (1948).

36 See Johanna Gibson “The UDHR and the Group: Individual and Community Rights to Culture” (2008) *Hamline J Pub L & Pol’y* 285 at 294.

37 This reluctance to contemplate even the existence of collective rights can be seen in the deconstruction of national, ethnic, religious and linguistic minorities into “persons belonging to” those minorities in the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* GA Res 47/135 (1992). See Marc Weller “Self-Determination of Indigenous Peoples” in Jessie Hohmann and Marc Weller (eds) *The UN Declaration on the Rights of Indigenous Peoples* (Oxford University Press, Oxford, 2018) 115 at 121. On the history of the United Nation’s focus on individual rights, see Mattias Åhrén “The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction” in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Transaction Publishers, Copenhagen, 2009) 200 at 201–202.

38 Johannes Morsink “Cultural Genocide, the Universal Declaration, and Minority Rights” (1999) 21 *Hum Rts Q* 1009 at 1019–1021.

39 ICCPR, art 1(1); and ICESCR, art 1(1). On the scope of self-determination in the Declaration in relation to self-determination in the twin Covenants, see discussion in Rodolfo Stavenhagen “The Rights of Indigenous Peoples Work: The Challenge Ahead” in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford, 2011) 147 at 161; and Adelfo Regino Montes and Gustavo Torres Cisneros “The United Nations Declaration on the Rights of Indigenous Peoples: The Foundation of a New Relationship between Indigenous Peoples, States and Societies” in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Transaction Publishers, Copenhagen, 2009) 138 at 154–157.

40 This is a complex topic and should be understood in light of the process of drafting the Declaration. For a comprehensive analysis, see Weller, above n 37.

Despite the inclusion of the right to self-determination in those human rights treaties, there has been a struggle in the UN human rights system to work out the proper approach to recognising collective rights at all and in particular where they might be seen as conflicting with individual rights. Indeed, Associate Professor Claire Charters has suggested that the current international human rights framework is a manifestation of ongoing colonial domination that does not respect indigenous philosophical or legal traditions.<sup>41</sup>

There has been more thinking about these issues in states where their constitutions recognise both custom, by its nature collective, and human rights, most of which are set out as individual rights.<sup>42</sup> Even in such countries there have, however, been inconsistencies in approach. A clear mechanism for balancing individual and collective interests, especially in the setting of indigenous rights, is still very much a work in progress. The Declaration means that the international human rights system generally must now tackle this issue and ensure states are compliant with their obligations under human rights treaties with regard to the recognition of collective rights. I do not pretend to have an answer on the proper approach to the recognition of collective rights and their relationship to individual rights but I will make some tentative comments.

It seems to me that cases analysing conflicting rights, albeit conflicting individual rights, might be useful in working out how potentially conflicting individual and collective rights can be balanced.<sup>43</sup> Such an approach would give proper weight to collective rights as rights in their own regard. At the beginning of the analysis both the individual and collective right would be accorded equal weight. Exactly what each right protects

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41 Claire Charters “Finding the Rights Balance: A Methodology to Balance Indigenous Peoples’ Rights and Human Rights in Decision-making” [2017] NZ L Rev 553 at 589–590.

42 For example, the Solomon Islands, Samoa and Tuvalu. See Susan Glazebrook, Judge of the Supreme Court of New Zealand “Custom, human rights and Commonwealth constitutions” (Sir Salamo Injia Lecture series, University of Papua New Guinea, Port Moresby, 29 November 2018); and Susan Glazebrook, Judge of the Supreme Court of New Zealand “Custom and the Constitution in the Nigerian Supreme Court: Commentary on *Anekwe v Nweke*” (paper presented at the Fourth International Meeting: Judging with Gender Perspective, Mexico City, 27–28 September 2018).

43 See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 175–176 citing *Re S (FC) (a child)* [2004] UKHL 47, [2005] 1 AC 593 at [17]. See also *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

and what risks are associated with giving one right precedence over the other in the particular circumstances would then be examined. This consideration would include the risk that a customary practice or right may be lost or become meaningless if individual freedoms are given primacy.

I think too that the three-stage analysis proposed by Associate Professor Charters will be very helpful. She suggests dividing indigenous rights into three categories to ensure that human rights evolve to accommodate all types of indigenous collective rights.<sup>44</sup> Her first category is indigenous individual rights, meaning rights that belong to all individuals, including indigenous individuals; for example, non-discrimination. Her second category is indigenous peoples' human rights, meaning the rights the collective has so individuals can flourish in the same way individuals from the dominant culture flourish; for example, minority rights, rights to property and rights to culture. The third category, and arguably the most important, is peoples' collective rights to authority — that is, rights arising from indigenous peoples' historical authority over their territories.

I also note that indigenous peoples themselves would have customary mechanisms for balancing collective and individual rights that could be drawn upon in working out an appropriate balance. Indigenous societies were after all made up of individuals. Such mechanisms could well provide lessons for the human rights system more generally.

## *V Meaning of Self-Determination*

The right to self-determination, while encompassing collective rights, must, however, be wider than this.<sup>45</sup> Another challenge, therefore, both at the international level and at the state level, will be to work out what the right to self-determination contained in the Declaration (and indeed in the human rights treaties) means in practice for both

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44 Charters, above n 41, at 562–563 and 592.

45 The right to self-determination is art 3 of the Declaration, but see arts 4, 5, 18, 19, 20, 23, 32, 33(2) and 46(1) for further facets of self-determination focusing on autonomy and self-governance, including the rights of indigenous peoples to establish their own institutions and to participate in decision-making institutions of the state. See also Anaya, above n 13, at 190–194.

indigenous peoples and the state.<sup>46</sup> This is particularly the case in relation to indigenous peoples who remain part of other states, such as Māori in New Zealand. The position is even more difficult for those indigenous peoples who are split between two or more states because of the vagaries of colonial border arrangements, such as the Saami people who are spread across Norway, Sweden, Finland and parts of Russia.<sup>47</sup> The issue of what self-determination means for indigenous peoples in these circumstances has been brought into sharp focus by the Declaration.

I do not intend to make any further comment on self-determination, other than to say that consideration of Associate Professor Charters's third category of indigenous rights will be vital in any analysis of state obligations to provide self-determination for indigenous peoples within those states.

## *VI Intersection of Indigeneity and Other Groups*

Another issue that will arise with regard to the Declaration relates to the intersection of indigeneity and other groups, and in particular other minority groups. The Declaration does recognise that there are groups within indigenous peoples who may be particularly vulnerable. Article 22 provides that particular attention should be paid to the rights and special needs of indigenous elders, youth, children and persons with disabilities in implementing the Declaration. At the international level, there is

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46 There is debate around whether the international customary law principle of self-determination, understood as one of the highest norms from which states cannot derogate (*jus cogens*), and exercised in the wave of decolonisation in the 1960s and 1970s, applies in the same way as the right to self-determination under art 3. That debate is a critical one, but is beyond the scope of this article. For records of what various countries and indigenous observers thought on the issue in drafting the Declaration, see Erica-Irene A Daes "The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples" in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Transaction Publishers, Copenhagen, 2009) 48 at 68–70. For further reading, see Weller, above n 37; Andrew Pullar "Rethinking Self-Determination" (2014) 20 *Canta LR* 91; and Nin Tomas "Indigenous People and the Maori: The Right to Self-Determination in International Law — From Woe to Go" [2008] *NZ L Rev* 639.

47 See generally Malgosia Fitzmaurice "The UN Declaration on the Rights of Indigenous Peoples: Recent Developments regarding the Saami People of the North" in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford, 2011) 536.

some recognition that people at the overlap of intersections such as gender and indigeneity face particular challenges, as recognised by the Human Rights Council's 2014 compilation of references to indigenous women and girls by the Expert Mechanism.<sup>48</sup>

With regard to gender, the Declaration provides that all rights and freedoms are guaranteed equally to male and female indigenous individuals.<sup>49</sup> The position of women has often been considered a “sticking point” in this context, especially where traditional authority structures and customs might be seen as discriminatory.<sup>50</sup> In this regard, I note the issue of the adverse effect of colonisation on traditional authority structures, particularly as they relate to women. Commentators suggest that colonisation and the associated Western gender hierarchy norms changed the balance between men and women in indigenous and other pre-colonial societies.<sup>51</sup> This has deprived women of their traditional authority. These issues are to be aired in New Zealand before the Waitangi Tribunal next year in the mana wāhine kaupapa inquiry.<sup>52</sup>

## *VII The Declaration in New Zealand*

I now move onto the significance of the Declaration for New Zealand. I start by acknowledging the long-lasting effect of colonisation on New Zealand's indigenous

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48 Human Rights Council *Compilation of References to Indigenous Women and Girls in Reports and Advice of the Expert Mechanism on the Rights of Indigenous Peoples (1st to 6th Sessions)* UN Doc A/HRC/EMRIP/2014/CRP3 (10 July 2014).

49 Article 44.

50 Alexandra Xanthaki “The UN Declaration on the Rights of Indigenous Peoples and Collective Rights: What's the Future for Indigenous Women?” in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford, 2011) 411 at 419–423.

51 Annie Mikaere “Māori Women: Caught in the Contradictions of a Colonised Reality” (1994) 2 Wai LR 125. See also Jennifer Corrin Care “Negotiating the Constitutional Conundrum: Balancing Cultural Identity with Principles of Gender Equality in Post-Colonial South Pacific Societies” (2006) 5 Indig LJ 51 at 62; and Mema Motusaga “Women in Decision Making in Samoa” (PhD Thesis, Victoria University, Australia, 2016) at 177–179.

52 WW Isaac *Memorandum — Directions of the Chairperson calling judicial conferences on starting kaupapa inquiries into claims concerning Mana Wāhine and Housing Policy and Services* (Waitangi Tribunal, 16 November 2017).

people. Even today, Māori suffer inequities in all areas, including in health,<sup>53</sup> education,<sup>54</sup> employment,<sup>55</sup> and justice — both in terms of incarceration and across the justice system.<sup>56</sup> That this is the case highlights the importance of the Declaration in New Zealand, although as I said earlier, the Declaration has much wider significance than righting past wrongs.

### ***A Government Response to the Declaration***

As I noted above, New Zealand originally voted against the Declaration. This was not, it said at the time, because it was opposed to the principles and aspirations of the Declaration but because of concerns about three particular articles<sup>57</sup> and, incidentally, probably based on a misunderstanding of what those articles required.<sup>58</sup> In 2010, New Zealand reversed its position and endorsed the Declaration, stressing that it

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53 Māori have a lower life expectancy at birth than non-Māori. Statistics New Zealand “Life expectancy” (May 2015) <<http://archive.stats.govt.nz>>. Māori also have higher rates of mental illness, suicide and diabetes. See Ministry of Health “Tatau Kahukura: Māori health statistics” (8 October 2015) <[www.health.govt.nz](http://www.health.govt.nz)>.

54 In 2017, Māori had the lowest rate of students leaving secondary education with the highest level of school qualification, National Certificate of Educational Achievement Level Three. The proportion of Māori students obtaining Level Three was 35.6 per cent, compared to Pākehā rates of 57.2 per cent. Education Counts “School leavers with NCEA level 3 or above” (September 2018) <[www.educationcounts.govt.nz](http://www.educationcounts.govt.nz)>. See also Statistics New Zealand “18-year-olds with higher qualifications” (February 2017) <<http://archive.stats.govt.nz>>.

55 As at June 2018, the average woman earned \$27.41 per hour, whereas the average Māori woman earned \$24.26. Additionally, the average man earned \$31.82 per hour, whereas the average Māori man only earned \$26.08. Coalition for Equal Value, Equal Pay “Pay gaps by ethnicity and gender” (15 August 2018) <[www.cevepnz.org.nz](http://www.cevepnz.org.nz)>. In 2017, the Māori unemployment rate was 10.8 per cent, compared to the national unemployment rate of 4.9 per cent. Ministry of Business, Innovation and Employment *Māori in the Labour Market* (September 2017) at iv.

56 As at 31 March 2019, 51.3 per cent of the New Zealand prison population was Māori. See Department of Corrections “Prison Facts and Statistics — March 2019” (2019) <[www.corrections.govt.nz](http://www.corrections.govt.nz)>. Comparably, Māori only comprise 14.9 per cent of the national population. Statistics New Zealand “Major ethnic groups in New Zealand” (29 January 2015) <[www.stats.govt.nz](http://www.stats.govt.nz)>. In 2015, the Police Commissioner admitted to “unconscious bias” resulting in Māori people being more severely punished than non-Māori for similar transgressions: Action Station *They’re our Whānau* (3 October 2018) at 10–17. See also Elizabeth Stanley and Riki Mihaere “The Problems and Promise of International Rights in the Challenge to Māori Imprisonment” (2019) 8 *Intl J Crime, Justice & Social Democracy* 1.

57 Rosemary Banks “Explanation of Vote by HE Rosemary Banks, New Zealand Permanent Representative to the United Nations” (2007) Ministry of Foreign Affairs and Trade <[www.mfat.govt.nz](http://www.mfat.govt.nz)>.

58 Treasa Dunworth “International Law” [2011] *NZ L Rev* 569 at 570–572.

accorded with government policies related to the Treaty of Waitangi (the Treaty or te Tiriti) but also stressing the Declaration's non-binding and aspirational nature.<sup>59</sup>

A significant development occurred in March 2019: Cabinet gave its approval for the Minister of Māori Development to lead a process to develop a national plan of action on New Zealand's progress towards the objectives of the Declaration.<sup>60</sup> The Cabinet Paper recognises that the Declaration contains principles and duties consistent with the Treaty. It is said that New Zealand is committed to the common objectives of the Treaty and the Declaration, alongside existing legal and constitutional frameworks.<sup>61</sup> The Paper notes that the Declaration is increasingly being raised before international monitoring bodies and that developing a plan of action will demonstrate New Zealand's continuous commitment to the international framework on indigenous issues and to its implementation in New Zealand.<sup>62</sup> This includes ensuring greater coherence across government to delivering beneficial outcomes for Māori.<sup>63</sup>

So, although at this stage there is only a plan to develop a plan, it nevertheless shows that we have reached a stage where the Declaration is seen as playing a significant role in the government's indigenous policies.

### ***B The Status of the Declaration in New Zealand Law***

I move now to the Declaration and courts and tribunals. First I would suggest that the fact that the Declaration is not a treaty is in fact somewhat irrelevant in the New Zealand context. To explain why this is so requires a brief explanation of the status of international law in New Zealand.

Treaties are negotiated by the executive arm of government and, under international law, are binding on New Zealand once ratified.<sup>64</sup> New Zealand is, however, what is

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59 (20 April 2010) 662 NZPD 10230.

60 Cabinet Māori Crown Relations: Te Arawhiti Committee *Developing a Plan on New Zealand's Progress on the United Nations Declaration on the Rights of Indigenous Peoples* (18 March 2019).

61 At [2].

62 At [16].

63 At [17].

64 Cabinet Office *Cabinet Manual 2017* at [7.123].

known as a dualist state. This means that treaties entered into by New Zealand are not automatically part of domestic New Zealand law. They only become part of domestic law if enshrined in legislation.<sup>65</sup>

This is not the full picture, however. First, customary international law is automatically part of the common law unless inconsistent with a statute.<sup>66</sup> But, as I have said, the whole of the Declaration has not reached that status yet. More importantly, however, the courts do refer to treaties that New Zealand has entered into but have not been enshrined in legislation and thus are not part of New Zealand domestic law. Courts can and do refer to such unincorporated treaties when interpreting New Zealand statutes.<sup>67</sup> Unincorporated treaties can also be considered in developing the common law and deciding cases where an international dimension is present.

The courts do not treat unincorporated treaties as directly binding in New Zealand law because of course they are not. But the courts do apply a presumption that Parliament did not intend to legislate contrary to international law. There are two ways this presumption plays out. The first relates to the interpretation of statutory provisions. Applying the presumption, provisions will be interpreted to be consistent with international law (as found in both treaties and custom), if possible.<sup>68</sup> If it is not possible, the statute prevails.<sup>69</sup> The second relates to a situation where statute law gives discretion to the executive arm of government. The courts have held that such discretionary powers must be exercised in accordance with New Zealand's international obligations, even if those obligations are not incorporated into statutes.<sup>70</sup> Again, this is subject to any contrary provision in a statute.

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65 Shaw, above n 10, at 93–95.

66 Crawford, above n 9, at 67–68; and Toki, above n 9, at 265.

67 On this topic, see Claudia Geiringer “Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law” (2004) 21 NZULR 66 at 72; and Alice Osman “Demanding Attention: The Roles of Unincorporated International Instruments in Judicial Reasoning” (2014) 12 NZJPIL 345 at 366.

68 *Worth v Worth* [1931] NZLR 1109 (CA) at 1121; *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA); and *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289.

69 See Susan Glazebrook “Cross-Pollination or Contamination: Global Influences on New Zealand Law” (2015) 21 *Canta LR* 60 at 65.

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

It is not too much of a stretch to presume that Parliament also intended to legislate in a manner consistent with a declaration, like this one, that was passed by the UN General Assembly by such a large majority and that the executive took a positive decision in 2010 to endorse and a further decision this year to develop an implementation plan for. I would suggest, therefore, that the courts may well treat the Declaration in the same way as unincorporated treaties.<sup>71</sup> This is especially the case where, as I discuss later, the Declaration in fact elaborates on rights already enshrined in the Treaty.

Further, the rights in the Declaration are in any event in large part contained in human rights and other international treaties to which New Zealand is a party. Indeed, at least some of the rights in the Declaration have been incorporated in New Zealand legislation under the New Zealand Bill of Rights Act 1990. A few brief comments on that Act. It does not incorporate any of the rights outlined in the ICESCR and it does not incorporate all of the rights in the ICCPR.<sup>72</sup> For example, there is no general property right in our Bill of Rights Act. Nor is there a privacy right or a right to self-determination. Collective rights are not explicitly referred to in our Bill of Rights Act but legal persons are covered by it,<sup>73</sup> and that must include, for example, Māori corporations and other indigenous entities. And there are some rights in the Bill of Rights Act that can be seen as relating to collectives, such as the right to freedom of association.<sup>74</sup>

It might be that the Declaration could lead to a more expansive interpretation of the Bill of Rights Act than we have seen to date and one that is more responsive to interpreting the rights already domestically protected under the Bill of Rights Act as including collective rights.

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71 See Associate Professor Treasa Dunworth's "pedigree" theory on the adoption of international law, which states that the degree to which a norm or rule applies depends on its content or alignment with the existing domestic legal system as opposed to its source. Treasa Dunworth "Law Made Elsewhere: The Legacy of Sir Ken Keith" in Claudia Geiringer and Dean Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) 126 at 133.

72 The long title of the New Zealand Bill of Rights Act 1990 says, among other things, that it is "An Act ... to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".

73 Section 29.

74 Section 17.

I also note for completeness that there will be other pieces of legislation that relate to matters covered by the Declaration. I refer for example to the Resource Management Act 1991. Section 6 recognises the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga as a matter of national importance. Section 7 of that Act provides that decision-makers must have “particular regard” to kaitiakitanga.

### *C The Treaty of Waitangi*

Moving now to the position of te Tiriti. First, a few general (and necessarily incomplete) comments on the position of the Treaty in New Zealand’s legal landscape. We have come a long way since it was declared to be a “simple nullity” in 1877.<sup>75</sup> Significant issues relating to the Treaty are recognised by the Senior Courts Act 2016 as matters of general and public importance in relation to leave applications to the Supreme Court.<sup>76</sup> The Waitangi Tribunal has been set up to examine breaches of te Tiriti and,<sup>77</sup> as well as looking at specific claims, the Tribunal has examined more broad-reaching claims such as the recent health kaupapa claim.<sup>78</sup>

The Treaty has also been increasingly enshrined in legislation.<sup>79</sup> For example, anyone exercising any powers under the Resource Management Act to manage the use, development and protection of natural resources has to “take into account” the principles of the Treaty.<sup>80</sup> These principles have been held to include, among other things, partnership, active protection, autonomy, equity and redress.<sup>81</sup> The exact wording used in provisions is important in determining the extent of obligations related

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75 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC). See also David Williams *A Simple Nullity? The Wi Parata Case in New Zealand Law and History* (Auckland University Press, Auckland, 2011).

76 Section 74(3).

77 Waitangi Tribunal Act 1975, ss 5 and 6.

78 Waitangi Tribunal “Health Services and Outcomes Inquiry” <[www.waitangitribunal.govt.nz](http://www.waitangitribunal.govt.nz)>.

79 For a categorisation of statutory references to the Treaty, see Joseph Williams *Laws of New Zealand The Treaty of Waitangi in Legislation* (online ed) at [142]–[149]. See also Mason Durie “Universal Provision, Indigeneity and the Treaty of Waitangi” (2002) 33 VUWLR 591 at 595–598.

80 Section 8.

81 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA). See also Waitangi Tribunal “Principles of the Treaty” <[www.waitangitribunal.govt.nz](http://www.waitangitribunal.govt.nz)>.

to the Treaty under the various statutes that include references to it.<sup>82</sup> The terminology “take into account” is not as strong as “give effect to”, which is how the obligation is framed in some legislation, such as the Conservation Act 2004.<sup>83</sup> But whatever the wording used, I think it is fair to say that the courts will interpret legislation to give substance to the obligation and that legislative incorporation of the Treaty will not be regarded as mere window dressing.<sup>84</sup>

Further, even when not enshrined in legislation, te Tiriti is likely to be used by the courts in a similar way to unincorporated treaties. This means it will be presumed that Parliament does not intend to act in a manner that is contrary to the Treaty, even if the Treaty is not mentioned in the particular statute.<sup>85</sup> Statutes would be interpreted in accordance with that presumption if possible. Further, any broad discretions given to the executive under legislation would be presumed to be intended to be exercised consistently with te Tiriti. Like unincorporated international law treaties, te Tiriti can also be used in the development of the common law.

I mention here for completeness that, aside from this, tikanga should in any event have been regarded as part of the common law, provided it was not inconsistent with a statute and met certain tests, which I suggested in *Takamore v Clarke* would need to be modified to reflect modern thinking on indigenous issues.<sup>86</sup> Tikanga has not, however, been seen until recently as part of the common law, and the legal system has remained resolutely based on the British system forced on Maori in the colonial period. How tikanga might now be incorporated into the common law and the implications of

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82 See Edward Willis “The Treaty of Waitangi: Narrative, Tension, Constitutional Reform” [2019] NZ L Rev 185 at 199.

83 Section 4.

84 On statutory interpretation of provisions relating to the Treaty, see Ross Carter (ed) *Burrows and Carter Statute Law in New Zealand* (5th ed, Lexis Nexis, Wellington, 2015) at 521–525, 529 and 531–533.

85 At 521.

86 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [254]–[258]. See also *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

this process, both for tikanga and for the common law, are, however, beyond the scope of this speech.<sup>87</sup>

#### *D The Declaration and the Treaty*

The most important point to my mind is that the Declaration provides in art 37 and in three places in the preamble that states should honour rights affirmed in treaties with indigenous peoples. Indeed, the preamble says sometimes the rights affirmed in such treaties will be of “international concern, interest, responsibility and character”. It is not clear in what circumstances any breach of such a treaty would be of international significance. Perhaps all that is meant is that some treaties with indigenous peoples will be treaties at international law, a technical matter on which there is some debate.<sup>88</sup> It is beyond the scope of this article to consider this debate with regard to the character of the Treaty.<sup>89</sup> What is important for our purposes is that New Zealand’s endorsement of the Declaration means it has further committed to honouring te Tiriti.<sup>90</sup>

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87 On this topic, see generally Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Wai LR 1; Helen Winkelmann “Renovating the House of the Law” (keynote speech to Te Hūnga Rōia Māori o Aotearoa, Wellington, August 2019); Natalie Coates “What does Takamore mean for tikanga? — *Takamore v Clarke* [2012] NZSC 116” (2013) February Māori LR 14; Emma Gattey “Do New Zealand Courts Regard Tikanga Māori as a Source of Law Independent of Statutory Incorporation? Or is Anglo-Inspired Common Law Still the ‘Sole Arbiter’ of Justice in New Zealand?” (LLB(Hons) Dissertation, University of Otago, 2013) at 39–41; and Laura Lincoln “*Takamore v Clarke*: An Appropriate Approach to the Recognition of Māori Custom in New Zealand Law?” (2013) 44 VUWLR 141.

88 This largely turns on whether indigenous groups had (or were considered to have) international legal personality and thus treaty-making capacity: see Kenneth Keith “The Treaty of Waitangi in the Courts” (1990) 14 NZULR 37 at 37–39; and Ian Brownlie *Treaties and Indigenous Peoples: The Robb Lectures 1990* (Clarendon Press, Oxford, 1991) at 9. Treaties with indigenous peoples in Canada are considered *sui generis* and not international law treaties. *Simon v R* [1985] 2 SCR 387 at 404. By contrast, treaties with indigenous peoples in the United States have the same status as international treaties. United States Constitution, art I, § 8.

89 No international or national court has decisively determined that te Tiriti is an international treaty; the question was left open in *Tamihana Korokai v Solicitor-General* (1913) 32 NZLR 321 (CA) at 347. For a technical analysis of the status of te Tiriti as a treaty at international law, see Matthew Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, Wellington, 2008) at 154–169; Benedict Kingsbury “The Treaty of Waitangi: Some International Law Aspects” in IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 121; and Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [17.4.6].

90 See Cabinet Māori Crown Relations: Te Arawhiti Committee, above n 60.

Another important point is that the Declaration in any event reflects obligations contained in te Tiriti. For example, rangatiratanga<sup>91</sup> can be seen as reflected in art 3 of the Declaration, which provides for self-determination. Article 4 of the Declaration expands on this as including the right to autonomy and self-government in matters relating to internal and local affairs. Article 5 goes further and reflects a kind of balance between rangatiratanga and kāwanatanga — that indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining the right to participate fully in the political, economic, social and cultural life of the state.

Another example of congruence between te Tiriti and the Declaration is that a central feature of the Declaration is the connection between indigenous peoples and the land. Whenua, mentioned in art 2 of te Tiriti, can be related to arts 25 and 26 of the Declaration, which refer to the spiritual relationship of people with traditionally owned and used lands and resources, and the right to use, develop and control lands and resources traditionally owned and occupied.<sup>92</sup>

We can also see the Treaty principles of partnership, consultation, good faith and equity referred to in the Declaration. For example, the preamble solemnly proclaims that the Declaration is a standard of achievement to be pursued in a spirit of partnership and mutual respect, and arts 19 and 32 provide that states shall consult and cooperate in good faith with indigenous peoples through their own representative institutions in order to obtain their consent before adopting laws or policies that may affect them.<sup>93</sup>

This means the Declaration aligns with te Tiriti, as was recognised by the Hon Pita Sharples when New Zealand endorsed the Declaration and in the recent Cabinet Paper.

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91 Treaty of Waitangi, art 2.

92 For more on these articles, see Claire Charters “Indigenous Peoples’ Rights to Lands, Territories, and Resources in the UNDRIP: Articles 10, 25, 26, and 27” in Jessie Hohmann and Marc Weller (eds) *The UN Declaration on the Rights of Indigenous Peoples* (Oxford University Press, Oxford, 2018) 395.

93 For more on the concept of free, prior and informed consent in the Declaration, see Mauro Barelli “Free, Prior and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2)” in Jessie Hohmann and Marc Weller (eds) *The UN Declaration on the Rights of Indigenous Peoples* (Oxford University Press, Oxford, 2018) 247.

But the Declaration is much more detailed than the Treaty and in this sense provides elaboration of the Treaty rights and obligations. For example, art 2 of te Tiriti provides for te tino rangatiratanga over whenua, kainga and taonga. Kainga is reflected in the articles of the Declaration that prohibit forcible removal of people from their territories.<sup>94</sup> Taonga is reflected in the emphasis in the Declaration on cultural traditions and customs, including sacred sites, designs, ceremonies, technologies and art, and the right to use and control ceremonial objects, as well as the right to provide education in the indigenous language in a manner appropriate to cultural methods of teaching and learning.<sup>95</sup>

### *E How the Declaration Has Been Used before the Courts*

Finally, I come to how the Declaration has been used in courts in New Zealand.<sup>96</sup> Rather than going through the case law I will try to categorise the possible ways the Declaration has been and could in the future be used. But I do not suggest this is necessarily a definitive list.

First, there are the cases where counsel have relied on the Declaration in submissions but where the judgment does not mention it or only does so to record the submission but without making any comment.<sup>97</sup> In most cases this will be because the decision is based on the most authoritative source (such as a statutory provision) and it is not necessary to refer to documents, like the Declaration, that are supportive but are not

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94 Articles 7 and 10.

95 Articles 11, 12 and 14.

96 On this topic, see generally Treasa Dunworth “International Law” [2015] NZ L Rev 285 at 285–302; and Claire Charters “Wakatū in Peripheral Vision: Māori Rights-Based Judicial Review of the Executive and the Courts’ Approach to the United Nations Declaration on the Rights of Indigenous Peoples” [2019] NZ L Rev 85.

97 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305; *Tukaki v Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [27]; *Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2018] NZHC 2217, [2019] NZRMA 64 at [171]–[172]; *Ngati Mutunga o Wharekauri Asset Holding Co Ltd v Attorney-General* [2017] NZHC 2482, [2018] NZAR 18; and *Haupini v SRCC Holdings Ltd* [2011] NZHRRT 20, (2011) 9 HRNZ 668.

part of New Zealand law.<sup>98</sup> And a tip here for advocates: always refer first to the most authoritative source and, indeed, often you can stop right there.<sup>99</sup>

The second type of case is where the Declaration is relied on by counsel but the court or tribunal considers the Declaration to be inconsistent with a New Zealand statute or, alternatively, that the interpretation of the effect of the Declaration contended for by the party is inconsistent with a statute.<sup>100</sup> As statutes prevail and the Declaration is not binding in law, this conclusion necessarily means the submission based on the Declaration will be rejected.

The third type of case is where the Declaration is relied on to interpret a statute. I venture to suggest this will be most successful where this submission is combined with reference to the Treaty and particularly where the Treaty is referred to in the legislation. This would enable the Declaration to be used to flesh out the obligations in the Treaty in some of the ways I have just discussed. And this could have quite a significant effect on adding more legal weight to both the Treaty and the Declaration.

The fourth type of case is where the Declaration is used to argue that executive discretions and policies should be aligned with the Declaration.<sup>101</sup> Assuming there is

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98 See *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31. There, the New Zealand Māori Council sought the interpretation of Treaty principles consistently with the Declaration, in particular art 28. The Supreme Court accepted “that the Declaration provides some support for the view that those principles should be construed broadly. In particular, it supports the claim for commercial redress as part of the right to development there recognised.” However, it doubted that “the Declaration add[ed] significantly to the principles of the Treaty statutorily recognised under the State-Owned Enterprises Act and Part 5A of the Public Finance Act”. At [92].

99 Susan Glazebrook “Effective Written Submissions” (paper presented to the New Zealand Bar Association, Queenstown, September 2014).

100 See *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZHC 389, [2017] 3 NZLR 516. There, arts 19 and 37 of the Declaration were cited before the High Court. The High Court said: “While New Zealand has declared its support for the UNDRIP declaration, it is clear that the existing legislative and legal framework by which Treaty claims are dealt with and determined in New Zealand defines the bounds of this country’s engagement with the provisions and principles of the declaration, they being consistent with the duties and principles contained and inherent in the Treaty”. At [111]. The Supreme Court referred to the pleading of the Declaration but did not cite it in its reasons. *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [27].

101 In *Tukaki*, above n 97, it was argued that the discretion to surrender someone for extradition in s 8 of the Extradition Act 1999 should take into account tikanga rights, and that the Declaration among other things requires those rights to be upheld. At [27]. This argument was not, however, accepted by the Court of Appeal.

nothing in a statute that prevents this, arguments such as these could be successful in the same way that arguments based on unincorporated treaties can succeed. The more the Declaration is referred to by the executive as being a cornerstone of indigenous policies,<sup>102</sup> the more likely it is that such arguments could be successful.

The fifth type of case is a subset of the fourth and it is where a party wishes to use the Declaration to argue that the government should change its current indigenous policies and procedures. A court or tribunal would reject such a submission where it considers that what is being done by the government is already aligned with the Declaration. And, once the proposed government plan for the implementation of the Declaration is in place, arguments that aspects of that plan should change would probably face real difficulties. This is because the process for putting in place the plan involves extensive consultation. It is also because there will be multiple ways of complying with the Declaration and the courts would usually respect the legitimate choices made, subject possibly to there being no judicially reviewable issues with the process followed. Further, there will inevitably be other wider policy issues and budget constraints that may mean the courts are not the most suitable vehicle for arguments about policy choices. And, of course, if such policies and procedures are embedded in legislation, the courts cannot act contrary to or overturn that legislation.

The final type of case is where the Declaration is one of the sources used to argue for the development of the common law.<sup>103</sup> This is probably one of the most promising

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102 See, for example, Cabinet Māori Crown Relations: Te Arawhiti Committee, above n 60.

103 See *Paki v Attorney-General (No 2)* [2015] NZSC 118, [2015] 1 NZLR 67. There, the Supreme Court unanimously held that the common law presumption of the midpoint of rivers determining ownership did not automatically apply in the case of Māori land. Elias CJ, agreeing but writing separately, cited art 28 of the Declaration and said the Declaration “may be of some importance” in the case of established breaches of equitable duties owed to Māori, given that it supports restitutionary remedies where possible. At [158] and [164]. See also *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423. There, Elias CJ and I held that a narrow approach to standing does not accord with the Declaration, in particular art 40. At [491] and [657], n 867. Elias CJ would have held that the Declaration is authority with which New Zealand law should be reconciled. At [491]. Further, I referred to the Declaration as affirming remedies for infringements of collective rights. At [668], n 879. However, the majority on this point (William Young, Arnold and O’Regan JJ) rejected arguments for a wider approach to standing. At [799], [810] and [952]–[953] (it should be noted that William Young J was reluctant to determine standing as he saw the claim failing for more fundamental reasons, but nevertheless recorded his conclusions on standing to avoid an equal division of the Court). For comment on the majority’s

ways the Declaration could be used. But any development of the common law will have to accord with the common law method, which favours incremental change. The most promising aspect of this could be the incorporation of tikanga into the law of New Zealand. This is because, as I said earlier, custom should in fact be part of the common law already.

What is clear from how the Declaration has been used so far in our courts and tribunals is that the more parties cite the Declaration and the more the Crown has to respond to the submissions, the more the Declaration will become embedded into New Zealand's legal framework.<sup>104</sup> The work the government is doing on the plan to integrate the Declaration into its indigenous policies across all of government can only accelerate this trend.

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approach in *Wakatū*, see Dwight Newman “*Wakatū* and Transnational Dimensions of Indigenous Rights Discourse” [2019] NZ L Rev 61 at 66; and compare Charters, above n 96, at 109.  
104 Charters, above n 96, at 113.