



Centre for International
Governance Innovation

UNDRIP Implementation Comparative Approaches, Indigenous Voices from CANZUS

SPECIAL REPORT

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Acronyms and Abbreviations



ACCC	Australian Competition and Consumer Commission
ACHPR	African Commission on Human and Peoples' Rights
ADRIIP	American Declaration on the Rights of Indigenous Peoples
ANU	Australian National University
CANZUS	Canada, Australia, New Zealand and the United States
DOCIP	Indigenous Peoples' Centre for Documentation, Research and Information
ECOSOC	United Nations Economic and Social Council
FPIC	free, prior and informed consent
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGC	WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
ILA	International Law Association
ILO	International Labour Organization
IMM	Iwi Monitoring Mechanism
IP	intellectual property
ITK	Inuit Tapiriit Kanatami
IWGIA	International Work Group for Indigenous Affairs
NHPA	National Historic Preservation Act of 1966
NIACA	National Indigenous Arts and Cultural Authority
NICA	National Indigenous Cultural Authority
NZBORA	New Zealand Bill of Rights Act 1990
OAS	Organization of American States
RFRA	Religious Freedom Restoration Act

RMA	Resource Management Act 1991
TCEs	traditional cultural expressions
TK	traditional knowledge
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UNDRIP/UN Declaration	United Nations Declaration on the Rights of Indigenous Peoples
UNGA	United Nations General Assembly
UNSW	University of New South Wales
WGDD	Working Group on the Draft Declaration
WIPO	World Intellectual Property Organization

Introduction



Brenda L. Gunn and Oonagh E. Fitzgerald

In 2007, the United Nations General Assembly (UNGA) voted in favour of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration/UNDRIP). Unfortunately, four states voted against it: Canada, Australia, New Zealand and the United States (CANZUS states). Each of these states raised its own concerns, which varied from Canada's expressed concern about "the wording of the current text, including the provisions on lands, territories and resources; on free, prior and informed consent when used as a veto...and on the need to achieve an appropriate balance between the rights and obligations of indigenous peoples, Member States and third parties."¹ Australia, New Zealand and the United States also expressed concern with the process taken to finalize the text, preferring further work to negotiate the text.² It was the CANZUS states' position that debate on the UN Declaration should have continued until full international consensus was reached, which is problematic, as it would have set the bar higher for adopting the UN Declaration than for any other international human rights instrument.³ In fact, requiring full consensus could be viewed as effectively giving these states a veto on the UN Declaration.

These four states have all since changed their positions on the UN Declaration and have now expressed their support for it. However, expressing support is only the first step; now comes the critical phase of implementation. Although more than 10 years have passed since the adoption of the UN Declaration, many states have been slow to take concrete steps to implement it. *UNDRIP Implementation: Comparative Approaches, Indigenous Voices from CANZUS* aims to contribute to the dialogue on challenges and opportunities to implement the UN Declaration, with a focus on experiences in the CANZUS states.

This collection results from a round table that was a partnership between the International Law Research Program at the Centre for International Governance Innovation (CIGI) and

1 UNGAOR, 61st Sess, 107th Plen Mtg, UN Doc A/61/PV.107 (2007) at 12–13.

2 *Ibid.*

3 There were eight abstentions to the Universal Declaration of Human Rights.

the Office of the Pro Vice-Chancellor Indigenous at the University of New South Wales (UNSW). The research round table on “Comparative Perspectives on Implementing the United Nations Declaration on the Rights of Indigenous Peoples” took place on August 25, 2018, at the UNSW, following the International Law Association (ILA) Biennial Conference in Sydney, Australia.

The purpose of the research round table was to connect international Indigenous peoples’ human rights law experts from Canada, Australia, New Zealand and the Pacific, as well as visiting ILA members for collaborative and comparative research on implementation of the UN Declaration.

At the Sydney research round table, participants from across the CANZUS states⁴ presented their perspectives on implementation, drawing on experiences in the negotiations of the UN Declaration and subsequent efforts to promote implementation of the declaration in their respective states.

Oonagh Fitzgerald, on behalf of CIGI, welcomed participants to the workshop and thanked Megan Davis, pro vice-chancellor Indigenous at the UNSW, and Sonia Smallacombe, for their generous partnership in hosting the workshop at their UNSW premises, and Brenda Gunn, for her work in helping to organize the workshop. Fitzgerald provided the history of the development of CIGI’s first two special reports on the implementation of the UN Declaration, using the theme of braiding international, domestic and Indigenous peoples’ own laws in the implementation process. She also expressed both her and Gunn’s hope that the Sydney workshop would broaden this discussion from experiences within Canada to learn from Indigenous leaders and scholars from Australia, New Zealand, the United States and the Pacific Island nations.

Megan Davis provided an opening keynote address on the theme “How Has the UN Declaration Influenced Constitutional Recognition in Australia?” The development of the UN Declaration over a period of three decades influenced both the process and the substantive recommendations in Australia’s constitutional reflections about how to recognize Aboriginal and Torres Strait Islander peoples in domestic governance. The focus of this reflection shifted over time and, more recently, has been centred on their rights under the UN Declaration’s article 3 (right to self-determination); article 18 (right to participate in decision making affecting Indigenous peoples); article 19 (consultation and free, prior and informed consent); and article 37 (right to enter into treaties).

Davis described the 2017 Uluru Statement from the Heart,⁵ made by representatives of Aboriginal and Torres Strait Islander peoples gathered in Uluru, Australia’s spiritual heart. Their joint statement emphasized voice, *makarrata* (meaning “treaty”) and truth as the three key constitutional reforms needed.⁶ With no treaties yet in Australia, Davis noted that one of the challenges in implementing the UN Declaration is that there may be differences in how state governments use and define its standards and how these standards are understood by Indigenous peoples.

4 Note that Dalee Sambo Dorrough was originally confirmed to attend, but due to weather conditions, her travel dates changed.

5 Central Land Council, “Uluru Statement from the Heart” (2017), online: <www.clc.org.au/files/pdf/Uluru-Statement-3.pdf>. It states, in part: Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from ‘time immemorial’, and according to science more than 60,000 years ago. This sovereignty is a spiritual notion: the ancestral tie between the land, or ‘mother nature’, and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown. How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years? With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia’s nationhood....We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country. We call for the establishment of a First Nations Voice enshrined in the Constitution.

6 Katy Marriner, *Uluru Statement from the Heart: Study Guide* (Australian Teachers of Media, 2019), online: <<https://documentaryaustralia.com.au/wp-content/uploads/2019/08/Study-Guide-Final-Uluru-Statement-From-the-Heart.pdf>>.

Sarah Prichard, a barrister who was involved in the early days of negotiating the UN Declaration, then discussed a draft paper entitled “The Particular or Peculiar in Australia,” providing an overview of Australia’s changing position on the UN Declaration during the course of 30 years of negotiations. She recounted how Australia had been the first state to include language of self-determination in its domestic policy and was a positive contributor in the early negotiations at the Working Group on Indigenous Populations and the Working Group on the Draft Declaration. However, by 1998, there was a fundamental shift where Australia was resisting self-determination and pushing for an alternative term such as self-management or self-empowerment. Prichard then traced the domestic changes, including a change in government, which led to increased resistance to the UN Declaration and culminated in Australia voting against the UN Declaration in the UNGA.

Fleur Te Aho discussed “Indigenous Rights Ritualism in Aotearoa: The State and Implementation of the UNDRIP,” arguing that New Zealand/Aotearoa’s endorsement of the UN Declaration has not changed things. While acknowledging that there have been some gains, including treaty settlements giving greater recognition to Māori law (*tikanga Māori*), she remains concerned that much of New Zealand/Aotearoa’s approach to implementation remains state-centric.

Brenda Gunn examined Canada’s first attempt to implement the UN Declaration through legislative action. Despite the failure of Bill C-262, An Act to Implement the UN Declaration on the Rights of Indigenous Peoples, to become law, she noted there are several lessons to be considered for other jurisdictions that are contemplating legislative implementation.

Kirsty Gover discussed the UN Declaration’s article 37 on treaties and treaty making, and some of the attempts in Australia to negotiate treaties between Indigenous peoples and Australian states. She considered how to interpret article 37(2) in light of article 46 (provisos on consistency with the UN Charter, territorial integrity and so forth).

Claire Charters reviewed the various ways the UN Declaration had been used by domestic courts. While she identified some positive examples of implementation through the courts, she expressed concern about the need to ensure that courts are not watering down the substance of the UN Declaration. She also acknowledged the challenge for domestic state courts to fully embrace the UN Declaration, as it leads to the potential questioning of their jurisprudential and institutional legitimacy.

Valmaine Toki discussed *tikanga Māori* as a way to incorporate the rights of the UN Declaration into common law. She examined the Iwi Monitoring Mechanism (IMM), which is an Indigenous mechanism that monitors the implementation of the UN Declaration, arguing that the IMM serves to promote the right of self-determination in the process of implementing the UN Declaration.

Andrew Erueti provided a historical overview of the development of the UN Declaration, the theoretical and political tensions between a human rights model and a decolonization model that underly it, and the approaches of the CANZUS states in shaping, resisting and finally embracing the declaration. He concludes that the UN Declaration is best understood as a mix of both human rights and decolonization models.

Sonia Smallacombe discussed the experiences of implementing the UN Declaration in the Pacific region. In particular, she considered some of the challenges the UN Permanent Forum on Indigenous Issues experienced when organizing a regional workshop in Samoa. At the UNGA, only one Pacific country (Micronesia) voted in favour of the UN Declaration, Samoa abstained, and many countries were out of the room to avoid political pressure from the CANZUS states. The challenges for many Pacific Island states included the use of the term “Indigenous.” There was the view that Indigenous peoples are minorities in states, but that is not the case in many Pacific Island states. There were questions on how successfully global human rights instruments translate to the strong communal cultural rights

that exist in many Pacific Island communities. Smallacombe noted that implementation of the UN Declaration in the Pacific Island states requires careful consideration of the particular political and cultural context and should not include any attempt to force Western human rights norms onto these nations.

Over the course of the daylong workshop, several themes emerged related to the challenges in implementing the UN Declaration. There was acknowledgement of the limitations of working with a document that universalizes Indigenous peoples' rights. The rights need to be reinterpreted or translated for each Indigenous community to ensure there is a cultural match, and that the interpretation meets the needs and understandings of Indigenous peoples at the local level. Domestic implementation, therefore, should be particularized for, and embedded in, the local context.

Participants considered that the unresolved debate about whether the UN Declaration is a human rights or decolonization instrument can best be resolved by Indigenous peoples' understanding it as more organic and not dichotomized, using it for both purposes as needed in particular contexts. It will be important to hold governments to account for approaches to domestic implementation that amount to cherry-picking or rights ritualism.

Another key issue for implementation was the question of who interprets the standards of the UN Declaration. Indigenous peoples have their own understandings of the rights, and many of the rights are specifically grounded in Indigenous peoples' own legal traditions. In many jurisdictions, judges can and are playing a role in interpretation. There are examples where national governments are taking their own approach to interpreting the rights, which may not align with Indigenous peoples' own understandings or international interpretations. There are both risks and opportunities in having domestic courts engage with the UN Declaration and international human rights law. It will be important for Indigenous leaders and scholars to monitor this carefully to ensure that the UN Declaration serves to enhance human dignity and self-determination of Indigenous peoples around the world and does not get distorted or co-opted by courts and legislators to help justify an unjust status quo. Monitoring mechanisms (for example, by Indigenous organizations, domestic human rights commissions, international bodies and so forth) can play a crucial role in ensuring steady progress and course correction when needed in domestic implementation of the UN Declaration.

There was also considerable discussion about the importance of relationship building between state governments and Indigenous peoples in order to promote Indigenous peoples' self-determination in the implementation of the UN Declaration. This idea of relationship building is connected to the broader idea of the need to ensure that the government is working with the appropriate Indigenous representative bodies, a right protected in the UN Declaration itself that is critical to the process of implementation. Because successive strategies of colonial interference have impacted Indigenous peoples' governance systems, careful consideration must also be given to whether the particular implementation discussion is best done at the national, regional, state or provincial, or even local community level. Participants noted that in order to build these relationships between state governments and Indigenous peoples, it will be important to take incremental steps that help to alleviate fear and resistance and build confidence in the project of domestic implementation of the UN Declaration.

At the end of the daylong discussion, the CIGI organizers invited participants to collaborate in producing a third special report on the UN Declaration, with an emphasis on comparative approaches in the CANZUS states. Due to other work pressures that developed after the workshop, the list of contributors shifted slightly, with a few workshop participants unable to submit a final paper and another two new contributors joining for the publication. Patricia Adjei's contribution discusses implementation of the UN Declaration's article 31 dealing with protection of traditional cultural expressions and traditional knowledge. Kristen Carpenter's paper, focusing on religious freedoms and sacred sites, considers how American Indians should take a multi-pronged advocacy strategy, using relevant substantive and

procedural provisions in the UN Declaration, as well as domestic constitutional law, to assert their claims for the protection of their religious freedoms in sacred sites.

In publishing this third and final special report in the series of CIGI special reports on implementing the UN Declaration, CIGI gratefully acknowledges the research partnership with the Office of the Pro Vice-Chancellor Indigenous that nourished the daylong workshop at the UNSW in Sydney and fostered the production of this publication. The first two special reports focused on implementing the UN Declaration in Canada. The braiding metaphor used throughout both reports was helpful to show how implementation of the UN Declaration in Canada requires a new kind of jurisdictional, nation-to-nation negotiation to recognize and reconcile different legal orders: international law, ordinary domestic law, Canadian constitutional law and Indigenous peoples' own laws. The examples of Indigenous peoples' own laws discussed in the first two special reports showed the tremendous potential for developing new awareness, understanding and respect for our relationships with each other and the natural environment by making space for First Nations, Inuit and Métis legal traditions in domestic implementation of the UN Declaration in Canada. This third report takes the conversation beyond Canada to the other CANZUS states and considers how the legal traditions of Aboriginal peoples and Torres Strait Islanders, Pacific Islanders, Māori and Native Americans can be strengthened and revitalized through domestic implementation of the UN Declaration, and examines the particular challenges and opportunities that exist for implementing both the human rights and the decolonization dimensions of the declaration within the CANZUS states.

Some months after the Sydney workshop, those discussions are now reflected in the revised, peer-reviewed and finalized papers in this collection, complemented by the works of Indigenous visual artists. Andrew Erueti's panoramic account of the role of the CANZUS states in the negotiation of the UN Declaration begins the collection, followed by Fleur Te Aho's chapter on the risks of implementation of the UN Declaration turning into rights ritualization and Claire Charters's essay on the dangers of judicial interpretations undermining the UN Declaration's potential. Kristen Carpenter then discusses how to use the UN Declaration in conjunction with domestic constitutional law to build a stronger case for the protection of American Indians' religious freedoms and sacred sites, and Brenda Gunn examines an attempt to create a legislative framework for implementation of the UN Declaration in Canada. Kirsty Gover then discusses the challenges of using the UN Declaration to invigorate treaty negotiations in Australia, and Patricia Adjei examines the importance of the UN Declaration's article 31 in protecting Indigenous cultural heritage, traditional knowledge and traditional cultural expressions. Valmaine Toki completes the special report with her consideration of how Māori law can support implementation of the UN Declaration and further Māori self-government in New Zealand.

It is the co-editors and contributors' hope that these pieces will contribute to increasing understanding among Indigenous, state and subnational government policy makers and law makers, scholars, students, jurists and legal practitioners about the important opportunity provided by domestic implementation of the UN Declaration. This provides a historic opportunity to acknowledge, reconcile, adopt and incorporate in positive ways Indigenous peoples' own laws to reframe, revitalize and reimagine new relationships of law and governance. Further, we hope these pieces demonstrate the lasting and monumental value of the collective efforts of Indigenous peoples from around the world, working sometimes with, but often facing stiff resistance from, national governments, to develop the UN Declaration. Thereby Indigenous peoples put into words for all to embrace the minimum requirements for their recognition and respect at home and in the global community.

About the Authors

Brenda L. Gunn is a CIGI fellow. In this role, Brenda explores comparative approaches and best practices for the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) internationally.

Brenda is also an associate professor in the Robson Hall Faculty of Law at the University of Manitoba, where she teaches constitutional law, international law and advocacy for the rights of Indigenous peoples in international law. Prior to joining the University of Manitoba, Brenda worked at a community legal clinic in Rabinal, Guatemala, on a case of genocide submitted to the Inter-American Commission on Human Rights.

Brenda has also worked with First Nations on Aboriginal and treaty rights issues in Manitoba and provided technical assistance to the UN Expert Mechanism on the Rights of Indigenous Peoples in the analysis and drafting of the report summarizing the responses to a survey on implementing UNDRIP. A proud Métis woman, Brenda is recognized for developing the key handbook in Canada on understanding and implementing UNDRIP.

Brenda has a B.A. from the University of Manitoba and a J.D. from the University of Toronto. She completed her LL.M. in Indigenous peoples' law and policy at the University of Arizona and was called to the Bars of Ontario and Manitoba.

Oonagh E. Fitzgerald was director of international law at CIGI from April 2014 to February 2020. In this role, she established and oversaw CIGI's international law research agenda, which included policy-relevant research on issues of international economic law, environmental law, intellectual property law and innovation, and Indigenous law. She has extensive experience as a senior executive in the federal government, providing legal services and leadership in international law, constitutional law and human rights law. In her last posting before joining CIGI in 2014, Oonagh served as national security coordinator for the Department of Justice.

Oonagh has a B.F.A. (Hons.) from York University (1977). She obtained her LL.B. from Osgoode Hall Law School (1981) and was called to the Bar of Ontario in 1983. She obtained an LL.M. from the University of Ottawa (1990), a doctorate of juridical science (S.J.D.) from the University of Toronto (1994) and an M.B.A. from Queen's University (2007). She has taught various courses at the Faculty of Law (Common Law) and Telfer Business School at the University of Ottawa and at the Department of Law at Carleton University.



The UN Declaration on the Rights of Indigenous Peoples

A Mixed Model of Interpretation



Andrew Eruefi

To date, there has been little discussion about the meta principles underpinning the rights set out in the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration)¹ and their implications for how to interpret and apply the text. The assumption often made is that the UN Declaration is supported by a human rights model. However, this sidesteps the controversies within the declaration negotiations between advocates of different Indigenous rights movements about the aims and aspirations set for the declaration. To simplify, within the international movement, a split emerged between advocates of a human rights model (a Southern movement) and those who sought to advance a self-determination model that reflected Indigenous peoples' historical experience of intensive European colonization and settlement (the Northern movement). The human rights model, ultimately, has prevailed and become the mantra of the movement. But as I argue in this paper, the UN Declaration, in fact, contains a mix of both human rights and self-determination models. While the human rights model is important to Indigenous peoples of the so-called CANZUS states (Canada, Australia, New Zealand and the United States), it detracts from the self-determination model, and it is this model that has the most potential to realize the aspirations of those Indigenous advocates in the CANZUS states seeking fundamental structural reforms.

¹ United Nations Declaration on the Rights of Indigenous Peoples, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

Introduction

This paper discusses the history of the drafting of the UN Declaration and the implications of this for its construction and application to states. The focus of this paper is on the politics of the international Indigenous movement as it intersected with the drafting of the UN Declaration. Often the declaration is said to be based upon classic, universal human rights adapted to Indigenous peoples' particular circumstances. Indigenous rights in the UN Declaration are part of the global family of human rights and, as a result, share their origins in natural law, divine codes or human reason.² In other words, everyone has these rights by virtue of their shared humanity, whether they are Indigenous peoples, minority groups, men, women, children or transgendered people. Others view the UN Declaration as grounded in the particular historical circumstances of Indigenous peoples.³

In his book, *The Sovereignty of Human Rights*, Patrick Macklem argues the purpose of Indigenous rights is to address unfair distributions of sovereign power sanctioned by international law.⁴ International Indigenous rights thus possess normative significance, not because they transcend the contingencies of history and protect universal features of humanity but because of the contingencies of history itself, namely, in the ways international law has organized global politics into a legal order. According to this view, the UN Declaration is a form of corrective justice, providing reparations for historical wrongs.⁵ This account makes perfect sense in the context of specific rights in the declaration, such as the right to historical redress for the loss of land in article 28. However, there are other rights in the declaration that do seem to be simple elaborations of universal human rights.

What is argued in this paper is that neither the human rights account nor the historical account captures what the UN Declaration is about because the declaration is about *both* human rights and history. In this paper, "history" refers to the specific historical experience of Indigenous peoples in the CANZUS states and their advancement in the UN Declaration negotiations of a self-determination model (Macklem is less clear about the focus of his theory geographically, but as argued below, his argument is most compelling when applied to Indigenous peoples in the CANZUS states). This model asserts that Indigenous peoples, like other peoples subjected to colonization, possess the right to self-determination and the right to enjoy their independence as a people. It is this model that has the most potential to realize the aspirations of these Indigenous advocates in the CANZUS states seeking fundamental structural reforms that give effect to the right to self-determination in the declaration.

The human rights model, on the other hand, while important to Indigenous peoples of the CANZUS states, has limited potential to effect the fundamental structural reforms sought by Indigenous peoples of the CANZUS states. A right to free, prior and informed consent (FPIC), for example, has more meaning and import if viewed as grounded in a self-determination model as opposed to a human rights model. If the right to self-determination in the UN Declaration is connected to the right to self-determination in the UN Charter, international covenants and the promise of independence, then this calls for significant rights of self-government.

The next section of the paper sets out how the models emerged in negotiations on the UN Declaration in the context of a struggle between the aims of Indigenous advocates and outlines a mixed model of interpretation for the declaration, which includes both human rights and the self-determination model. The paper concludes with a case study — a Canadian judicial decision on Aboriginal title — to show how the model can be deployed in domestic advocacy. The point should be emphasized, however, that

2 Compare S James Anaya, *Indigenous Peoples in International Law* (Oxford, UK: Oxford University Press, 1996) [Anaya, *Indigenous Peoples*].

3 Patrick Macklem, *The Sovereignty of Human Rights* (Oxford, UK: Oxford University Press, 2015).

4 *Ibid* at 161.

5 Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford, UK: Oxford University Press, 2003).

the self-determination model is not only a method for domestic application. This model can influence the development of the common law and statutory reforms, but it also has a supranational dimension, the parameters of which, so far, have been underexplored.

The Rise of an International Indigenous Movement and the Self-determination Model

When the Working Group on Indigenous Populations was established in 1982, almost all of the Indigenous advocates participating represented Indigenous peoples of the CANZUS states.⁶ North American advocates were most prominent, but, in subsequent years, more Australian and New Zealand advocates began to participate. This was particularly important because it was these advocates who set out the foundational frame of argument that would prove critical in establishing core aspects of the UN Declaration. These advocates emerged from the sovereignty-based movements of their countries. These were the heady days of high-profile protests and occupations, not only by Indigenous peoples but also by many other movements, including the black power, second-wave feminism, and gay and lesbian movements. In New Zealand, Māori leaders and activists marched in 1976 from Te Hapua in the far north of the North Island to the New Zealand capital of Wellington in its extreme south.⁷ The Aboriginal Tent Embassy occupation was established opposite the Australian Parliament in 1972.⁸ In 1969, American Indian student activists occupied Alcatraz for over a year.⁹ These Indigenous movements emerged practically simultaneously across the CANZUS states, and they increasingly provided one another with inspiration and a sense of solidarity. Their ambitions were different to most other movements of the North.¹⁰ Their agenda was political power for Indigenous peoples based on their prior nationhood status, in particular, the restoration of Indigenous historical/political institutions and territory.¹¹

The CANZUS governments responded with law and policy reforms leading to a new phase of Indigenous rights recognition. In the United States, President Richard Nixon's 1977 Self-Determination Policy looked to a "new era in which the Indian future is determined by Indian Acts and Indian decisions."¹² Yet Indigenous activists, in particular the more radical elements, were frustrated at their relatively weak bargaining power and the slow pace of reforms. A perennial problem for Indigenous peoples was the unilateral manner in which reforms were determined. This had been a problem throughout the history of Indigenous/settler-state relations and continued to plague policy making in the new era

6 See e.g. the Working Group on Indigenous Population, *Report of the Working Group on Indigenous Populations on its first session*, UNESCOR, UN Doc E/CN.4/Sub.2/1982/33 (1982); see also the electronic copies of submissions made to the working group compiled by the Indigenous Peoples' Centre for Documentation, Research and Information (DOCIP) in Geneva, online: <<http://docip.org/en>>.

7 See Andrew Sharp, *Justice and the Maori: Maori Claims in New Zealand Political Argument in the 1980s* (New York: Oxford University Press, 1990).

8 See Gary Foley, Andrew Schaap & Edwina Howell, eds, *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State*, 1st ed (New York: Routledge, 2014).

9 For an account of how the occupation started, see Lanada Boyer, "Reflections of Alcatraz" in Susan Lobo & Steve Talbot, *Native American Voices: A Reader*, 2nd ed (Upper Saddle River, NJ: Prentice Hall, 2001) 401 ("We took the island because we wanted the federal government to honour our treaties and its own laws. The previous claim [to the island] had been made back in 1964, so we were the follow up. We also wanted to focus our attention on Indian reservations and communities throughout the nation where our people were living in poverty and suffering great injustice" at 418). Other protests included the Trail of Broken Treaties March to Washington, DC; the seizure of the Bureau of Indian Affairs building; and the two-month siege at Wounded Knee on the Pine Ridge Sioux reservation by American Indian Movement activists.

10 Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (New York: Basic Books, 1987) (noting how the Civil Rights Act of 1964 undermined calls for more radical reforms for the American black community).

11 For example, referring to the Treaty of Waitangi of 1840, Māori activists in New Zealand called for sovereign control over their communities and lands alongside the sovereign power of the state. See Sharp, *supra* note 7.

12 Richard Nixon, "Special Message on Indian Affairs" (8 July 1970) in *Public Papers of the Presidents of the United States: Richard Nixon, 1970* at 564. See also *Alaska Native Claims Settlement Act*, 43 USC 33 (1971), which sought to resolve the long-standing issues surrounding Aboriginal land claims in Alaska. In Australia, state and national land laws were passed, leading to major land returns to Aboriginal peoples, including large areas of the Northern Territory. See Marcia Langton, Odette Mazel & Lisa Palmer, eds, *Settling with Indigenous People: Modern Treaty and Agreement-Making* (Sydney: Federation Press, 2006).

of Indigenous rights recognition. As with other social movements of the time, reform was neither fast enough nor radically transformational.

Northern Indigenous advocates saw promise in the UN system. The US-based International Indian Treaty Council (Treaty Council) was a particularly key player in establishing a space in the international arena.¹³ Lobbying by the Treaty Council and the Canadian-based World Council of Indigenous Peoples, together with support from within the United Nations¹⁴ and sympathetic states,¹⁵ led to the establishment of the Working Group on Indigenous Populations, which was given the task of focusing on “the evolution of standards concerning the rights of indigenous populations.”¹⁶ This was clearly intended to be a human rights project. The working group was located in the human rights division of the United Nations as a subsidiary body beneath the Sub-Commission on the Prevention of Racial Discrimination, which was itself a subsidiary body of the UN Commission on Human Rights.

In this international context, there were several models available to Indigenous peoples, including the human rights and minority rights models. These were the models preferred by states¹⁷ and they reflected what many states had already instituted in their legal systems. However, human rights did not fit well with the core concerns of the emergent international movement. The 1948 Universal Declaration of Human Rights (UDHR), which was drafted by Western states, with an emphasis on individual rights held universally, irrespective of the person’s cultural, religious or political connections, failed to address those matters that were of greatest importance to Northern Indigenous peoples: political sovereignty and territory.¹⁸ The same could be said for the two treaties that gave effect to the UDHR: the International Covenant on Civil and Political Rights (ICCPR),¹⁹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁰

More fundamentally for Indigenous advocates, human rights were closely attached to the construction of, and implied fidelity to, the modern liberal democratic state. As Samuel Moyn notes, these rights established the boundaries of citizenship as a means of solidifying state power.²¹

13 The Treaty Council was formed in June 1974 at the first International Indian Treaty Conference, by the American Indian Movement and traditional leaders of the Sioux Nation. See Roxanne Dunbar-Ortiz, *Indians of the Americas: Human Rights and Self-determination* (London, UK: Zed Books, 1984).

14 See e.g. UN Economic and Social Council (ECOSOC), *Discrimination against Indigenous Populations*, ECOSOC Res 1589(L), UNESCOR, 50th Sess, Supp No 1, UN Doc E/5044 (1971) at 16 (authorizing the sub-commission to conduct a general and complete study into the problem of discrimination against Indigenous populations and to suggest the necessary national and international measures by which to eliminate it).

15 The Nordic states – Norway in particular – lobbied for the establishment of the working group. See Asbjørn Eide, “UN Action on the Rights of Indigenous Populations” in Ruth Thompson, ed, *The Rights of Indigenous Peoples in International Law: Selected Essays on Self-Determination* (Saskatoon, SK: University of Saskatchewan, 1987) 11 at 31.

16 *Study of the Problem of Discrimination against Indigenous Populations*, ECOSOC Res 1982/34, UNESCOR, 28th Plen Mtg, UN Doc E/RES/1982/34 (1982).

17 According to Canada, Australia, New Zealand and the United States (CANZUS), the clear plight of Indigenous peoples suggested that the priority should be the basic human rights set out in the international covenants. See *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 [ICCPR]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 [ICESCR]; see e.g. New Zealand, “New Zealand Statement under Item 5” (31 July–4 August 1989), DOCIP Doc 200284_1 (1989) at 21 [on file with author] (referring to UN Resolution 21/120 and the need to “ensure compatibility with existing human rights instruments”); see also Australia, UN Doc E/CN.4/Sub.2/1983/2/Add.2 (22 July 1983) (“The standards evolved by the group should harmonize with existing human rights enunciated in the relevant international legal instruments” at 2).

18 *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

19 ICCPR, *supra* note 17.

20 ICESCR, *supra* note 17.

21 Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2010), ch 1.

Minority rights were not a good fit either. Minority rights are notoriously weak, in large part because states are concerned about internal minorities seeking greater autonomy and possibly independence,²² hence the reference to only human rights and not minority rights in the UN Charter, the UDHR and the postwar regional human rights instruments.²³ Article 27 of the ICCPR guarantees the right to culture, but it is expressed as a right held by individual members of minorities rather than of the minority as a collective. The International Labour Organization (ILO) Convention no. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (Convention no. 107),²⁴ adopted in 1957, and Convention no. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (Convention no. 169),²⁵ adopted in 1989, broadly provide for a range of civil, political, economic, social and cultural rights for two categories of peoples: Indigenous peoples of the settler states and tribal peoples of Asia, Africa and the Middle East. The latter category comprised culturally distinctive, marginalized communities such as the hill tribal peoples of East, Southeast and Southern Asia. However, Convention no. 107's intention was to ultimately "integrate" Indigenous/tribal peoples by making them more productive workers.²⁶ Convention no. 169 was directed toward the promotion of Indigenous/tribal rights, in keeping with the prevailing views at the time of its adoption in 1989. This convention was underpinned by a minority rights model, not the right to self-determination.²⁷

However, the self-determination model best matched the ideals motivating Indigenous advocates of the North. For several decades following World War II, the UN-directed decolonization project had been the dominant international movement for the freedom of peoples.²⁸ The UN Charter had offered the promise of independence by referring to the "self-determination of peoples."²⁹ However, the founding states of the United Nations, most of them imperial powers, were ambivalent about decolonization and self-determination. Mark Mazower notes: "One can view the Charter and especially its preamble, along with the UDHR and the Genocide Convention, as testifying to the foundational imperatives of the new world order established in the fight against Nazism. Or one can read them as promissory notes that the UN founders never intended to cash."³⁰ Like the League of Nations, the United Nations was a club of Western states concerned about shoring up and maintaining their power.³¹

However, as Mazower notes, a shift occurred due to a battle of ideas about the protection of minorities and to agitation from former colonial nations who were early entries into the UN system. India's then Prime Minister Jawaharlal Nehru led his country's protests over the South African treatment of its Indian population and found a receptive audience, despite the United Nations' formal prohibition on

22 Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford, UK: Oxford University Press, 2007).

23 *Charter of the United Nations*, 26 June 1945, 1 UNTS 15.

24 *Convention no 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, 26 June 1957, 328 UNTS 247 [Convention no 107].

25 *Convention no 169 Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 ILM 1382 [Convention no 169].

26 *Convention no 107*, *supra* note 24, art 2(1): "Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries." For a discussion on the drafting of Convention no. 107, see Luis Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919–1989)* (Oxford, UK: Oxford University Press, 2005).

27 Russel Lawrence Barsh, "Revision of ILO Convention No. 107" (1987) 81:3 *Am J Intl Law* 756; Lee Sweptson, "Indigenous and Tribal Populations: A Return to Centre Stage" (1987) 126 *Int Labour Rev* 447; Sharon Venne, "The New Language of Assimilation: A Brief Analysis of ILO Convention 169" (1990) 2 *Without Prejudice* 53.

28 In fact, Moyn argues that human rights struggled to emerge from the shadow cast by the decolonization movement. The notion of human rights in the sense of supranational standards of protection did not fully emerge until the mid-1970s with the demise of anti-colonialism. See Moyn, *supra* note 21.

29 *Charter of the United Nations*, *supra* note 23, art 1(2) lists as one of the United Nations' purposes: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."

30 Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton, NJ: Princeton University Press, 2009) at 8.

31 *Ibid.*

intervening in internal matters.³² This triggered a major change in direction for the United Nations, from its initial project of protecting imperialism to the active promotion of decolonization. The decolonization project succeeded in making the United Nations an instrument for the emancipation of colonial peoples throughout the world. Self-determination then moved from a principle of international law to a widely accepted legal right. This movement and the process of decolonization radically shifted international politics.³³ While at its inception, in 1945, the United Nations consisted of 51 states (mostly representative of the Americas and Western Europe, and with minimal representation from Asia and Africa), by 1970, there were more than 70 new member states. These additions were almost all newly decolonized nations of Asia and Africa. In 1960 alone, 16 African states joined the United Nations.³⁴

In fact, the decolonization movement was so powerful that the reference to self-determination in the international covenants was largely due to this democratization of the United Nations. When the UN organs debated the covenants in the 1950s, the post-colonial states insisted that they contain the right of peoples to self-determination as the threshold right.³⁵ In this demand, they found support from the Soviet Union and the Communist bloc countries.³⁶ Western states, on the other hand, opposed the inclusion of a right to self-determination, given their colonial interests and concern about control over investment in developing countries.³⁷ Alternatively, if self-determination was to be included, Western states argued that it should not be confined to colonial situations, but should also apply to the peoples of sovereign states oppressed by their own governments.³⁸ Thus, the West sought to define the right of self-determination in terms of their own political tradition of popular sovereignty and representative government, given concerns about human rights violations in post-colonial states.³⁹ The post-colonial states ultimately prevailed. Common article 1 of the ICESCR thus provides: “All 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.”⁴⁰

The post-colonial states also sought recognition for the right to self-determination and its connection with decolonization in a series of UN General Assembly (UNGA) resolutions, including the 1960

³² *Ibid.*

³³ David A Kay, “The Politics of Decolonization: The New Nations and the United Nations Political Process” (1967) 21:4 *International Organization* 786; Thomas D Musgrave, *Self-Determination and National Minorities* (Oxford, UK: Oxford University Press, 2000) at 67–68.

³⁴ The countries were Cameroon, Central African Republic, Chad, Congo (Brazzaville), Congo (Leopoldville), Dahomey, Gabon, Ivory Coast, Malagasy Republic, Mali, Niger, Nigeria, Senegal, Somalia, Togo and Upper Volta.

³⁵ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge, UK: Cambridge University Press, 1998) (“The socialist countries – soon joined, at least at the political level, by an increasing number of freshly independent Third World countries – were the most active advocates of anti-colonial self-determination. They adopted and developed Lenin’s thesis that self-determination should first and foremost be a postulate of anti-colonialism” at 44); Moyn, *supra* note 21 at 97–98.

³⁶ Cassese, *supra* note 35 at 47–52, noting how, in 1950, the Soviet Union proposed a provision regarding self-determination in the international covenants (“the primary concern was the right of self-determination of colonial peoples” at 48); Musgrave, *supra* note 33 at 67–68. Vladimir Lenin had long advocated for the self-determination of colonized peoples, as did subsequent Soviet political leaders. See Cassese, *supra* note 35 at 14–19 (although, as Cassese notes, “the Soviet leader championed self-determination more to further his ideological and political objectives than to safeguard peoples” at 18).

³⁷ Cassese, *supra* note 35 at 49–50 (“By and large, it can be contended that Western countries opposed the provision on self-determination either on account of their colonial interests, or out of fear that the paragraph relating to the free disposition of natural resources imperiled foreign investments and enterprises in developing countries” at 50).

³⁸ *Ibid* at 47–52.

³⁹ *Ibid* at 19–23.

⁴⁰ ICESCR, *supra* note 17.

Declaration on the Granting of Independence to Colonial Countries and Peoples (1960 Declaration).⁴¹ This declaration stressed “the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations.”⁴²

Decolonization was probably the most significant movement of the twentieth century, but it was denied to Indigenous peoples. According to the so-called blue-water or saltwater thesis adopted by the UNGA in 1960, the right to self-determination and decolonization only applied to overseas colonial possessions.⁴³ There had to be blue or salt water between the colonizing country and the colony or at least a geographically discrete set of boundaries. This thesis excluded Indigenous peoples of the Americas and Australasia from decolonization, given they were not ruled from afar but by long-established settler governments. This was the setting in which Indigenous peoples found themselves when they commenced negotiations in the UN working group. Their choices were the three categories of human rights, minority rights or the right to self-determination,⁴⁴ and they aligned themselves with the self-determination line. During the first working group meetings, the Treaty Council and other prominent Northern Indigenous organizations provided the working group with their idealized model declarations. These did not resemble human rights instruments so much as they did declarations of independence. For example, the Treaty Council’s Model Declaration provided:

Article 1. Indigenous populations are subject to an economic and/or political and/or social domination which is alien and colonial or neo-colonial in nature.

Article 2. Indigenous populations are composed of nations and peoples which are collective entities entitled to and requiring self-determination. The Working Group should, therefore, develop a definition of the ultimate goals of self-determination, appropriate to indigenous populations, and procedures for achieving those goals.

Article 3. Indigenous nations and peoples *who so desire* should be granted the full rights and obligations of external self-determination.

Article 4. Indigenous nations and peoples *who wish to limit* themselves to the exercise of internal self-determination only should be granted the freedom to do so. The rights of internal self-determination should include, but not be limited to, the right to:

- (a) control their own economies;
- (b) freely pursue their economic, social and cultural development in conformity with their tradition, custom and social mores;
- (c) engage in foreign relations and trade if they so desire;
- (d) restore, practice and educate their children to their cultures, languages, traditions and way of life;

41 Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514, UNGAOR, 15th Sess, Supp No 16/15, UN Doc A/4684 (1960) [1960 Declaration]. There were, in fact, earlier resolutions aimed at anti-colonialism, for example, *The right of peoples and nations to self-determination*, GA Res 637 (VII), UNGAOR, 7th Sess, UN Doc A/RES/637 (1952), which asked UN members to “recognize and promote the realization of the right to self-determination of the peoples of non-self-governing and trust territories who are under their administration.” Musgrave, *supra* note 33 at 67–68.

42 1960 Declaration, *supra* note 41.

43 Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, GA Res 1541(XV), UNGAOR, 15th Sess, UN Doc A/RES/1541(XV) (1960), Principle IV.

44 Compare Benedict Kingsbury, “Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law” (2002) 52 UTLJ 101.

(e) and the right to the ownership of land as the territorial base for the existence of indigenous populations as such.⁴⁵

Few Indigenous advocates actually sought full independence. Articles 3 and 4 of the Treaty Council's Model Declaration, for example, grant Indigenous peoples the choice of either internal or external self-determination. But it is clear that the option of independence was important to many and that self-determination would provide support for this optional right, should Indigenous peoples and states fail to negotiate their terms of co-existence.⁴⁶ Self-determination thus provided Indigenous peoples with significant leverage in these negotiations. The right to self-determination in the decolonization context was thus adapted and extended to Indigenous peoples, and parallels were drawn between European colonization of African, Asian and Middle Eastern states, and the colonization and intensive settlement of the Indigenous peoples of the North. In support of this self-determination model, Northern Indigenous peoples pointed to treaty making with European states and a long-established practice of recognizing Indigenous peoples as First Peoples with a *sui generis* political/legal status.⁴⁷

Human rights were obviously significant to Indigenous advocates. Indigenous peoples in the North occupied the margins of social and economic life, and few participated meaningfully in mainstream national politics. However, human rights, especially the right to equality, were most important to the extent that they supported the right to self-determination.⁴⁸ Equality meant that all peoples, not just those in blue-water states, should be entitled to self-determination and independence. As noted by Indigenous organization the Four Directions Council: "Looking around the world today, we observe a curious phenomenon. Peoples of every race, with one exception, have been achieving self-determination and decolonization under the auspices of the UN. There are independent States today of every colour, save one. Is this a temporary oversight, or the result of institutionalized discrimination?"⁴⁹

Equality was also used to stave off states' demands that any reference to self-determination in the UN Declaration be conditioned by states' rights to territorial integrity. Indigenous peoples argued in response that common article 1 in the ICCPR and the ICESCR was not subject to territorial integrity.

This self-determination model was influential. When early drafts of the UN Declaration emerged, they contained statements of classic human rights and minority rights, although adapted to Indigenous peoples. But several years into the negotiations, there was a major shift. The 1989 draft contained a reference to historical redress for the dispossession of land and a collective right to autonomy.⁵⁰ Gradually, references to FPIC and self-government were inserted, so that by 1993, the year of the final working group meeting, the UN Declaration consisted of a preamble with 19 paragraphs and 45 articles

45 See Information Received from Non-Governmental Organizations, International Indian Treaty Council, 'Draft Principles for Guiding Deliberations of the Working Group', UN Doc E/CN.4/Sub.2/AC.4/1983/5/Add.2 (1983) [emphasis added].

46 The working group chair, Erica-Irene Daes, referred to this "as a kind of 'belated State-building,' through which indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed and just terms, after many years of isolation and exclusion." See Erica-Irene A Daes, "Some Considerations on the Right of Indigenous Peoples to Self-Determination" (1993) 3 *Transnat'l L & Contemp Probs* 1 at 9.

47 For an account of this practice of Indigenous peoples/states relations, see Kirsty Gover, *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* (Oxford, UK: Oxford University Press, 2010).

48 Human rights were important, but to focus too much on basic human rights or poverty would divert attention from the Indigenous advocates' self-determination model. Human rights in the abstract supported the goals of popular or collective liberation – just as they had with the anti-colonialism movement. See Moyn, *supra* note 21 at 85.

49 See Four Directions Council, "Statement Concerning Racism in the Application of the Principles of Self-determination and Legal Equality of States", DOCIP Doc 200479_2 (9 August 1983) [on file with author]; see also Sharon Venne, submission to Working Group on Indigenous Populations, DOCIP Doc 200479_2 (1984) [on file with author] (urging the Working Group on Indigenous Populations to consider a recommendation to the sub-commission that "[t]he standards and obligations enunciated in the UN Charter on non-self-governing and trust territories, chapter 11, Article 73 must apply to self-determining Indigenous peoples").

50 "First Revised Text of the draft Universal Declaration on the Right of Indigenous Peoples, as presented by the Chairman/Rapporteur Ms. Erica-Irene Daes" in *Report of the Working Group on Indigenous Populations*, UNESCO, UN Doc E/CN.4/Sub.2/1989/36 (1989), Annex II.

and contained the “self-determination framework”; that is, the rights to self-determination, self-government, respect for treaties, FPIC and historical redress.⁵¹ The UN Declaration contained a reference to self-determination in almost identical terms to the rights as expressed in common article 1 of the ICCPR and the ICESCR. Article 3 of the declaration provided: “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.”

There was no reference to territorial integrity. It is the self-determination model that accounts for the self-determination framework in the UN Declaration. As state-like peoples subjected to colonization, equality demanded that Indigenous peoples be entitled to self-determination alongside other peoples. The resulting standards established by the self-determination model set a precedent that would prove to be enormously difficult for states to disassemble.

Emergence of the Human Rights Model of International Indigenous Rights

The UN Declaration negotiated by the first working group was a breakthrough for Indigenous peoples, but states objected to the self-determination framework. The working group sat below the Sub-Commission on the Prevention of Racial Discrimination, which provided it with flexibility and a degree of independence. The working group members were not state delegates but, rather, independent experts chosen from the sub-commission. But when the UN Declaration came before the sub-commission’s parent body, the UN Commission on Human Rights, which consists of state representatives, the commission directed the declaration to a second working group for elaboration.⁵² In this working group, which met from 1995 to 2006, the human rights model began to emerge more fully in the negotiations so that it gradually came to supersede the self-determination model.⁵³ Northern Indigenous peoples resisted this development. However, eventually the human rights model became the prominent model and has effectively become the mantra of the international movement.⁵⁴

Karen Engle has offered a strong critique of this shift.⁵⁵ She attributes it to a decision made by Indigenous advocates to adapt to the realities of working within the UN human rights system. Many Indigenous advocates saw strong claims to self-determination as a “futile attempt to affect international law too dramatically.”⁵⁶ She cites James Anaya as one of the lead proponents of this shift in strategy.⁵⁷ She also notes that the human rights model was the preferred approach of Indigenous advocates of the former Spanish colonies of Latin America, where claims to political sovereignty were neither realistic, given the presence of repressive regimes, nor aligned with the aims of the Latin American movement.⁵⁸ When Latin American Indigenous advocates did participate, their focus, as she shows, tended not to be political independence but, rather, cultural autonomy and basic human rights.

51 “Draft Declaration on the Rights of Indigenous Peoples, as Agreed Upon by Members of the Working Group on Indigenous Populations at its Eleventh Session” in *Report of the Working Group on Indigenous Populations*, UNESCO, UN Doc E/CN.4/Sub.2/1993/29 (1993), Annex 1.

52 *Establishment of a Working Group of the Commission on Human Rights to Elaborate a Draft Declaration*, ESC Res 1995/32, UNESCO, 52nd Sess, Supp No 2, UN Doc E/CN.4/1996/177 (1995).

53 For the classic statement of this human rights model, see Anaya, *Indigenous Peoples*, *supra* note 2.

54 See e.g. Jackie Hartley, Paul Joffe & Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon, SK: Purich, 2010); Claire Charters & Rodolfo Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs [IWGIA], 2009).

55 Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Durham, NC: Duke University Press, 2010).

56 *Ibid* at 2.

57 *Ibid* at 98.

58 *Ibid* at 55–66.

Conceiving Indigenous rights as human and cultural rights, Engle argues, has led to the simplification and reification of Indigenous identities.⁵⁹ This approach has also resulted in the problem of displacement — that is, it has “largely displaced or deferred many of the economic and political issues that initially motivated much indigenous advocacy: issues of economic dependency, structural discrimination, and lack of indigenous autonomy.”⁶⁰ The movement has drifted from its moorings in self-determination toward matters of culture, consultation and land rights. She describes this as the “soft edge” of the claims of Indigenous peoples, resulting in less of a threat to the state, and cites Convention no. 169 as “both representative of and central to the move to protect indigenous rights under a human rights framework, particularly through the right to culture.”⁶¹ All of this jurisprudence, as she notes, is based on human rights and in particular the right to culture.⁶²

Anaya has indeed played a key role in the shift toward a human rights model. All rights in the UN Declaration are “a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples.”⁶³ When he introduced this new approach, Anaya was part of a new school of thought about self-determination and human rights.⁶⁴ But, contrary to Engle’s view, Anaya’s human rights model delivers much more than rights to land and culture. Anaya’s model, in theory, could support the self-determination framework and could lead to significant rights of autonomy for Indigenous groups vis-à-vis the state.⁶⁵ But this is a human rights reading of self-determination, which is different from a self-determination reading.⁶⁶ The self-determination model speaks to a nation-to-nation relationship between Northern Indigenous peoples and CANZUS states, whereas a human rights model applies, and in fundamental ways depends on, existing configurations of state power.⁶⁷ The self-determination model indicates that the right to self-determination in the UN Declaration offered Indigenous peoples the option of independence, should Indigenous peoples and states fail to negotiate their terms of co-existence.

59 See Nancy Fraser and her critique of identities and their emphasis on tradition and displacement of the politics of distribution. Nancy Fraser, *Adding Insult to Injury: Nancy Fraser Debates Her Critics* (London, UK: Verso, 2008).

60 Engle, *supra* note 55 at 3.

61 *Ibid* at 5. Convention no. 169 has indeed become the prominent “go-to” instrument for Indigenous peoples in Latin America. The convention contains basic rights for Indigenous peoples, affirming rights to traditional lands and the right to be consulted on activities that will affect them. See *Convention no 169, supra* note 25. This “soft approach,” Engle argues, is evident also in the decisions of UN and Inter-American human rights treaty bodies. Advocates have largely couched their demands in terms of cultural rights, as treaty bodies have proven increasingly receptive to these arguments. Here, Engle dwells especially on the Inter-American Court of Human Rights, which has upheld Indigenous rights to consultation, land and resources, and FPIC. See Engle, *supra* note 55, ch 4.

62 Engle, *supra* note 55 at 123–32.

63 See S James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UNHCROR, 9th Sess, UN Doc A/HRC/9/9 (2008) at 86.

64 During the early 1990s, leading international law scholars spoke of self-determination, in a human rights sense, in terms of promoting representative government and democratic governance. See Hurst Hannum, “Rethinking Self-Determination” (1993) 34:1 Va J Intl L 1; Thomas M Franck, “The Emerging Right to Democratic Governance” (1992) 86:1 AJIL 46; Robert McCorquodale, “Self-Determination: A Human Rights Approach” (1994) 43 ICLQ 857.

65 Although Engle concedes “indigenous peoples sometimes make relatively strong redistributive claims under the right to culture, or with the claim that particular human rights (like the right to property) protect their culture.” See Engle, *supra* note 55 at 3.

66 See e.g. S James Anaya, “Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend” (2005) 16 Colo J Intl Envtl L & Pol’y 237.

67 For an example of how a human right to self-determination interpretative approach may be reduced to effective participation in democratic life, see “Statement in the Working Group by Colin Milner on Behalf of Australian Delegation”, DOCIP Doc 960255_3, DOCIP Doc 960255_34 (24 July 1992) [on file with author]: “Realization of the right to self-determination is not limited in time to the process of decolonization nor is it accomplished by a single act or exercise. Rather it entails the continuing right of all peoples and individuals within each state to participate fully in the political process by which they are governed. Clearly enhancing popular participation in this decision-making is an important factor in realizing the right to self-determination. It is evident that, even in some countries that are formally fully democratic, structural, attitudinal and procedural barriers exist which inhibit the full democratic effective participation of particular groups.”

It is easy to appreciate the human rights model's appeal as a means of thinking about Indigenous rights. At its heart, it is an appeal to the universal right of equality. Indigenous peoples, as equal and free citizens, ought to be entitled to those rights available to other peoples.⁶⁸ Such a broad justification meant the UN Declaration could encompass both the Northern and the Southern Indigenous movements. Cast as a human rights instrument — or the elaboration of widely ratified human rights — the rights in the declaration would also possess binding qualities, despite its technical status as a non-binding instrument. And the declaration enabled Indigenous peoples to access the extensive international and regional institutional mechanisms available to advance human rights, including the UN human rights supervisory functions and the global network of human rights-based non-governmental organizations. Furthermore, the human rights model could accommodate a reference to territorial integrity, as it assumes Indigenous peoples will continue to be citizens of the modern state.

It is clear, as Engle notes, that many Northern Indigenous peoples shifted from the self-determination model to the human rights model for strategic reasons. But many advocates stayed the course and continued to rely on the self-determination model right up to the point of the UNGA's endorsement of the declaration. However, I argue that the most significant reason for the shift to human rights was the increased participation of Indigenous peoples from the South — and not simply from Latin America, as identified by Engle — but especially the participation of Indigenous peoples of East, Southeastern and Southern Asia and Africa, where there were different agendas more disposed to human rights-based models.

The inclusion of Asian and then African Indigenous peoples in the negotiations on the UN Declaration is largely due to the advocacy efforts of activist anthropologists working with tribal peoples in the South. Survival International, the Anti-Slavery Society and the International Work Group for Indigenous Affairs attended the declaration's negotiations and spoke about the struggle of the Jumma tribal peoples of Bangladesh and the Indian scheduled tribes of India.⁶⁹ These organizations placed particular emphasis on culture and human rights to establish a common cause with Indigenous peoples of the North. This approach was also an effort to defuse anxiety held by Southern states over minority security and stability issues. Asian and African states were particularly concerned with the right to self-determination in the declaration. They argued that their states contained no Indigenous peoples — only minorities — and insisted that the declaration provide a definition of Indigenous peoples that made clear that it only applied to Indigenous peoples of the settler states of Australasia and the Americas. In response, Asian Indigenous advocates held themselves out as “non-threatening” communities of remote mountain and hilltop areas seeking cultural survival in the face of unrelenting Western development and culture (not secession). Asian and African Indigenous peoples could not credibly advance the self-determination model because, unlike Indigenous peoples of the Americas and Australasia, they were not First Peoples subjected to colonization and intensive settlement. They could only benefit from alternatives to the self-determination model. Asian and African Indigenous peoples quickly became active participants in the negotiations on the UN Declaration. Once Asian and African movements gained a foothold in the negotiations, new movements also emerged from the Soviet Union and the Middle East. All of these Southern movements provided arguments and an empirical basis to support the inclusion of basic

68 Anaya, *Indigenous Peoples*, *supra* note 2 at 75–76.

69 Information received from NGOs (*Anti-Slavery Society*) in relation to the Hmong of Thailand, West Papua, Guatemala, CHT, Bangladesh, UNESCO, UN Doc E/CN.4/Sub.2/AC.4/1983/5/Add.1 (1983); “Report by Anti-Slavery Society” (1989) DOCIP Doc 211057_1 [on file with author] (commenting on Chittagong Hill Tracts); “Report by Anti-Slavery Society” (1989) DOCIP Doc 211060_1 [on file with author] (commenting on Burma); *Report of the Secretary-General, Information communicated by Non-Governmental Organizations, Survival International*, UNESCO, UN Doc E/CN.4/Sub.2/AC.4/1984/4 (1984) at 5 (commenting on land rights of “indigenous minority groups” in the Philippines, “tribal minority peoples” in Bangladesh, “Indians” of the Americas, “indigenous peoples” of Guatemala and “Melanesian peoples” of West Papua).

human rights in the declaration.⁷⁰ And, in some respects, their argument was more powerful than the human rights arguments made by Northern Indigenous peoples. Many of the Latin American, Asian and African Indigenous advocates came from countries widely recognized as failed or failing states. The issues raised in the South tended to underscore the urgency for the UNGA to adopt the declaration. Issues of life and liberty, military rule and extra-judicial killings, and the impacts of extractive industries in the South provided a more immediate and, perhaps, compelling motivation than the Northern-based historical-centric arguments. In relation to Asia in particular, the sheer numbers of Indigenous peoples (two million, according to most UN estimates) provided a compelling case for international action. These Southern advocates, through their participation and argument, vested the human rights in the UN Declaration with political legitimacy and authority. Thus, it is clear that Southern Indigenous peoples served an important purpose in generating attention toward the declaration and ensured that it was adopted by the UNGA. They not only provided a human rights argument but they also contributed considerable momentum in the negotiations and lifted the profile of the declaration, thereby advancing the aims of the Northern movement and vesting the overall project with significant authority.

However, this presented real difficulties for the Northern Indigenous peoples because once Asian and African Indigenous peoples began to attend the negotiations on the UN Declaration and identify themselves as Indigenous peoples, Asian and African states would likely oppose strong statements of Indigenous rights in the declaration (which the African Group of States did in the end). This placed pressure on the Northern movement to drop the self-determination model. However, Engle's view that "strong forms of self-determination" were abandoned in favour of the human rights model overstates matters. The self-determination model was, in fact, consistently maintained throughout by the Treaty Council and other prominent Indigenous advocates of the North. They did not want to compromise their core roots in radical sovereign tribal politics. And this persistence from the North had an impact. Changes were made to the UN Declaration, but the final version produced by the second working group still contained the self-determination framework and no reference to territorial integrity. It can be argued that it was the persistence of Northern Indigenous peoples in advancing the self-determination model that resulted in this outcome.

Ultimately, a reference to territorial integrity was added to the UN Declaration, but only at the eleventh hour after strong opposition in the UN Third Committee from the African Group of States. Just before the declaration was to be sent to the UNGA, the African Group, prompted by the Northern states, refused to vote for the declaration in the UNGA unless the self-determination framework was removed. Eventually, the African Group agreed to support the declaration, provided it contained a reference to nothing in the declaration undermining the territorial integrity of any state. This was a great disappointment to Indigenous peoples after more than 20 years of effort to avoid any reference to territorial integrity. However, despite this last-minute insertion of a reference to territorial integrity, the long-standing connection between the self-determination model and the right to self-determination in the declaration remains. Territorial integrity would seem to rule out the option of independence sought by Indigenous peoples.⁷¹ But the declaration's right to self-determination is still imbued with

70 For the Asian Indigenous movement, see RH Barnes, Andrew Gray & Benedict Kingsbury, eds, *Indigenous Peoples of Asia* (Ann Arbor, MI: Association for Asian Studies, 1995); see also Andrew Gray et al, "On Anthropological Advocacy" (1990) 31:4 *Current Anthropology* 387; see also, in relation to Africa, Dorothy L Hodgson, "Becoming Indigenous in Africa" (2009) 52:3 *African Studies Rev* 1; IWGIA & African Commission on Human and Peoples' Rights (ACHPR), *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (Somerset, NJ: Transaction, 2005).

71 Scholars have argued that the 1970 Friendly Relations Declaration should be read as granting a right to independence in cases of gross abuses of human rights. However, it is not clear in international law that this notion of remedial secession constitutes an additional legal category to classic colonialism. See *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (Kosovo Opinion), Advisory Opinion, [2010] ICJ Rep 403 at 436; see also *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, GA Res 2625, UNGAOR, 25th Sess, Supp No 28, UN Doc A/8082 (1970).

strong decolonization overtones and, arguably, this has implications for both domestic application and international remedies.

A Resurgent Self-determination Model

The human rights model may be the dominant means of thinking about the UN Declaration today, but it has its fair share of detractors. In his book *The Sovereignty of Human Rights*, Patrick Macklem expresses his skepticism of the human rights model. More specifically, he is critical of how this broad justificatory model has detracted from the historical-based justifications advanced by Indigenous peoples of the settler states. He is especially critical of the constructivist model that Benedict Kingsbury develops in his article, “Indigenous Peoples’ in International Law: A Constructivist Approach to the Asian Controversy,” whereby the concept of Indigenous peoples (and Indigenous rights) in international law can be seen as being sourced in a variety of justifications — some historical, some contemporary and others functional in nature.⁷² Kingsbury has sought to overcome Asian states’ opposition to local tribal groups self-identifying as such by shifting the emphasis away from, as he puts it, historical continuity with First Peoples (that is, the self-determination model) as the primary normative basis of Indigenous rights. This emphasis, he notes, was due to the dominance of Northern Indigenous peoples during the early years of the negotiations on the UN Declaration. As a result, Kingsbury stresses the commonalities between Northern Indigenous peoples and Asian tribal peoples in terms of “functional matters such as dispossession of land, cultural dislocation, environmental despoliation and experiences with large development projects.”⁷³ These, he argued, should be the “essential” justifications for Indigenous rights: self-identification as a distinct ethnic group; historical experience of, or contingent vulnerability to, severe disruption, dislocation or exploitation; long connection with the region; and the wish to retain a distinct identity;⁷⁴ in contrast, historical continuity should only be viewed as a “strong” justification. Thus, historical continuity (and its connection to decolonization) was moved to the background.

However, such a broad range of justifications for Indigenous rights makes it easy for all types of cultural communities to self-identify as Indigenous. As Macklem notes, “Kingsbury’s approach, unless supplemented by an explanation of the normative significance of international indigenous rights, risks conflating different forms of international legal protection into an undifferentiated concern about the disruption or exploitation of diverse communities of value. Numerical minorities, cultural minorities, national minorities, religious communities, linguistic communities, impoverished majorities — are we all indigenous peoples now?”⁷⁵

Pointing to Kingsbury’s essential attributes of self-identification, experience of severe disruption and so on, Macklem questions why these factors ought to merit international legal protection in the form of Indigenous rights as opposed to more generic human rights, such as minority rights and rights to cultural protection, as well as those that protect civil, political, social and economic interests.⁷⁶ Macklem’s point seems to be that the self-determination framework must be based on something more distinctive than a history of displacement.

Macklem approaches the problem of recognition of Indigenous peoples by considering the distinction made between legal and political recognition of states in international law. He draws on international lawyer Hans Kelsen’s observation that there can be political recognition in the form of actions such

72 Benedict Kingsbury, “Indigenous Peoples’ in International Law: A Constructivist Approach to the Asian Controversy” (1998) 92:3 AJIL 414.

73 *Ibid* at 457.

74 *Ibid* at 455.

75 Macklem, *supra* note 3 at 160.

76 *Ibid*.

as the establishment of diplomatic relations.⁷⁷ But, for recognition to be legal, states must meet the criteria prescribed by international law itself.⁷⁸ Likewise, Macklem notes, a political movement may self-identify as an Indigenous group, but it must meet certain criteria determined by international law in order to possess the legal status of Indigenous peoples and thereby access Indigenous rights under international law.⁷⁹

According to Macklem, these criteria for legal recognition derive from the nature and purpose of Indigenous rights.⁸⁰ Macklem gleans this purpose from his review of the legal history of international Indigenous rights during the twentieth century (that is, the protection of “Indigenous workers” in the colonies by the ILO in the 1920s, to the promulgation of ILO Convention no. 107 and no. 169, and up to its most contemporary expression in the UN Declaration).⁸¹ The object of these protections, according to Macklem, is to address the wrongs established by international law, in particular, Indigenous peoples’ “historic exclusion from the distribution of sovereignty initiated by colonization that lies at the heart of the international legal order.”⁸² Given this purpose, Macklem argues that Indigenous peoples in international law “are communities that manifest historical continuity with societies that occupied and governed territories prior to European contact and colonization. They are located in States whose claims of sovereign power possess legal validity because of international law’s refusal to recognize these peoples and their ancestors as sovereign actors. What constitutes indigenous peoples as international legal actors, in other words, is the structure and operation of international law itself.”⁸³

Of course, this description of Indigenous peoples by Macklem describes the historical experience of Indigenous peoples of the settler states. This can be compared with the purpose of minority rights of religious and cultural groups, which, Macklem argues, “challenge the limits of sovereign power more than its sources.”⁸⁴ The assumption is that Indigenous peoples merit greater legal protections and remedies due to the greater injustice visited upon them by international law. In the case of national minorities, for instance, international law may have created them through redistributions of sovereignty (leaving Hungarian minorities in Romania after the Great War, for example). But, for Indigenous peoples, international law sanctioned the complete displacement of Indigenous peoples and the installation of a new sovereign with absolute power over Indigenous peoples, followed by intensive settlement and the ongoing marginalization of Indigenous peoples (as in the case of Australia, for example).⁸⁵

However, the purpose of international Indigenous rights is not as clear as Macklem suggests. The targeted category of Indigenous peoples, as well as the aims of international legal standards and their underlying justifications, has always shifted. The ILO protections for Indigenous workers of the 1920s were aimed at forced labour and workers’ conditions for colonial populations.⁸⁶ Convention no. 107 and no. 169 were aimed at both Indigenous peoples and “tribal peoples” — the former being Indigenous

⁷⁷ *Ibid* at 133.

⁷⁸ *Ibid* at 133–34.

⁷⁹ *Ibid* at 156–62.

⁸⁰ *Ibid* at 135.

⁸¹ *Ibid* at 141–56.

⁸² *Ibid* at 162.

⁸³ *Ibid* at 135.

⁸⁴ *Ibid* at 130.

⁸⁵ Although Macklem seems to accept that national minorities may share similarities with Indigenous peoples in terms of the type of injustice caused by and remedy required under international law. This is consistent with his central argument about the object of international human rights law. See *ibid*, ch 5.

⁸⁶ Rodríguez-Piñero, *supra* note 26 (noting the definition of Indigenous workers in the Forced Labour Convention “applied, first and foremost, to ‘indigenous populations’ of...dependent territories”; in other words, to the “populations living under a legal status of dependency in conditions of formal colonialism” at 4).

peoples of the settler states and the latter being tribal peoples of Asia, Africa and the Middle East.⁸⁷ And the intention of Convention no. 107 was to integrate Indigenous peoples not only for their own good but also for the good of the nation.⁸⁸ In the 1950s, when Convention no. 107 was enacted, this aim was considered benevolent, but it would be a stretch to describe this convention's purpose as remedying the historical denial of sovereignty. Convention no. 169 shifted the focus from integration toward the promotion of Indigenous rights, but rejected calls by Northern Indigenous peoples to incorporate a reference to self-determination and directed its attention toward basic human rights and cultural autonomy. Again, Indigenous peoples were defined separately from tribal peoples, but little turned on this — the convention was directed at fundamental human rights for both categories of people. There is no reparative element to either convention; they are both prospective in outlook.

As shown above, the UN Declaration itself — and this is the most significant international development — was initially directed at the anti-colonialist claims of Northern Indigenous peoples, but it also came to be directed at the human rights concerns of Southern Indigenous peoples, given their participation in the declaration's negotiations and their human rights agenda. This indicates that the declaration is serving two purposes, not one. Macklem's reading of the nature and purpose of international Indigenous rights comes close to the self-determination model. However, Macklem's model seems to be directed at Indigenous peoples of the settler states (that is, all those states settled and colonized by European powers: the North and Central and South America), whereas the self-determination model applies only to the North. Indeed, Macklem's argument has greater force and resonance in the context of Northern Indigenous peoples' experience of treaty making and treaty breaking and international law's refusal to recognize their sovereign status.

Implicit in Macklem's argument is the idea that Indigenous peoples were akin to nations and candidates for sovereignty, but that international law, after a period of recognition of their nationhood for purely political, self-serving motives, refused to recognize them as sovereign legal actors. Once the colonizing power had the upper hand, international law doctrines of "*terra nullius*" and "discovery" were deployed under international law to deny their sovereign status. This nation-to-nation historical experience is difficult to find outside of the North. Indigenous peoples of Latin America would struggle to meet this notion, as would Indigenous peoples in Indonesia, Nepal, the Philippines and Thailand.⁸⁹ Moreover, Indigenous peoples in Asia and Africa live in states that have enjoyed decolonization. In other words, they have been provided with a remedy, although it is the state as a whole that has benefited.

This suggests that the self-determination framework in the UN Declaration has a narrower focus than Macklem indicates. It is not directed at settler states but, rather, at the North and is based on a nation-to-nation historical relationship. This sharper focus enables a clearer distinction to be made between Indigenous rights and minority rights than that offered by Macklem. It also directs greater attention to the close connection between the self-determination model and the self-determination framework set out in the declaration. Will Kymlicka also advocates an approach that sees Indigenous rights as being directed at the settler states.⁹⁰ He is critical of the move by minorities to reinvent themselves as Indigenous peoples. The reasons are clearly due to the weak nature of minority rights: "If they come to the international community under the heading of national minority, they get nothing other than generic Article 27 [minority] rights; if they come instead as 'indigenous peoples', they have the promise

⁸⁷ *Ibid.*

⁸⁸ Convention no. 107, *supra* note 24, Preamble.

⁸⁹ Macklem does not see his argument as necessarily precluding international law from recognizing Indigenous peoples in Africa or Asia. However, he is aware of the extension of the international Indigenous movement to the South (and how Kingsbury has justified this), and his argument seems to be aimed at redirecting attention once more on the Indigenous peoples of CANZUS and Latin America. Macklem, *Sovereignty*, *supra* note 3.

⁹⁰ Kymlicka, *supra* note 22.

of rights to land, control over natural resources, political self-government, language rights and legal pluralism.”⁹¹

For Kymlicka, these minorities (including Asian and African Indigenous peoples) are politically opportunistic: self-identifying as Indigenous peoples for not only stronger standards of protection than minority rights but also to gain greater publicity and access to international funding and support. Kymlicka’s argument is that there ought to be different standards for different types of peoples. For Indigenous peoples, there are standards in the UN Declaration that promote self-government and territorial rights based on the self-determination model. Kymlicka believes this is the purpose of the declaration. These standards are differentiated from those that could be established for “immigrant groups, or for other types of groups with unique histories and needs, such as Roma and Afro-Latinos.”⁹²

The aim of both Macklem’s and Kymlicka’s approaches, then, is to counter the obfuscation caused by Kingsbury’s constructivist model, developed in the context of the Asian controversy, by providing greater clarity about the normative basis of Indigenous rights in the UN Declaration. Macklem and Kymlicka are aware that the normative argument does not match the legal right, and that Indigenous peoples of Asia and Africa have self-identified as Indigenous to access the rights in the declaration. They seek to remedy this by redirecting attention to the historical experience of the settler states. However, as argued in the next section, the UN Declaration is not directed at the settler states only, and there is no need to establish different normative texts to meet the needs of different categories of people. Rather, as argued below, the declaration is a global initiative, and different aspects of the declaration can serve different types of peoples.

A New Mixed-model Interpretative Approach to the UN Declaration

Whereas the Northern Indigenous movement initiated the UN-based activity that led to the adoption of the UN Declaration, it was the project’s extension to the Southern movement — the declaration’s globalization — that provided it with significant momentum. While Engle emphasizes the great material cost of globalization for the North, and Macklem and Kymlicka focus on the normative dissipation of the *raison d’être* of Indigenous rights, all three argue against a focus on human rights and thus, necessarily, exclude the Southern movement.

However, there is an alternative account of the UN Declaration that both reflects and respects the contribution of both Southern and Northern Indigenous peoples. On this account, the political history of the declaration led it to carry two normative strands. It is proposed that the declaration be read as containing two normative themes for different categories of peoples. On the one hand, the declaration can be read as an instrument for Northern Indigenous peoples in that it contains not only human rights but also the self-determination framework that is supported by their self-determination model. On the other hand, the declaration can be read as a human rights instrument for Southern Indigenous peoples.

The benefit of this model is that it is not a zero-sum game for the Northern and Southern movements. It enables both the Northern and the Southern Indigenous movements to gain the rights they seek from the UN Declaration. This interpretation of the declaration enables Indigenous peoples of Africa and Asia (as well as Latin America) to access the rights in the declaration that mean the most to them and are grounded in their particular experience. These include the rights to practise and revitalize their cultural traditions and customs (article 11); the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies (article 12); and the right to determine and develop priorities and strategies for exercising their right to development (article 23). But there are many more —

⁹¹ *Ibid* at 168.

⁹² *Ibid* at 169.

indeed, almost all of the 46 articles in the declaration are directed at Southern Indigenous peoples. This interpretation could conceivably include self-determination itself, although in the sense of promoting the right to effective participation in public life and local autonomy.

However, the self-determination framework — the right to self-determination, self-government, historical redress, treaty rights and FPIC — has resulted from the self-determination model. Indigenous peoples are First Peoples, prior to the current state, and entitled to recognition of their inherent sovereign status. For Indigenous peoples of the CANZUS states, this interpretative approach highlights the normative power of the self-determination model and demonstrates that the self-determination framework is in the UN Declaration to address their specific circumstances. Northern Indigenous peoples, of course, would claim the basic human rights outlined in the declaration. These are important to them, even though their first priority was self-determination. There is no bright line between the two models; they overlap and intersect at their margins while speaking at their core about different ideals. As Roland Burke notes in relation to the decolonization movement, human rights were more than simply a means to the end of decolonization and independence for colonies (at least until the 1960s, when more colonies began to acquire independence).⁹³ For the colonies, at least initially, self-determination was a means to enjoy human rights and democracy after decades of oppressive colonial rule. Similarly, with the Indigenous peoples' right to self-determination, Indigenous peoples of the CANZUS states saw human rights as more than simply a tool to achieve greater autonomy. Human rights provided a means to shed generations of stereotyping, discrimination, and exclusion from public and private institutions. Human rights spoke to their right to be free and equal, self-determining peoples.⁹⁴ However, Indigenous peoples were wary of the CANZUS states' insistence that the UN Declaration *only* contain human rights or existing human rights adapted to Indigenous peoples' circumstances, because this meant there could be no new rights that were collective in nature and directed at their right to govern themselves.

The Northern and the Southern movements both benefit from this mixed model. The mixed model can substantially benefit the Southern movements, in particular the Asian and African movements, by assuaging Asian and African states' concerns with the category of Indigenous peoples and the self-determination framework. This model would also emphasize the political legitimacy that these rights have for Southern Indigenous peoples. In the North, the self-determination model can be applied to counter the trend among states to interpret the declaration as a human rights model.

It is hoped that revealing the role of the self-determination model in the political history of the UN Declaration negotiations will encourage Indigenous advocates to reassert the self-determination model so as to counteract the effects of the dominant human rights model. The challenge of this mixed-model approach is to prevent the self-determination model from being absorbed by the human rights model through the practices of interpretation. And that challenge can be met, if Northern Indigenous advocates recognize the relevance and normative significance of the self-determination model and apply it in their Indigenous rights advocacy (which has generally not been the case to date).

Application of the Mixed Model to CANZUS States

In the CANZUS states, Indigenous rights reforms have drawn most of their succor from domestic treaty and common law developments instead of from classic human rights. However, the resulting reforms over the past 40 years, in effect, correlate with those proposed by this model. That is, most prominent

⁹³ Roland Burke, *Decolonization and the Evolution of International Human Rights* (Philadelphia: University of Pennsylvania Press, 2010) (noting the emphasis placed on human rights by colonized peoples during the initial stages of the UN decolonization process).

⁹⁴ Moana Jackson, "A personal reflection on the drafting of the United Nations Declaration on the Rights of Indigenous Peoples" in Selwyn Katene & Rawiri Taonui, *Conversations About Indigenous Rights: The UN Declaration on the Rights of Indigenous People in Aotearoa New Zealand* (Auckland: Massey University Press, 2018).

reforms have included processes on consultation and recognition of culture, existing land rights⁹⁵ and economic development. The focus, then, is on recognition of present issues and needs. There are few instances of policies and laws aimed at rectification for loss of sovereignty and territory, and few instances of recognition of self-government rights and political autonomy for Indigenous peoples.

This deficit in the reforms is most clearly evident when one compares the self-determination framework in the UN Declaration to current domestic law and policy. And, of course, it was precisely this deficit that compelled Indigenous leaders of the CANZUS states to take their claims to the United Nations in the first place. It is this mismatch that accounts for the initial vote against the declaration in the UNGA and ongoing resistance to the declaration by the CANZUS states. The overriding concern for the CANZUS states is the power of the self-determination framework and the self-determination model. At various stages of the 20-plus years of declaration negotiations, the CANZUS states sought to limit the reference to self-determination by either seeking a reference to territorial integrity, reading it as giving effect to the right of effective participation/self-management or having it removed altogether from the text. By continuing to characterize the self-determination framework as “aspirational” in nature, the CANZUS states are seeking to disconnect these rights from their normative origins in human rights, but especially from the self-determination model.

It is the prospect of meaningful autonomy and territorial rights, and the use of international law to advance these rights, that most concerns CANZUS states. Ultimately, this prospect calls for a domestic process of rectification. None of these countries has made sufficiently robust steps to restore self-government and return territory. To use just one well-known example, the Canadian government has committed to recognizing Aboriginal peoples’ self-government through “self-government agreements.” Recognition of the inherent right of Aboriginal peoples to self-government has been official government policy since 1995.⁹⁶ The self-government policy could be viewed as reparative in nature — the reference to self-government as an inherent right indicates that it predates Canadian sovereignty and has its source in Aboriginal law. But the policy says little about the need to recognize self-government in order to address past injustices. Rather, the emphasis lies more with the benefits of control over their lives and economic benefits. Moreover, practically all self-government agreements form part of comprehensive land claim agreements.⁹⁷ In other words, the self-government rights are more readily realized in those cases where Aboriginal land rights continue to exist. The vast majority of Indian communities, however, exercise self-government under the Indian Act, which offers very limited powers.

In sum, CANZUS states are concerned about the large gap between what Northern Indigenous peoples are entitled to under international law (the self-determination framework based on the self-determination model) and what they have obtained through four decades of state reforms (the human rights model and its correlates).

The self-determination model can provide the normative basis for these reforms. Bringing the UN Declaration “back home” to the CANZUS states provides the means to revisit the motivations and arguments that initiated the international movement. Domestically, the self-determination model applies in two ways. First, at a meta-level, it requires fundamental reform: states must engage with Indigenous peoples about their terms of co-existence, that is, the constitutional recognition of Indigenous rights, self-government, the protection of Indigenous rights from human rights challenges

95 In Canada, New Zealand and Australia, Aboriginal rights to property may be recognized by the courts if they are proven to be existing rights exercised on a regular basis since the assertion of European sovereignty. See PG McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford, UK: Oxford University Press, 2011).

96 Crown-Indigenous Relations and Northern Affairs Canada, “The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government” (1995), online: <www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136#PartIII>.

97 See Government of Canada, *Implementation of Modern Treaties and Self-Government Agreements* (2019), online: <www.rcaanc-cirnac.gc.ca/eng/1573225148041/1573225175098#chp1>.

and/or models of reconciliation of Indigenous and human rights. Second, before this process is complete, the self-determination model imbues the right to self-determination with normative weight for the purpose of smaller-scale reforms, for example, in domestic litigation about the content of Indigenous rights. This is the focus of the case study below.

Case Study: Proving Aboriginal Title in Canada

In Canada, the Supreme Court has long recognized Aboriginal rights to engage in specific activities such as hunting and fishing,⁹⁸ but did not recognize Aboriginal title to exclusive use and occupation of land until the decision of *Tsilhqot'in Nation v British Columbia*.⁹⁹ The rules for recognition of Aboriginal title were originally set out in the Supreme Court decision of *Delgamuukw v British Columbia*.¹⁰⁰ This decision recognized the possibility of Aboriginal title. However, due to errors of fact made by the trial judge, the Supreme Court did not make an Aboriginal title declaration, but referred the case back to trial where, ultimately, the claimants settled their claims by negotiating the Nisga'a Treaty.¹⁰¹ The Supreme Court in *Delgamuukw* saw Aboriginal title as arising out of Aboriginal peoples' *exclusive occupation* of the land prior to the assertion of sovereignty. According to Chief Justice Antonio Lamer, Aboriginal title is aimed at "the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory."¹⁰² The Supreme Court made no mention of *prior Aboriginal sovereignty* and how this might provide an independent justificatory basis for Aboriginal title.

The question of what factual circumstances amount to exclusive occupation, however, has been highly contentious. On the one hand, in *Delgamuukw*, the state had argued that the standard of occupation must be that set by the common law, which implied the need for evidence of regular and intensive use of the lands.¹⁰³ On the other hand, the Aboriginal claimants argued Aboriginal title must be established with reference to Aboriginal patterns of land holdings.¹⁰⁴ The motivation for this argument was that Aboriginal land tenure systems at sovereignty did not always strictly conform to the types of occupation and use that would ordinarily qualify as occupation under the common law. In response, Chief Justice Lamer decided that both common law and Aboriginal "perspectives" (i.e., Aboriginal law or systems of law) must be taken into account when determining occupation and exclusivity.¹⁰⁵ As a result, through this "dual approach," Aboriginal law is used to avoid ethnocentric application of the common law.

Proving Aboriginal title has been particularly controversial in relation to Aboriginal peoples who were hunter-gatherer peoples at sovereignty. The *R v Marshall; R v Bernard*¹⁰⁶ decision, decided shortly after *Delgamuukw*, concerned two separate appeals from criminal convictions for the logging of timber on state lands without authorization in the adjacent provinces of Nova Scotia and New Brunswick. In each case, the defendants were Mi'kmaq who claimed a logging right on the specific tracts of lands for commercial purposes pursuant to Aboriginal title. In the *Marshall* case, the trial evidence showed that, at sovereignty, the Mi'kmaq were "moderately nomadic" peoples who did not have permanent

98 *R v Van der Peet*, [1996] 2 SCR 507.

99 *Tsilhqot'in Nation v British Columbia*, [2014] SCC 44, 2 SCR 257 [*Tsilhqot'in*].

100 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*].

101 *Nisga'a Final Agreement Act*, SBC 1999, c 2; see also *Tsawwassen First Nation Final Agreement Act*, SC 2008, c 32; see also *Maanulth First Nations Final Agreement Act*, SC 2009, c 18.

102 *Delgamuukw*, *supra* note 100 at para 81.

103 *Ibid* at paras 146–47.

104 *Ibid*.

105 *Ibid* at 147–48. The Aboriginal perspective could be gleaned in part, but not exclusively, from Aboriginal systems of law (including a land tenure system or laws governing land use).

106 *R v Marshall; R v Bernard*, [2005] 2 SCR 220 [*Marshall; Bernard*].

settlements and “moved with the seasons and circumstances to follow their resources.”¹⁰⁷ Nonetheless, the trial judge found that the Mi’kmaq were familiar with their territory and considered all of Nova Scotia to be their territory. In the *Bernard* case, the trial evidence disclosed a similar nomadic existence and connection with territory for Mi’kmaq residing within New Brunswick. The central issues were whether the Mi’kmaq had satisfied the *Delgamuukw* tests of exclusive occupation. The trial courts in each case concluded that exclusive occupation required proof of intensive, regular use of the *specific cutting sites* and that this had not been established in evidence. This has been described by commentators as a “postage stamp” approach to proof of Aboriginal title.¹⁰⁸

On appeal, the Nova Scotia and the New Brunswick courts of appeal both ruled that these standards were too strict and that there was no need for the appellants to prove regular use of the cutting sites to establish Aboriginal title. The courts applied what has been described as a “territorial approach” to proof of Aboriginal title. In *Marshall*, Appellate Court Justice Thomas Cromwell noted: “The question...is not whether exclusive occupation of the cutting sites was established, but whether exclusive occupation of a reasonably defined territory which includes the cutting sites, was established. Insistence on proof of acts of occupation of the specific cutting sites within that territory is, in my opinion, not consistent with either the common law or the aboriginal perspective on occupation.”¹⁰⁹

The Appellate Court in *Bernard* similarly regarded the Aboriginal title claim of the Mi’kmaq as a claim to territory rather than as a claim to specific sites. It was only necessary to show that the Mi’kmaq had occupied an area near the cutting site, since “[t]his proximity permitted the inference that the cutting site would have been within the range of seasonal use and occupation by the Mi’kmaq.”¹¹⁰

On appeal, in *Marshall; Bernard*, the Supreme Court said there was no evidence to support a finding of Aboriginal title. According to Chief Justice Beverley McLachlin, the “Court’s task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right.”¹¹¹ If the claim related to Aboriginal title — conferring a right to exclusive use and occupation of land — then it was essential that the pre-sovereignty practice demonstrate some correlation with that right.¹¹² This did not require “absolute congruity,” provided “the practices engage the core idea of the modern right.”¹¹³ The Aboriginal perspective, according to Chief Justice McLachlin, would assist the court in its assessment of the true nature of the pre-sovereignty right or practice. In relation to exclusivity, Chief Justice McLachlin did not expressly refer to Aboriginal perspectives and law. She said there was no need to produce evidence of overt acts of exclusion, but that there was a need to show “effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so.”¹¹⁴ Based on these propositions, Chief Justice McLachlin concluded that both trial decisions had correctly ruled that “[i]n each case, they required proof of sufficiently regular and exclusive use of the cutting sites by Mi’kmaq people at the time of assertion of sovereignty.”¹¹⁵

¹⁰⁷ *Ibid* at para 86.

¹⁰⁸ Kent McNeil, “Aboriginal Title and the Supreme Court: What’s Happening?” (2006) 69:2 Sask L Rev 281.

¹⁰⁹ *R v Marshall*, [2003] NSCA 105 at para 183.

¹¹⁰ *R v Bernard*, [2003] NBCA 55 at para 127.

¹¹¹ *Marshall; Bernard*, *supra* note 106 at para 48; see also Paul Chartrand, “R. V. Marshall, R. V. Bernard: The Return of the Native” (2006) 55 UNBLJ 135.

¹¹² *Marshall; Bernard*, *supra* note 106 at para 95.

¹¹³ *Ibid* at para 96.

¹¹⁴ *Ibid* at para 65.

¹¹⁵ *Ibid* at para 72.

Chief Justice McLachlin's reasoning was heavily criticized for its approach to proof.¹¹⁶ According to Kent McNeil, instead of adopting the "dual approach" toward determining occupation, the chief justice focused on the common law approach to occupation, ignoring the Aboriginal perspective based on Aboriginal law: "[F]or Aboriginal title to be established, it appears to be McLachlin C.J.'s view that Aboriginal practices in relation to land have to amount to the kind of exclusive occupation that would ground title at common law. While she stressed the importance of Aboriginal perspectives in evaluating Aboriginal practices, the Chief Justice did not explicitly consider Aboriginal law in her analysis."¹¹⁷

As a result, Chief Justice McLachlin adopted the postage stamp approach of the trial court judge; exclusive occupation required proof of intensive, regular use of the cutting sites and this had not been established in evidence.

The issue came before Chief Justice McLachlin again in the decision of *Tsilhqot'in*,¹¹⁸ which involved a claim brought by the Tsilhqot'in Nation, a semi-nomadic group of six bands in Northern British Columbia, to Aboriginal title of a 1,550 km² section of their traditional territory. Legal counsel for British Columbia had argued — citing McNeil's criticisms — that the Supreme Court in *Marshall*; *Bernard* had rejected a territorial approach to title and applied a postage stamp approach that was inconsistent with the dual approach in *Delgamuukw*. In *Tsilhqot'in*, Chief Justice McLachlin stressed that she had always applied a dual perspective to the question of occupation and exclusivity. As she noted: "In fact, this Court in *Marshall*; *Bernard* did not reject a territorial approach, but held only...that there must be 'proof of sufficiently regular and exclusive use' of the land in question, a requirement established in *Delgamuukw*."¹¹⁹ In her view, the Tsilhqot'in Nation had established evidence of "sufficiently regular and exclusive use" of the land in question and was entitled to a declaration of Aboriginal title.¹²⁰

What are the implications of the self-determination model for this case? The self-determination model would, first of all, highlight how the law of Aboriginal title downplays Aboriginal sovereignty. Aboriginal title is not based on Aboriginal law and sovereignty but on prior *occupation*. Aboriginal law is adopted as a tool to ensure that the common law tests of occupation are modified to accommodate different perspectives. It would also draw attention to the fact that Aboriginal title is not just a proprietary right; it contains jurisdictional elements. Some law-making function is needed to determine how rights are regulated in relation to Aboriginal title, and the obvious answer is Aboriginal law.¹²¹ Indeed, the self-determination model would also emphasize that Aboriginal sovereignty — not just Aboriginal law relating to administration of land — continued post-assertion of Crown sovereignty over Canada, absent any extinguishment or treaty. This would provide greater support for the territorial approach than the notion of the continued existence of Aboriginal law relating to land only. In addition, the self-determination model would indicate *another* basis for asserting territorial rights, based on Aboriginal laws and the doctrine of continuity rather than common law Aboriginal title.¹²²

116 McNeil, *supra* note 108.

117 *Ibid* at 298.

118 *Tsilhqot'in*, *supra* note 99.

119 *Ibid* at para 43.

120 *Ibid* at para 66.

121 McNeil, *supra* note 108 ("Unlike fee simple lands, Aboriginal title lands are vested in communities that have laws pre-dating Crown sovereignty. Such communities have the legal personality necessary for them to have real property rights that are defined and protected externally by the common law, but that are governed internally by continuing Aboriginal law" at 293).

122 For argument based on this alternative basis to Aboriginal title, see Mark D Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and under the Constitution Act, 1982" (1999) 44:3 McGill LJ 711; see also Gordon Christie, "Who Makes Decisions over Aboriginal Title Lands?" (2015) 48:3 UBC L Rev 743; John Borrows, "Aboriginal Title in *Tsilhqot'in* v British Columbia [2014] SCC 44" (2014) Māori L Rev, online: <<https://maorilawreview.co.nz/2014/08/aboriginal-title-in-tsilhqot-in-v-british-columbia-2014-scc-44/>>.

At the same time, apart from highlighting these shortcomings relating to the proof of Aboriginal title in Canada, the self-determination model has much potential for thinking about the future implications of the Supreme Court's decision in *Tsilhqot'in* in terms of self-determination. As noted above, the judicial recognition of Aboriginal title indicates that there must be a body of law to regulate the use and interests held under the title. The self-determination model indicates that this law has to be Aboriginal law. Aboriginal title thus provides space for the development of Aboriginal law-making institutions.

Legal counsel for the *Tsilhqot'in* did not rely on international human rights law, let alone the UN Declaration and the self-determination framework. However, interveners in the litigation did. Amnesty International argued the court's reasoning on Aboriginal title had to be consistent with international human rights law, in particular the declaration. The Amnesty International submission cited the right to self-determination in the declaration, although it clearly applied a human rights model. Citing Anaya, the UN Declaration is said to be "grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity."¹²³ The only other reference by interveners to self-determination in the declaration was offered by the Assembly of First Nations. This alone called for consideration of Aboriginal title in the context of the self-determination model:

The promise of the law of Aboriginal title is the recognition of First Nations, both at the time of the assertion of sovereignty and in the present, as legal, political and cultural nations with a right to self-determination. These indigenous legal orders occupied, used and treated the land as their own. The modern conception of Aboriginal title must not be diluted by concerns about the impact today of recognizing the historical realities of First Nations and their interactions with the Crown. There are many and varied ways that reconciliation can be accomplished. But it must start with recognition and respect for the rights of First Nations as distinct and sovereign peoples who occupied their land and territories, in accordance with their own laws.¹²⁴

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¹²³ *Tsilhqot'in Nation v British Columbia*, [2014] SCC 44 (Factum of the Interveners Amnesty International and Canadian Friends Service Committee) at para 12, online: <www.scc-csc.ca/WebDocuments/DocumentsWeb/34986/FM085_Interveners_Amnesty-International-et-al.pdf>.

¹²⁴ *Tsilhqot'in Nation v British Columbia*, [2014] SCC 44 (Factum of the Intervener Assembly of First Nations) at para 3, online: <www.scc-csc.ca/WebDocuments/DocumentsWeb/34986/FM130_Intervener_Assembly-of-First-Nations.pdf>.



Treaty Settlements, the UN Declaration and Rights Ritualism in Aotearoa New Zealand



Fleur Te Aho

New Zealand belatedly endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) in 2010,¹ after infamously voting against it three years earlier. However, this expression of support for the UN Declaration has not heralded a new era of Indigenous rights recognition within the state. Instead, the New Zealand Government's support could be characterized as displaying evidence of "rights ritualism." Rights ritualism occurs where actors give the appearance of support for rights frameworks, while actually resisting substantive implementation of those rights.² I explore whether this concept may help us to better understand aspects of the New Zealand Government's behaviour in relation to the declaration, and close with comments on what it could mean for Indigenous rights recognition in New Zealand going forward.

I focus upon the negotiation of historical Treaty of Waitangi settlements by the Crown with *iwi* (nations). These politically negotiated settlements seek to resolve claims for breaches of the treaty by the Crown prior to 1992. I have chosen this subject because New Zealand's Treaty of Waitangi settlement process is often regarded as a world-

1 United Nations Declaration on the Rights of Indigenous Peoples, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/ RES/61/295, 46 ILM 1013 (2007) [UNDRIP]; New Zealand Parliament, *Ministerial Statements: UN Declaration on the Rights of Indigenous Peoples – Government Support* (20 April 2010) [Statement on UNDRIP], online: <www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansD_20100420_00000071/ministerial-statements-un-declaration-on-the-rights-of>.

2 Hilary Charlesworth, "Swimming to Cambodia: Justice and Ritual in Human Rights After Conflict" (Kirby Lecture in International Law) (2010) 29 Austl YBIL 1 at 12–13.

leading example of Indigenous rights recognition.³ Further, as will be seen, the government uses the settlement process to illustrate its engagement with the UN Declaration before international fora, even as it has asserted the declaration's irrelevance to the process at important points. In particular, I examine to what extent the declaration is reflected in the recent and much-celebrated negotiated settlement innovations that have seen (or will soon see) the legal personality of a former national park, a river and mountains recognized in state law for the first time. These settlements are seen as affording groundbreaking recognition to Māori world views, which include an understanding of these natural phenomena as kin with *mauri* (life force). I argue that these Treaty of Waitangi settlement innovations, while reflecting impressive negotiation on the part of the affected iwi and deserving of praise, also demonstrate elements of Indigenous rights ritualism on the part of the state when assessed against the UN Declaration.

The paper is divided into four parts. The first part introduces the concept of rights ritualism. The second argues that Indigenous rights ritualism is one way of characterizing aspects of the New Zealand Government's response to the UN Declaration, including in relation to historical Treaty of Waitangi settlement negotiations. The third part briefly examines the legal personality settlement innovations against core rights affirmed in the declaration: Indigenous peoples' rights to self-determination, culture, land, participation in decision making, redress, and to have their treaties respected. The final part offers some concluding remarks and reflections on the New Zealand Government's future relationship with Indigenous rights.

Rights Ritualism

Rights ritualism describes a particular type of behavioural response to a rights framework. In essence, it is where an actor such as a state has abandoned the substantive goals of a rights framework, for example, the right of Indigenous peoples to own their traditional lands. Yet, the actor formally participates in the institutionalized means for achieving those goals, such as endorsing or ratifying the instrument in which those rights are affirmed and engaging with the formal mechanisms established to monitor implementation of the instrument.

Hilary Charlesworth was the first to use the concept of ritualism in the human rights space, drawing on the work of regulatory scholars.⁴ She describes the concept with reference to state behaviour toward rights regimes, although the behaviour is not unique to states. Charlesworth posits that in "the field of human rights, rights ritualism is a more common response than an outright rejection of human rights standards and institutions."⁵ This is because it allows states the cover of rights support, which enables them to escape close examination and critique. She suggests that "[r]ights ritualism can be understood as a way of embracing the language of human rights precisely to deflect real human rights scrutiny and to avoid accountability for human rights abuses."⁶ Charlesworth observes that states from both the Global North (for instance, Australia) and the Global South (such as Cambodia) engage in rights ritualism. This is evident, she argues, in their ratification of international human rights treaties without corresponding moves to give effect to the rights affirmed in those treaties within the state.⁷

3 See e.g. *Report of the Special Rapporteur on the rights of Indigenous peoples, James Anaya, Addendum: The situation of Maori People in New Zealand*, Human Rights Council, UNGAOR, 18th Sess, UN Doc A/HRC/18/35/Add.4 (2011) at 2.

4 Charlesworth, *supra* note 2 at 12; Hilary Charlesworth & Emma Larking, "Introduction: The Regulatory Power of the Universal Periodic Review" in Hilary Charlesworth & Emma Larking, eds, *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge, UK: Cambridge University Press, 2014) 1; Benjamin Authers et al, "Introduction" (2018) 9:1 *Humanity: Intl J Human Rights, Humanitarianism & Development* 63 at 69–71. Charlesworth and others draw on Robert K Merton, *Social Theory and Social Structure* (New York: Free Press, 1968) at 238, 241; John Braithwaite, Toni Makkai & Valerie Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (Cheltenham, UK: Edward Elgar, 2007) at viii, 7.

5 Charlesworth, *supra* note 2 at 12.

6 *Ibid.*

7 *Ibid* at 13.

Rights ritualism can thus be difficult to identify, given that its defining feature is the formal appearance of commitment to the goals of rights frameworks, even though the substance of such goals has been abandoned. Accordingly, as Charlesworth suggests, it is the domain of states that wish to fly under the radar of international scrutiny⁸ and then enjoy the reputational and other benefits that accompany more positive rights records.

Rights Ritualism in Treaty Settlements

Indigenous rights ritualism is one way of characterizing aspects of the New Zealand Government's response to the UN Declaration. With much international fanfare, New Zealand expressed its support for the declaration, then promptly returned to business as usual with Māori. This was foreshadowed somewhat, especially in relation to land rights and the Treaty of Waitangi settlement process, in New Zealand's qualified statement endorsing the declaration at the UN Permanent Forum on Indigenous Issues.⁹ In its statement, the New Zealand Government made it clear that implementation of the declaration would occur within existing constitutional and legal parameters. In particular, the declaration's "aspirations for rights to and restitution of traditionally held land and resources" would continue to be addressed in accordance with the established treaty settlement process.¹⁰ Such a stance complicates the rights ritualism picture somewhat — the New Zealand Government's support for the declaration was tempered from the outset.

Yet, the New Zealand Government has, at various points, sought to use the treaty settlement process to illustrate its action on the UN Declaration and affirm itself as a rights leader. For example, before the UN Expert Mechanism on the Rights of Indigenous Peoples in 2011, New Zealand stated: "There are four key areas of work within the New Zealand Government that illustrate our engagement with the Declaration. Those are: Treaty settlements; social services; constitutional issues; and Māori participation in decision making."¹¹

The government has also connected what it perceives as the core principles of the UN Declaration and the Treaty of Waitangi, including "operating in the spirit of partnership,"¹² which it identified at the 2014 World Conference on Indigenous Peoples as exemplified in shared governance arrangements agreed through the treaty settlement process.¹³

In recent years, this professed partnership has manifested in treaty settlements that recognize the legal personality of the former Te Urewera national park via our Te Urewera Act 2014; the Whanganui River through our Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (Te Awa Tupua Act 2017); and, in the near future, of Ngā Maunga o Taranaki (the mountains of Taranaki), following agreement of a record of understanding with iwi of Taranaki in December 2017 (Taranaki Record of Understanding 2017).¹⁴ Each of these natural phenomena has been (or, in the case of Ngā Maunga o Taranaki, is expected

8 *Ibid* at 14.

9 Minister of Māori Affairs Pita Sharples, cited in *Statement on UNDRIP*, *supra* note 1.

10 *Ibid*.

11 New Zealand, *Statement on item 5 — UN Declaration on the Rights of Indigenous Peoples*, Expert Mechanism on the Rights of Indigenous Peoples (2011), 4th Sess, online: <<http://cendoc.docip.org/collect/cendocdo/index/assoc/HASHfe82/69fbd90.dir/EM11newzealand157.pdf>>.

12 Minister of Māori Affairs Pita Sharples, cited in *Statement on UNDRIP*, *supra* note 1.

13 Minister of Māori Affairs Pita Sharples, *Statement to the World Conference on Indigenous Peoples — Roundtable 2: Implementation of the Rights of Indigenous Peoples at the National and Local Level* (22 September 2014), online: <www.mfat.govt.nz/en/media-and-resources/ministry-statements-and-speeches/statement-to-the-world-conference-on-indigenous-peoples-roundtable-2-implementation-of-the-rights-of-indigenous-peoples-at-the-national-and-local-level/>.

14 Ngā Iwi o Taranaki and the Crown, *Te Anga Pūtakerongo mō Ngā Maunga o Taranaki, Pouākai me Kaitake/Record of Understanding for Mount Taranaki, Pouākai and the Kaitake Ranges* (20 December 2017) [Taranaki Record of Understanding 2017]. The deed of settlement, and associated enabling legislation, are yet to be developed.

to be) declared a legal entity with all the rights, powers, duties and liabilities of a legal person,¹⁵ with shared Crown-Māori governance entities established to represent them. This will make it easier to bring legal proceedings on behalf of the land, river and mountains, and is a form of acknowledgment of wrongs committed by the Crown against the relevant iwi. But in addition to the robust academic critique made of the settlement process generally,¹⁶ these settlements fail to go far enough in recognizing many of the core rights affirmed in the declaration.

Legal Personality Settlement Innovations and the UN Declaration

It is not possible here to analyze the settlement innovations against the UN Declaration in totality or in depth. Instead, I briefly highlight several areas of concern associated with the declaration's affirmation of Indigenous peoples' rights to self-determination, culture, land, participation in decision making, redress, and to have their treaties respected. Other scholars, including Katherine Sanders, provide more detailed examinations of the Whanganui River and Te Urewera settlements.¹⁷ Notably, given the focus of this paper, an excellent unpublished paper by Isabel Kelly also assesses the Whanganui River settlement against Indigenous rights norms under international law.¹⁸

The right to self-determination in article 3 is the cornerstone of the UN Declaration. At root, it is concerned with Indigenous peoples exercising collective autonomy over their lives.¹⁹ It is closely connected to Indigenous peoples' rights to self-government over their internal affairs and to maintain and strengthen their political and other institutions in articles 4 and 5. The settlement innovations allow iwi to contribute to decision making regarding these *taonga* (treasures), but through co-governance or co-management arrangements with the Crown. Iwi do not enjoy autonomous decision-making powers in relation to their *taonga*.²⁰ Te Pou Tupua, the central representative body of Te Awa Tupua,²¹ is made up of one person nominated by Whanganui Iwi and one person nominated by the Crown.²² This means that the nominee of the Crown will need to agree, for example, to any legal proceedings on behalf of Te Awa Tupua.²³ The governing board of Te Urewera is also made up of Tūhoe- and Crown-appointed representatives. While the number of Tūhoe representatives increased to a majority of six to the Crown's three from 2018, unanimous decision making is promoted and, where a vote is taken, the support of at least some of the Crown representatives is effectively required.²⁴ Shared decision making

15 *Te Urewera Act 2014* (NZ), 2014/51, s 11; *Te Awa Tupua Act 2017* (NZ), 2017/7, s 14; *Taranaki Record of Understanding 2017*, *supra* note 14 cl 5.2.2.

16 See e.g. Linda Te Aho, "The 'False Generosity' of Treaty Settlements: Innovation and Contortion" in Andrew Erueti, ed, *International Indigenous Rights in Aotearoa New Zealand* (Wellington: Victoria University Press, 2017) 99 [Te Aho, "The 'False Generosity' of Treaty Settlements"]; Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Wellington: Victoria University Press, 2016); Craig Coxhead, "Where are the negotiations in the direct negotiations of Treaty settlements?" (2002) 10 *Waikato L Rev* 13; Annie Mikaere, "Settlement of Treaty Claims: Full and Final, or Fatally Flawed?" (1997) 17 *NZULR* 425.

17 Katherine Sanders, "'Beyond Human Ownership'? Property, Power and Legal Personality for Nature in Aotearoa New Zealand" (2018) 30:2 *J Envtl L* 207. See also Te Aho, "The 'False Generosity' of Treaty Settlements", *supra* note 16; Linda Te Aho, "Ruruku Whakatupua Te Mana o te Awa Tupua – Upholding the Mana of the Whanganui River" (2014) *Māori L Rev* [Te Aho, "Ruruku Whakatupua Te Mana"]; Jacinta Ruru, "Tūhoe-Crown settlement – Te Urewera Act 2014" (2014) *Māori L Rev*; Elizabeth Macpherson & Felipe Clavijo Ospina, "The Pluralism of River Rights in Aotearoa, New Zealand and Colombia" (2015) 25 *J Water L* 283.

18 Isabel Kelly, "Does Self-Determination Flow from the Conferral of Legal Personhood on Te Awa Tupua?" (LAW456 Supervised Research Paper, University of Auckland, Faculty of Law, 2018) [on file with author].

19 James Anaya, *Indigenous Peoples in International Law*, 2nd ed (New York: Oxford University Press, 2004) at 97.

20 Sanders, *supra* note 17 at 209; Kelly, *supra* note 18 at 16.

21 *Te Awa Tupua Act 2017*, *supra* note 15, ss 18–19. Other bodies advise and support Te Pou Tupua; see *ibid*, ss 27–38.

22 *Ibid*, s 20.

23 This concern may be mediated by how the appointments to Te Pou Tupua are made in practice. The first two appointees – Dame Tariana Turia and Turama Hawira – are both Whanganui Iwi.

24 *Te Urewera Act 2014*, *supra* note 15, ss 31(1)(b); Sanders, *supra* note 17 at 229.

will also be required in the governance entity for Ngā Maunga o Taranaki, which will comprise eight members, half of which are appointed by the iwi of Taranaki and half by the Crown, and who “must strive to achieve consensus.”²⁵ It is important to acknowledge the agency of the iwi who negotiated and ratified the Urewera and Te Awa Tupua settlements (the agreement regarding Ngā Maunga o Taranaki will go before the relevant iwi for approval in due course). The decision to approve these settlements is an expression of iwi self-determination. Yet, it needs to be borne in mind that these negotiations occur in the context of markedly unequal power relations between iwi and the state, and reflect the realities of that dynamic.²⁶

Cultural rights are a feature of the UN Declaration. For example, articles 11 to 13 affirm Indigenous peoples’ rights to maintain, protect and develop their culture, including their language, philosophies and customs. The settlement innovations offer a degree of recognition of *tikanga Māori* (“the customary system of values and practices that have developed over time” in *Te Ao Māori* [the Māori world])²⁷ and have the potential to provide some enhanced protection for these taonga. Significantly, under our Te Awa Tupua Act 2017, decision makers preparing or changing a regional policy statement, regional plan or district plan under the Resource Management Act 1991 (RMA) must “recognise and provide for” the status and values of Te Awa Tupua,²⁸ and in other matters under the RMA must “have particular regard to” those status and values.²⁹ These values reflect the tikanga of Whanganui Iwi.³⁰ Similarly, under our Te Urewera Act 2014, the Urewera Board *may*, and in some cases *must*, consider tikanga principles.³¹ Further, the Taranaki Record of Understanding 2017 acknowledges a role for a set of “Maunga values” that will seemingly reflect, to some degree, the tikanga of Taranaki iwi.³² *Te reo Māori* (Māori language) and *mātauranga Māori* (Māori knowledge) also feature relatively prominently in the enabling documents for these innovations,³³ although they are still constrained. Tikanga values are translated, in English, into Western legal constructs. The resulting translation — legal personality — is not a Māori concept,³⁴ and the governance structures established largely reflect Western governance traditions.

Land and resource rights are central to the UN Declaration, in particular article 26.³⁵ Although the precise import of this article is contested — in that it may not require the return of full ownership where lands and resources have been lost — it does require the recognition of robust rights³⁶ and, arguably, significant control. The settlement innovations do not provide for iwi ownership of the taonga nor, arguably, significant control in accordance with tikanga, given that the provision is for co-management with the Crown. Ownership is a Western concept. But ownership offers the fullest ability to control the taonga, and absolute authority or control (in *te reo Māori*: *rangatiratanga*) is a tikanga concept. In fact, the legal personality device can properly be understood as a “compromise to prevent iwi from gaining

25 Taranaki Record of Understanding 2017, *supra* note 14, cls 5.2.7; 5.15, 5.20.

26 Kelly, *supra* note 18 at 16, makes this point in relation to Te Awa Tupua.

27 John C Moorfield, *Te Aka Online Māori Dictionary*, online: <<https://maoridictionary.co.nz/>>. For scholarly discussion of this encompassing concept, see e.g. Hirini Moko Mead, *Tikanga Māori: Living by Māori Values* (Wellington: Huia, 2003).

28 Te Awa Tupua Act 2017, *supra* note 15, s 15(2); Schedule 2, cl 1(s).

29 *Ibid*, s 15(3), Schedule 2, cl 2. On the significance of this, see Te Aho, “The ‘False Generosity’ of Treaty Settlements”, *supra* note 16 at 113, 115.

30 Te Awa Tupua Act 2017, *supra* note 15, s 13.

31 Te Urewera Act 2014, *supra* note 15, ss 18(2), 20. See Ruru, *supra* note 17.

32 Taranaki Record of Understanding 2017, *supra* note 14, cls 3.6, 5.2.5, 5.10–5.12.

33 For discussion, see e.g. Te Aho, “Ruruku Whakatupua Te Mana”, *supra* note 17.

34 Jones, *supra* note 16 at 98; Sanders, *supra* note 17 at 223; Macpherson & Clavijo Ospina, *supra* note 17 at 285; Kelly, *supra* note 18 at 12–15.

35 See also UNDRIP, *supra* note 1, arts 10, 25–30, 32.

36 International Law Association, Committee on the Rights of Indigenous Peoples, “Interim Report”, The Hague Conference Report (2010) at 21–22.

ownership.³⁷ Crown-owned parts of the riverbed (not waters) of the Whanganui River are vested in Te Awa Tupua, but private property rights in the riverbed are not affected, nor are public use and access rights.³⁸ Similarly, under Te Urewera Act 2014, private land is not affected and, as before, when it was a national park, Te Urewera must be available for public use and enjoyment (although some limited cultural redress sites will not have public access).³⁹ Under the Taranaki Record of Understanding 2017, only available Crown-owned land in Ngā Maunga o Taranaki will be vested in the governing entity and (unlike Te Urewera) the mountains will remain a national park under the National Parks Act 1980, which protects public access rights.⁴⁰

Relatedly, the UN Declaration also places obligations on states to consult with Indigenous peoples, and sometimes to obtain their consent (another contested area), regarding matters affecting them, including in articles 19 and 32(2). The innovations are in danger of making the iwi appointees on the governing bodies the proxy for broader iwi consultation and, where required, consent in relation to the taonga (although engagement and reporting with the broader iwi is expected).⁴¹ Further, the governing bodies do not have a say on all important matters affecting the taonga. Te Urewera, for instance, could still be mined even if Tūhoe refused consent.⁴² This would be in contravention of article 32(2) of the declaration, which states that the duty to consult to obtain Indigenous peoples' free, prior and informed consent applies "particularly in connection with the development, utilization or exploitation of mineral, water or other resources." Further, our Te Awa Tupua Act 2017 does not vest Whanganui Iwi with proprietary interests in the water of the river, and iwi consent is not required to use the water (although this may change following negotiations over iwi rights to fresh water).⁴³

In addition, the UN Declaration affirms Indigenous peoples' rights to redress in a host of articles, of which article 28 is key. It affirms the right of Indigenous peoples "to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation" for lands and resources taken or damaged "without their free, prior and informed consent." The co-management legal personality model falls short of restitution. Arguably, the co-management model, and the Treaty of Waitangi settlement process more broadly, are not effective remedies (article 40), nor an effective mechanism of redress (article 8(2)(b)) for the dispossession of these taonga (even if they are also associated with financial redress).

On top of this, there are funding concerns. The future operation of bodies associated with Te Awa Tupua are not guaranteed, given that the Crown's funding is time-limited,⁴⁴ and Tūhoe are required to contribute amounts equal to the Crown's contribution to the governing board of Te Urewera (unless

37 Linda Te Aho cites, with agreement, this statement by Laura Hardcastle in Te Aho, "Ruruku Whakatupua Te Mana", *supra* note 17.

38 *Te Awa Tupua Act 2017*, *supra* note 15, s 46(2); Sanders, *supra* note 17 at 226; Kelly, *supra* note 18 at 21.

39 *Te Urewera Act 2014*, *supra* note 15, s 55.

40 *Taranaki Record of Understanding 2017*, *supra* note 14, cls 5.2.3, 5.6.2.

41 See e.g. *Te Awa Tupua Act 2017*, *supra* note 15, s 19(2)(b).

42 *Te Urewera Act 2014*, *supra* note 15, ss 56(b), 64(1). Under our *Te Urewera Act 2014*, the board "determines whether the holder of a mining permit may access" Te Urewera, but "the Board is subject to the same legal limits as a Minister considering mining activity in a national park. In short, it appears that Te Urewera enjoys no greater formal legal protection from mineral exploitation than it did as a national park." Sanders, *supra* note 17 at 225.

43 Te Aho, "The 'False Generosity' of Treaty Settlements", *supra* note 16 at 115; Sanders, *supra* note 17 at 226; Andrew Erueti, "Māori Rights to Freshwater: The Three Conceptual Models of Indigenous Rights" (2016) 24 *Waikato L Rev* 58 at 61–62, 79.

44 The Crown will pay NZ\$200,000 each year for 20 years to cover the administrative costs of Te Pou Tupua and Te Karewao, and will provide a one-time payment of NZ\$430,000 toward the costs of establishing Te Kōpuka and the strategy. A NZ\$30 million contestable fund, Te Korotete, has also been established for projects to promote the well-being of Te Awa Tupua. It is funded by the Crown and administered by Te Pou Tupua; see *Te Awa Tupua Act 2017*, *supra* note 15, ss 57, 58. For discussion, see Te Aho, "Ruruku Whakatupua Te Mana", *supra* note 17; Kelly, *supra* note 18.

agreed otherwise),⁴⁵ despite the marked socio-economic deprivation experienced in the Urewera area.⁴⁶ The resourcing arrangements for Ngā Maunga o Taranki are yet to be agreed.⁴⁷

It is also possible to point to article 37 of the UN Declaration, which affirms Indigenous peoples' right to have their treaties with states honoured and respected, to critique the extent to which these settlements truly honour and respect the guarantee of *iwi tino rangatiratanga* (full authority or sovereignty) over their lands and taonga made in the Treaty of Waitangi.

Moving Forward?

New Zealand's Treaty of Waitangi settlement process in the years following the state's support for the UN Declaration can be understood as displaying features of rights ritualism. The state, it seems, endorsed the declaration without a substantive commitment to the core rights it affirms in that process. However, New Zealand's qualified support for the declaration and its attempts to both distance and link the declaration and the treaty settlement process add nuance to a rights ritualism argument. There is not the usual bold assertion of rights commitment; from the outset, New Zealand's support has been more tempered. Yet the New Zealand Government has professed that it is "engaging" with the declaration and that one of the ways it is doing so is through the treaty settlement process.

Certainly, the treaty settlement process brings benefits and goes some way toward recognizing the historical (and ongoing) wrongs committed by the Crown against iwi. But — even with the celebrated settlement innovations that afford legal personality to Te Urewera, Te Awa Tupua and, in the future, Ngā Maunga o Taranaki — the settlement process remains significantly flawed when assessed against core rights in the UN Declaration. Iwi are afforded co-management of these taonga with the Crown, rather than autonomous decision-making powers and ownership. While the notion of legal personality has some alignment with Māori cultural values, it is not a Māori concept, and tikanga principles will not always be front and centre in decision making regarding the taonga. Arguably, the settlements fall short of the rights and redress affirmed in the declaration and the guarantees made in the Treaty of Waitangi. Instead, they continue to reflect the constraints of a state-dictated settlement process in which the legal and political dominance of the state is never truly open for renegotiation.

One insight gained from seeing evidence of Indigenous rights ritualism in the government's behaviour is that it is necessary to closely scrutinize governmental actions purportedly in alignment with the declaration. They may be masking a deeper and more fundamental rights resistance.

There is, however, perhaps some cause for cautious optimism. As Hilary Charlesworth and Emma Larking remark, "Ritualism is not necessarily exactly the same thing as failure."⁴⁸ Ritualistic-type behaviour is one of the later phases in Thomas Risse and Stephen C. Ropp's understanding of the human rights socialization process, which is followed by their ultimate phase: "rule-consistent behaviour."⁴⁹ New Zealand has also had, since October 2017, a Labour-New Zealand First coalition government that has taken some initial steps toward monitoring domestic implementation of the declaration. In March 2019, Cabinet gave approval for the minister of Māori Development to lead the development of a plan

45 *Te Urewera Act 2014*, *supra* note 15, s 38(2).

46 Waitangi Tribunal, *Te Urewera: Part IV* (2015, pre-publication), ch 23.

47 *Taranaki Record of Understanding 2017*, *supra* note 14, cl 7.4.5.

48 "Charlesworth and Larking discuss their new book on the UN Universal Periodic Review", *Allegra Lab* (25 March 2015), online: <<http://allegralaboratory.net/questions-for-hilary-and-emma-on-their-new-book-human-rights-and-the-universal-periodic-review-rituals-and-ritualism/>>.

49 Thomas Risse & Stephen C Ropp, "International human rights norms and domestic change: conclusions" in Thomas Risse, Stephen C Ropp & Kathryn Sikkink, eds, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge, UK: Cambridge University Press, 1999) 234 at 246.

to monitor New Zealand's implementation of the declaration.⁵⁰ The following month, the New Zealand Government welcomed a delegation from the Expert Mechanism on the Rights of Indigenous Peoples to New Zealand to help advise on the plan.⁵¹ It was anticipated that the plan would be finalized in 2019,⁵² but it has not yet been released. Change may thus be on the horizon. Going forward, it will be important to remain attentive both to substantive rights gains and to signs of Indigenous rights ritualism on the part of the state.

About the Author

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50 Te Puni Kōkiri, "UN Declaration on the Rights of Indigenous Peoples" (19 September 2019), online: <www.tpk.govt.nz/en/whakamahia/un-declaration-on-the-rights-of-indigenous-peoples>.

51 Minister for Māori Development Nanaia Mahuta, Press Release, "Indigenous Experts Advise on Declaration Plan" (7 April 2019), online: <www.beehive.govt.nz/release/indigenous-experts-advise-declaration-plan>.

52 Te Puni Kōkiri, *supra* note 50.



The UN Declaration on the Rights of Indigenous Peoples in New Zealand Courts

A Case for Cautious Optimism



Claire Charters

Compared to Canadian, Australian and US courts, New Zealand's courts and tribunals are leading the way in their openness to argument based upon, and their willingness to cite, the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) in support of their judgments.¹ This trend is driven by New Zealand's highest court, the New Zealand Supreme Court, and in particular by the recently retired chief justice of New Zealand, Sian Elias, and by Justice Susan Glazebrook. In contrast, New Zealand's political institutions seem to be less enamoured with the declaration. New Zealand's comparatively powerful executive continues to illustrate resistance to the influence

¹ United Nations Declaration on the Rights of Indigenous Peoples, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

of the UN Declaration (although very recent developments suggest this may be changing),² and the omnipotent Parliament's silence as to the declaration is almost deafening.³

The recent Supreme Court decisions in the 2018 *Ngāti Whātua Ōrākei Trust v New Zealand (AG)* [*Ngāti Whātua Ōrākei*] and the 2017 *Proprietors of Wakatū & Rore Stafford v New Zealand (AG)* [*Wakatū*] cases join the earlier *Takamore v Clarke*,⁴ *Paki v New Zealand (AG) (No 2)* [*Paki No 2*]⁵ and *New Zealand Maori Council v New Zealand (AG)* [*NZMC (freshwater)*]⁶ Supreme Court cases in which the court — and in the case of *Takamore*, a majority of the Court of Appeal — referenced the UN Declaration.⁷ In this paper, I use *Wakatū* as the linchpin to analyze the ways in which New Zealand courts have utilized the UN Declaration in their judgments, as it includes the most influential references to the declaration and is recent.⁸

Here I compare the way in which the UN Declaration is cited in *Wakatū* to the way it is cited in the other decisions; I consider that the Supreme Court did not reference the declaration in relation to arguments for which it was pleaded by the appellants; and I reflect upon the unfortunate mistake in the chief justice's description of New Zealand as a signatory to the declaration. As it is a declaration, not a treaty, states can only vote for or express their support for the declaration. Significantly, as a declaration, not a treaty, it is not binding as a matter of international law formally understood under positive law.⁹

Judicial reference to the UN Declaration is normatively desirable to cultivate better compliance with Indigenous peoples' rights. Judicial reliance on the declaration — especially from justices of the Supreme Court, as members of New Zealand's highest court — even if only to support other legal justifications and arguments, is essential to embed the declaration into New Zealand law. Over time, it is expected that the declaration's legal (and political) influence will grow as a result, with positive outcomes for legal protection of Māori rights.¹⁰ However, *Wakatū* also signals that it might be time to examine more closely the way in which Supreme Court justices are utilizing the declaration in their judgments: it is important that the courts do so in a way that is both consistent with the normative foundations of the declaration, to accurately and appropriately apply the declaration, and technically correct, to support its legitimacy.

2 For example, the government's commitment to develop a national plan of action to implement the UN Declaration. See Ministry of Maori Development, "Developing a Plan on New Zealand's progress on the United Nations", online: <www.tpk.govt.nz/en/a-matou-mohiotanga/cabinet-papers/developplan-on-nz-progress-un>.

3 There are few references to the declaration in parliamentary debates. See e.g. Claire Charters, "The Rights of Indigenous Peoples under International Law and their Domestic Relevance in Aotearoa New Zealand" in Margaret Bedggood, Kris Gledhill & Ian McIntosh, eds, *International Human Rights Law in Aotearoa New Zealand* (Auckland: Thomson Reuters, 2017) ch 16 [Charters, "Domestic Relevance"].

4 [2012] NZSC 116, [2013] 2 NZLR 733.

5 [2014] NZSC 118, [2015] 1 NZLR 67.

6 [2013] NZSC 6, [2013] 3 NZLR 31.

7 *Proprietors of Wakatū & Rore Stafford v New Zealand (AG)* [2017] NZSC 17, [2017] 1 NZLR 423 [*Wakatū*]; [2018] NZSC 84 [*Ngāti Whātua Ōrākei*].

8 See also Dwight Newman, "Wakatū and Transnational Dimensions of Indigenous Rights Discourse" (2019) 1 NZLR 61.

9 Jean d'Aspremont, "Bindingness" (2015) Amsterdam Law School Legal Studies Research Paper No 2015-44.

10 Claire Charters, "Use It or Lose It: The Value of Using the Declaration on the Rights of Indigenous Peoples in Maori Legal and Political Claims" in Andrew Erueti, ed, *International Indigenous Rights in Aotearoa New Zealand* (Wellington, NZ: Victoria University Press, 2017) 137 [Charters, "Use It or Lose It"]; Claire Charters, "The Legitimacy of the UN Declaration on the Rights of Indigenous Peoples" in Claire Charters & Rodolfo Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Working Group for Indigenous Affairs, 2009) 280 [Charters, "Legitimacy of the UN Declaration"].

Wakatū and the UN Declaration

The UN Declaration in *Wakatū*

In *Wakatū*, Chief Justice Elias and Justice Glazebrook used the UN Declaration to support a relaxed interpretation of rules on standing to permit a Māori corporation to represent the interests of the customary owners of the land, even though not all its beneficiaries are customary owners and it does not represent all customary owners. After expressing the importance of taking into account the collective nature of Indigenous claims when assessing standing, citing *Manitoba Métis Federation v Canada (AG)*¹¹ and drawing on *Paki v New Zealand (AG)*,¹² Chief Justice Elias found that “it may be possible to draw a distinction between those entitled to bring a representative claim and those who will benefit from any remedy granted and that such flexibility is desirable when Maori collective interests are involved.”¹³

Moreover, the chief justice stated that an inflexible approach is “also difficult to reconcile with the Declaration, to which New Zealand is a signatory.”¹⁴ Chief Justice Elias mentioned two aspects of the UN Declaration. Citing article 8(2)(b), she recognized the right to redress for lands taken and used without the free, prior and informed consent of its customary owners.¹⁵ She also cited article 40 (“Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights”¹⁶). She concluded that “a narrow approach to standing does not accord with the principles expressed by the Declaration.”¹⁷

Justice Glazebrook agreed with Chief Justice Elias on standing and also footnoted the declaration, making the point that courts should facilitate rather than obstruct claims by collectives.¹⁸ Justice Glazebrook, when addressing questions about potential conflicts between the interests of individuals, smaller collectives and larger collectives, cited Alexandra Xanthaki’s statement in *Indigenous Rights and United Nations Standards* that such conflicts are common in human rights and “are generally solved on an ad hoc basis after taking into account various considerations.”¹⁹ Justice Glazebrook also referenced the appellants’ submission that the declaration’s emphasis on restitution means the Crown should be regarded as being in continuous breach, but did not take this up further.²⁰

Chief Justice Elias and Justice Glazebrook were in dissent and in the minority on the point of standing for which they cited the declaration.

The UN Declaration in *Wakatū*: Comparisons

Some broader trends are evident in the way in which the UN Declaration is referenced in Supreme Court judgments prior to *Wakatū* and subsequently in *Ngāti Whātua Ōrākei*. As in *Wakatū*, in all other cases the declaration was either not squarely addressed by the court, not by itself determinative on the particular point in question and/or was cited in support of *obiter dicta*. In each case, the question

11 2013 SCC 14, [2013] 1 SCR 623 at 43–44, cited in *Wakatū*, *supra* note 7 at para 491.

12 *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277.

13 *Wakatū*, *supra* note 7.

14 *Ibid.*

15 Cited in *Paki No 2*, *supra* note 5.

16 *Wakatū*, *supra* note 7.

17 *Ibid.*

18 *Ibid* at para 657.

19 *Ibid* at para 671, citing Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge, UK: Cambridge University Press, 2007).

20 *Wakatū*, *supra* note 7 at para 679.

was not whether New Zealand law complies with the declaration (nor could it be, as a matter of basic and formal New Zealand constitutional law, and due to the dualist understanding of the relationship between domestic and unincorporated international law). At most, the declaration is support for other reasoning based in New Zealand law. Finally, only two justices in the Supreme Court — Chief Justice Elias and Justice Glazebrook — have referenced the declaration when providing judgments, and the reasoning of the judges differed. The judgment in *NZMC (freshwater)* was a unanimous decision of the court.

In *Takamore*, the appellants unsuccessfully sought recognition and enforcement of *tikanga Māori* (traditional Māori rules and customs) under state law. The dispute involved the appropriate burial location of a Māori man. In her decision in *Takamore*, Chief Justice Elias referred to the UN Declaration in a significant way. In explaining that her decision was *not* because *tikanga* cannot be recognized in law because it is inconsistent with fundamental values in the common law, she remarked that “the preference for repatriation of the dead is recognized by the Declaration of the Rights of Indigenous Peoples as a matter of great moment.”²¹ However, the outcome in *Takamore* arguably falls especially short of the declaration’s articles on Indigenous peoples’ right to self-determination and autonomy, in that *tikanga* was not viewed as authoritative and thus only to be balanced with other factors.

The question in *NZMC (freshwater)* was whether Crown decisions impacting on fresh water were consistent with statutorily incorporated principles of the Treaty of Waitangi and Māori interests in fresh water. The New Zealand Māori Council argued they were inconsistent and sought an interpretation of the principles consistent with the declaration. The Supreme Court did not consider the declaration beyond citing the appellants’ arguments based on it and setting out article 28(1) on the right to redress. It stated that it did not find it necessary to consider the declaration further, noting that: “We doubt if the Declaration adds significantly to the principles of the Treaty statutorily recognised.”²² However, it accepted “that the Declaration provides some support for the view that those principles should be construed broadly,”²³ an important point if it is to be read as requiring a declaration-consistent interpretation of treaty principles more generally. Again, however, the outcome was arguably not declaration-consistent in that it did not uphold Māori rights to fresh water.

In *Paki No 2*, Chief Justice Elias made *obiter* comments on potential duties owed in equity by the Crown to Māori. In doing so, she referred to the UN Declaration’s provisions with respect to redress for lands, territories and resources taken from Indigenous peoples without their free, prior and informed consent. Further, she cited the support provided by the declaration for restitutionary remedies where possible. Justice Glazebrook also referred to the declaration when she stated that “[m]uch more research has been done since [*Re the Bed of Wanganui River*]...on the history of land transactions and on Maori custom.”²⁴ To the extent that *Paki No 2* provides the potential for Maori rights to lands in riverbeds to continue until expressly extinguished, and for those rights to land to be regulated under *tikanga*, it is not inconsistent with the declaration’s rights to lands, territories and resources. However, the declaration was not cited in support of these particular points.

In *Ngāti Whātua Ōrākei*, the Supreme Court decided not to strike out Ngāti Whātua Ōrākei’s application for judicial review of decisions affecting land over which Ngāti Whātua claims *mana whenua* (authority over the land). Ngāti Whātua Ōrākei pleaded that the minister’s decision was required to be exercised

²¹ *Takamore*, *supra* note 4 at 12.

²² *Ibid* at para 92.

²³ *Ibid*.

²⁴ *Ibid* at para 317.

in a manner that upholds and is consistent with the UN Declaration,²⁵ and was not.²⁶ The majority found it was unable to assess that particular argument because, as drafted in the specific pleadings, it challenged the principle of parliamentary non-interference.²⁷ In other words, the reasoning was *not* because the courts could not assess executive decision making against the rights set out in the declaration, a proposition left open for decision by the lower courts. The chief justice dissented with respect to that argument: she would have not struck out the argument based on the declaration. She reasoned that the Crown's legal compliance with tikanga Māori, *te Tiriti o Waitangi* (the Treaty of Waitangi) and the UN Declaration is likely to arise again under applicable legislation and/or as part of the continuing relationship between Ngāti Whātua and the Crown. Her decision on this particular point was undoubtedly related to the elements of her judgment minimizing deference to executive and parliamentary processes where rights are in issue. In short, then, the court does not make any especially legally significant conclusions with respect to the declaration in *Ngāti Whātua Ōrākei*, other than perhaps that any reference by the Supreme Court lends the declaration some gravitas. Still, and importantly, it opens the door to judicial review of executive decision making for breach of Māori rights, including rights expressed in the declaration.

There are a number of comparisons to make between Chief Justice Elias's and Justice Glazebrook's references to the UN Declaration in *Wakatū* and other references to the declaration in the Supreme Court. In *Wakatū*, Chief Justice Elias and Justice Glazebrook were in dissent on the specific point — standing — for which the declaration was cited and, in *Ngāti Whātua*, Chief Justice Elias was in dissent on the decision to strike out the particular claim to review based on the declaration (although the majority's reasoning did not relate to the declaration but to deference to Parliament). In *Paki No 2* and *Takamore*, the majority of justices agreed in outcome with the points for which the chief justice (in *Takamore* and *Paki No 2*) and Justice Glazebrook (in *Paki No 2*) cited the declaration in support, albeit without reference to the declaration. Put another way, it is significant that the majority in *Wakatū* disagreed with the outcome on the point for which the declaration was cited by the minority. Nonetheless, the majority's silence on the declaration should not be interpreted as rejection of the declaration's relevance (especially given the unanimous decision in *NZMC [freshwater]*).

As Dwight Newman points out,²⁸ Chief Justice Elias referenced the UN Declaration in *Wakatū* in a way that suggests it is more influential than in the previous cases, although this conclusion requires a nuanced reading. While the declaration was not found to be the single determinative factor on the standing issue, Chief Justice Elias used the declaration in a way that suggested it tipped the balance in reasoning toward the acceptance of *Wakatū* Incorporation's standing. So, while the declaration was only one relevant factor in the reasoning, its force as an interpretative gloss on common law principle was arguably greater than in the other cases.

Moreover, unlike *Takamore* and *NZMC (freshwater)*, the decision in *Wakatū* comes close to compliance with the declaration in its recognition of Māori land rights and by holding the Crown to fiduciary duties when dealing with them. However, this was not because the declaration was cited or determinative in any way on the issue of the legal quality of Māori land rights or the Crown's duties to Māori to treat fairly with those land rights. The UN Declaration was simply not cited by any of the Supreme Court justices on those points.

²⁵ *Ibid* at para 23.

²⁶ *Ibid* at para 29.

²⁷ *Ibid* at para 65.

²⁸ Newman, *supra* note 8.

Disjuncture between Submissions on the Declaration and Judicial Reliance on the Declaration

Another striking aspect of the references to the UN Declaration in *Wakatū* is that they were in relation to a point for which the appellants did *not* cite the declaration in written submission, although it was cited multiple times for support with respect to other points of law, outlined below. Instead, the tenor of *Wakatū* Incorporation's argument was that standing should be determined by tikanga Māori. Thus, Chief Justice Elias and Justice Glazebrook used the declaration to support the standing arguments of their own initiative.

Instead, the declaration and human rights more broadly were cited by *Wakatū* in its written submissions with respect to a number of issues. For example, the appellants used the declaration to argue for a finding of a fiduciary duty akin to *Guerin*:

Courts have a very important constitutional role to play in protecting the legal (property) rights of minorities, who are otherwise subject to the “tyranny of the majority” in a democracy. UNDRIP, which confirms that the State/indigenous peoples relationship gives rise to legally enforceable obligations, and NZBORA, both underscore the significance of this role, which is grounded in the rule of law concern that it would “be wrong in principle and dangerous in practice for the courts to leave the Crown to ‘acquit itself as best it may’ as the ‘sole arbiter of its own justice’” (cf. *Wi Parata*).²⁹

The declaration was also used to argue for a finding of a constructive trust. In relation to remedies, *Wakatū* Incorporation submitted that the UN Declaration supports restitutionary remedies, as suggested by Chief Justice Elias in *Paki No 2*. With respect to responses to the Crown's arguments that the claim was time barred under legislation and/or equity, the appellants cited the declaration to support the argument that the Crown is in continuous breach. However, these arguments were not taken up by the court. It is unclear, then, when and in response to which kind of argument, justices will reference the declaration.

Chief Justice Elias's Mischaracterization of the Declaration

For a second time,³⁰ Chief Justice Elias used the incorrect language to describe New Zealand's support for the UN Declaration, namely as a “signatory,” reflecting either a mistake, possibly in editing, or a misunderstanding of the formal status of the declaration under international law. The declaration is a resolution of the United Nations General Assembly (UNGA); states vote for or against, or support after the vote if they change their position subsequent to the instrument's adoption by the UNGA. The declaration is not a treaty, which states sign and ratify and which then becomes binding on them as a matter of international law. Formally, declarations are not in and of themselves binding.

The significance of Chief Justice Elias's mistake ought not be overstated. There is considerable academic and legal consensus that formal bindingness may matter little to the assessment of a norm's legality and implementation of it in fact. James Anaya, the former UN Special Rapporteur on the rights of Indigenous peoples and a pre-eminent scholar on the rights of Indigenous peoples under international law, has stated, “[T]o say simply that the Declaration is non-binding is an incomplete and potentially misleading characterization of its normative weight.”³¹ This is seen most vividly in the legal importance assigned to declarations, including the UN Universal Declaration of Human Rights, that are adopted by

²⁹ *Wakatū*, *supra* note 7 at para 5.17, citing *R v Guerin*, [1984] 2 SCR 335.

³⁰ See also *Paki No 2*, *supra* note 5 at para 158.

³¹ Report of the UN Special Rapporteur on the rights of indigenous peoples, James Anaya, to the General Assembly, UNGAOR, 68th Sess., UN Doc A/68/317 (2013).

the UNGA in accordance with the authority vested in it under the UN Charter.³² Moreover, as Justice Glazebrook and Justice Richard Wild recognized, many of the articles and norms in the UN Declaration mirror norms in binding human rights treaties.³³ Some international legal authorities, such as the International Law Association, assert that much of the UN Declaration constitutes binding customary international law.³⁴

A Global Context

The New Zealand Supreme Court references to the UN Declaration are unique in that there are few references to the declaration in courts internationally, albeit with some notable exceptions in regional human rights courts and a select few jurisdictions.³⁵

In contrast, and unlike in New Zealand, the declaration has been embraced relatively more by the political arms of government in some states. In Canada, a private member's bill³⁶ to implement the declaration was introduced and debated, but did not pass the Senate before the forty-second Parliament was dissolved for a federal election. And in Australia, there are live proposals for constitutional change for greater recognition of Aboriginal peoples at both the state and federal levels, influenced by the declaration.³⁷ While the declaration is visible when one looks hard in New Zealand's political dialogue,³⁸ including in Parliament, New Zealand's political arms of government have not embraced the declaration to the same extent. The former attorney general, Chris Finlayson, has stated that the declaration will not be referred to in treaty settlements.³⁹

It is the courts and not the political institutions supporting the UN Declaration in New Zealand, but the significance of this is unclear. New Zealand's wider constitutional context is that the courts are relatively weak compared to Canadian, Australian and US courts, which have strong-form judicial review and apply written constitutions. Formally, and likely also practically, the impact of legislative incorporation of the declaration would be greater than not-determinative references to the declaration in the judicial decisions, especially because the legislature has greater power to authorize structural change in favour of Indigenous peoples' rights in the short term. However, there might be concerns about the potential that the legislature or the especially duty-bearing executive might interpret the declaration restrictively compared to the more rights-amenable judiciary. From an Indigenous peoples'

32 The UNGA's authority to adopt declarations is sourced in article 13(1)(b) of the Charter of the United Nations (26 June 1945, Can TS 1945 No 7) to assist with the realization of human rights and freedoms.

33 They noted that while the UN Declaration is non-binding, "New Zealand announced its support of the Declaration in 2010" (*Takamore v Clarke* [2011] NZCA 587 at 253), that New Zealand "is a party to the international human rights covenants on which the Declaration is based" (*Takamore v Clarke* [2012] 1 NZLR 573), and that an authority on the declaration, Elsa Stamatopoulou, observed that "the Declaration thus does not contain any new cultural human rights, but restates, in one systematic text, human rights contained in previously adopted international instruments and confirmed through the case law of international bodies" (Elsa Stamatopoulou, "Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples" in Stephen Allen & Alexandra Xanthaki, eds, *Reflections on the UN Declaration on the Rights of Indigenous Peoples* [Oxford, UK: Hart, 2011] 387). Cf Andrew Erueiti, "Conceptualising Indigenous Rights in Aotearoa New Zealand" (2017) 27:3 NZULR (arguing for a self-determination framework/new rights).

34 International Law Association, *Rights of Indigenous Peoples*, Res No 5/2012 at para 3.

35 See e.g. *Cal v Belize* (AG), [2007] Claims No 171/172; *Sawhoyamaya v Paraguay* (2006), Inter-Am Ct HR (Ser C) No 146; *Yakye Axa v Paraguay* (2006), Inter-Am Ct HR (Ser C) No 142; *Saramaka v Suriname* (2007), Inter-Am Ct HR (Ser C) No 172; *Centre of Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2010), African Commission on Human and People's Rights 276/2003.

36 Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016 (as passed by the House of Commons 30 May 2018).

37 See e.g. Australian Human Rights Commission, News Release, "Constitution reform to recognise Aboriginal and Torres Strait Islander people in the nation's Constitution" (18 October 2018), online: <www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/constitution-reform>.

38 Charters, "Domestic Relevance", *supra* note 3.

39 Letter from the Honourable Christopher Finlayson to Haami Piripi (11 August 2011) [on file with author].

rights perspective, ideally all governmental institutions and bodies would proactively work together constructively for maximum implementation of the declaration generously understood.

Wakatū and the Declaration: Some Words of Caution

What should we make of judicial references to the UN Declaration? I strongly argue that they are positive and should be celebrated and continued. However, some caution may need to be exercised in how the declaration is referenced in the future for reasons that relate both to the declaration in particular and to systemic difficulties associated with attempting to realize Indigenous rights in monolegal, state-centric, (post-)colonial legal systems such as New Zealand's.

Embedding the Declaration in NZ Law

I have argued elsewhere that implementation of the UN Declaration and conformity with it (as with many norms, especially international norms) depend on the extent to which the norms are derived from sound process and procedure, are normatively just and legal, and on political engagement with them.⁴⁰

The value of using international norms as a means to increase their compliance pull on states over time, even when they may be resistant to the norms or the norms are not binding, is supported by theories on constructivism, transnational legal process theory and social movement theory. At heart, these theories share the proposition that there are methods to embed norms in the domestic political and legal landscape in such a way that states view conformity with them as ordinary and rationally-appropriate behavior or, conversely, contravention as politically and legally illegitimate. The theories stem from the idea that norm conformity can be achieved not only through legal sanctions or compulsion but also through the gradual normalization and acceptance of the legitimacy of norms by the state especially and also the public at large.⁴¹

Through this lens, Chief Justice Elias's and Justice Glazebrook's references to the declaration are undoubtedly positive, as they function to embed the declaration in New Zealand's legal and political discourse and increase the likelihood, over the long term, of greater compliance with Indigenous peoples' rights in New Zealand. The jurisprudence of the Supreme Court, including the reasoning of individual justices, is highly influential on lower courts and tribunals, including the Waitangi Tribunal, and litigants are likely to respond accordingly by using the declaration in their arguments. Crown lawyers will be required to engage and develop strategy and policy around it in legal argument, further embedding the declaration in New Zealand's legal and political landscape even if, ironically, to fulfill declaration-negative objectives. As empirically based and theoretical literature illustrates, state rejection of international norms amounts to bureaucratic interaction with norms, which can be a step on the road toward compliance in the longer term.⁴²

The Supreme Court justices' references to the declaration join the increasing reliance on the declaration by legal and political institutions in New Zealand. Other relevant actors include the Waitangi Tribunal,⁴³ international human rights and Indigenous peoples' rights-focused entities, including human rights

40 For the fullest explanation, see Charters, "Use It or Lose It", *supra* note 10; Charters, "Legitimacy of the UN Declaration", *supra* note 10.

41 Charters, "Use It or Lose It", *supra* note 10.

42 See e.g. Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995); Thomas Risse, Stephen C Ropp & Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge, UK: Cambridge University Press, 1999); Harold Hongju Koh, "Internalization Through Socialization" (2004–05) *Duke LJ* 975 at 978–79.

43 Charters, "Use It or Lose It", *supra* note 10.

treaty bodies, and domestic political (including, albeit to a limited extent, Parliament and the executive), social, economic and Māori bodies and individuals. These function together to normalize the legal character and political influence of the declaration. Moreover, it is significant that the judiciary is taking a lead in embedding the declaration, thereby enjoining other arms of government in the institutional “Declaration dialogue.” Nonetheless, the way in which the declaration is used by the courts also suggests that there might be some need for caution in how the declaration is referenced in the future.

Realizing Indigenous Peoples’ Rights in a State-dominant, (Post-)Colonial Legal System

The first note of caution is fundamental and potentially intractable in the shorter term. To be fully implemented, Indigenous peoples’ norms in international law must be given effect in domestic, non-Indigenous, state-dominant, (post-)colonial legal systems that are not well designed to recognize or give effect to them. Indeed, many are basically antagonistic to Indigenous peoples’ rights. For example, the origin narratives on which colonial legal systems are based undermine Indigenous peoples’ rights: a primary New Zealand constitutional myth is that the state has legal sovereignty over Māori and state law is the dominant, if not the only, cognizable law in the territory. The state legal system is based on a rejection of ongoing Māori authority and rights, a doctrine without any legal or legitimate basis. On the other hand, full implementation of Indigenous peoples’ rights, including the right to self-determination, requires state legal systems to jettison state legal and constitutional doctrines that are inconsistent with Indigenous authority and participation in the state. As John Borrows points out, in a similar context of interpretation of Indigenous treaties: “New Zealand and Canada’s origin stories are unconvincing. They preach a false religion. They promulgate faulty philosophical lines of reasoning. As such, they should be rejected. Invalidation not only requires rejecting particular interpretive doctrines related to treaty interpretation. Retraction also necessitates the quashing of a priori propositions which imply that the Crown-dominated law is supreme.”⁴⁴

The particular conundrum, or paradox, with respect to the courts’ attempts to realize the rights set out in the declaration is that it is exactly the courts that have developed the state-dominant constitutional myths, and the courts have the primary authority and responsibility to uphold them. In other words, is asking the courts to uphold Indigenous peoples’ rights rather like asking the fox to protect the chickens?

The conundrum perhaps explains the differences in court and Waitangi Tribunal approaches to interpreting the UN Declaration. As the above analysis illustrates, the declaration has either been cited in *obiter dicta* or has not been exclusively determinative in the courts. Despite similar rules applicable with respect to the application of international law in both the courts and the Waitangi Tribunal, the declaration was considerably more persuasive and cited extensively in support of New Zealand Māori Council claims to self-determination in Wai 2417.⁴⁵ Unlike the courts, the Waitangi Tribunal is required to assess the Crown against the principles of the Treaty of Waitangi and notably is not required to uphold the supremacy of New Zealand law, even if it is fundamentally still an “inside” entity as a creation of New Zealand legislation enacted in accordance with state constitutional law.

The best the courts might do to address (rather than resolve) the conundrum in the shorter term is as follows: shine a light on the myth of orthodox constitutional doctrine based on state legal supremacy and the difficulty in realizing Indigenous peoples’ rights inside a framework built upon that orthodoxy; provide the most expansive interpretation of Indigenous peoples’ rights possible, intentionally and explicitly pushing the boundaries of contemporary constitutional doctrine; and take steps to nurture a transparent and deliberate dialogue with the legislative and executive arms of government to promote

⁴⁴ John Borrows, “Origin stories and the law: Treaty metaphysics in Canada and New Zealand” in Mark Hickford & Carwyn Jones, eds, *Indigenous Peoples and the State: International Perspectives on the Treaty of Waitangi* (Oxford, UK: Routledge, 2019) 30 at 33.

⁴⁵ Waitangi Tribunal, Wai 2417.

the recalibration of constitutional doctrine so that it better balances Indigenous peoples' rights, state interests and peace.⁴⁶

More Justifications for a Generous Indigenous-centric Interpretation of the Declaration

There are other good reasons for a generous interpretation of Indigenous peoples' rights. The UN Declaration is the outcome of negotiations between Indigenous peoples and state representatives, which is much celebrated and often cited as enhancing the legitimacy of the declaration.⁴⁷ For interpretation purposes, this would suggest that Indigenous perspectives should also be taken into account in any interpretation of the norms, such as, for example, around Indigenous peoples' rights to lands, territories and resources, and governance rights. The *travaux préparatoires* might, then, be relevant, for example. It would also suggest that state-centric interpretations of the declaration should not be preferred or, at least, should be balanced against Indigenous interpretations. With respect to *Wakatū* specifically, maybe the court should have taken more notice of *Wakatū*'s arguments based on the declaration, with respect to the substantive arguments on lands, territories and resources, and to the content of the Crown's duties to Māori and remedies?

Fragmentation of Norms and Proliferation of Institutional Interpretations: Interpreting the Declaration in the Context of a Rich Transnational Dialogue

The UN Declaration sits within an international context of a proliferation of institutions creating and interpreting Indigenous peoples' norms and a related increase in, and fragmentation of, Indigenous peoples' norms. The number of international norm-making and norm-interpreting institutions engaged in Indigenous peoples' rights has increased tremendously over recent decades and includes domestic courts and tribunals, human rights treaty bodies, regional human rights courts and commissions, UN human rights-related working groups and special procedures (such as those focused on culture, climate change, the environment, and business and human rights) as well as the World Bank, regional banks, the Organisation for Economic Co-operation and Development, the International Labour Organization, the Food and Agricultural Organization and, of course, specialist Indigenous-focused bodies such as the UN Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples and the UN Special Rapporteur on the rights of Indigenous peoples.

We have seen an emergence of new standards and new interpretations of Indigenous peoples' norms with respect to obtaining Indigenous peoples' free, prior and informed consent. However, there is not always consistency between the various norms and interpretations of them. Indeterminacy and incoherence are problematic for a myriad of reasons, including that they might undermine the rule of law and norms' legitimacy. Most immediately and worryingly for Indigenous peoples, they might be manipulated by states to successfully argue for weak interpretations of Indigenous peoples' rights.⁴⁸ How should New Zealand courts take into account this messy international legal and institutional context in which Indigenous peoples' rights sit?

Whether consciously or not, New Zealand courts, in interpreting and applying the declaration in cases such as *Wakatū*, are participating in a transnational dialogue on the content of Indigenous peoples' norms. To minimize indeterminacy and incoherence, they might consider other interpretations of the norms applied and, if taking a different approach, be transparent in their reasons for doing so. They might also adopt a particular interpretative methodology, such as the "evolutionary approach" informed by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights,

46 Claire Charters, "Finding the Rights Balance: A Methodology to Balance Indigenous Peoples' Rights and Human Rights in Decision-making" (2017) 4 NZLR 553.

47 Claire Charters, "A Self-determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy-Making" (2010) 17:2 Intl J Minority & Group Rights 215.

48 Thomas M Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium" (2006) 100 AJIL 88.

in accordance with which they interpret norms “up,” in accordance with evolving standards.⁴⁹ New Zealand courts might also identify positive aspects of norm proliferation, such as the flexibility it offers decision makers to apply norms in ways that are most appropriate for the specific context: Māori may seek different types of land rights than their Indigenous brothers and sisters in other parts of the world. Moreover, as Indigenous peoples’ norms have evolved, they have become stronger, as illustrated in the contrast between the 1989 International Labour Organization Convention 169 on Indigenous and Tribal Peoples, and the UN Declaration.⁵⁰ At the very least, New Zealand courts should be alive to the potential impact of institutional proliferation and norm fragmentation on the content of Indigenous peoples’ rights, and be vigilant against attempts by states to argue for weaker interpretations of these rights.

Conclusion

This paper attempts a close and analytical assessment of New Zealand higher courts’ references to the UN Declaration, noting that New Zealand courts have made more use of the declaration than courts in other jurisprudentially close jurisdictions. It has revealed that the declaration has been cited mainly by Chief Justice Elias and Justice Glazebrook and, while not determinative, can be influential and might be more so in the future. However, there appears to be no obvious explanation for when justices cite the declaration in relation to an argument presented (or not) by appellants and not others.

Taking a wider view, judicial references to the UN Declaration in their judgments are positive, as they function to embed the declaration in New Zealand’s political, legal, economic and social infrastructure. However, some attention will be needed in the future as to *how* the courts rely on the declaration. Ideally, courts would transparently and courageously try to counter the structural impediments to full application of the declaration, mainly the tensions between Indigenous peoples’ rights and the courts’ role as upholders of the sovereignty of the state. They might also apply the declaration conscious of and open to the rich and dense international and transnational legal context in which the declaration sits. There is good reason to be optimistic about the courts’ use of the declaration, even if only somewhat cautiously for now.

About the Author

Claire Charters is from Ngāti Whakaue, Tuwharetoa, Nga Puhi and Tainui. Claire’s primary area of research is in Indigenous peoples’ rights in international and constitutional law, often with a comparative focus. Claire is working on articles on the UN Declaration on the Rights of Indigenous Peoples, the relationship between tikanga Māori and the state legal system, tensions between human rights and Indigenous peoples’ rights and on the legitimacy of Indigenous peoples’ rights under international law, to be published as a book by Cambridge University Press. Claire is also working on a number of collaborative research projects including on Indigenous peoples’ self-determination and the philosophical foundations of Indigenous law. She is a member of the International Law Association’s committee on Indigenous peoples’ rights, and was awarded a Royal Society Rutherford Discovery Fellowship in 2017.

Claire has typically combined her academic research and teaching with advocacy for the rights of Indigenous peoples at the domestic and international levels, and is currently a trustee on the UN Voluntary Fund for Indigenous Peoples. In 2016–2017, Claire was appointed by the president of the United Nations General Assembly to advise him on enhancing Indigenous peoples’ participation in

49 The seminal case is *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001), Inter-Am Ct HR (2011) (Ser C) No 79.

50 International Labour Organization (ILO), *Concerning Indigenous and Tribal Peoples in Independent Countries*, Convention No 169, 27 June 1989, 28 ILM 1382 (entered into force 5 September 1991). New Zealand has been called on to ratify ILO Convention 169 on a number of occasions, including under the Human Rights Council’s Universal Periodic Review of New Zealand. See *Report of the Working Group on the Universal Periodic Review: New Zealand*, UNGAOR, Human Rights Council, 26th Sess, UN Doc A/HRC/26/3 (2014).

the United Nations. From 2010 to 2013, Claire worked for the UN Office of the High Commissioner for Human Rights, in the Indigenous Peoples and Minorities Section, focusing on the Expert Mechanism on the Rights of Indigenous Peoples. She is currently a co-director of the Aotearoa New Zealand Centre for Indigenous Peoples and the Law.



Religious Freedoms, Sacred Sites and Human Rights in the United States



Kristen A. Carpenter

Introduction

Among Indigenous peoples, certain places in the natural landscape — mountains, lakes, rivers and rock features — have significance as sacred sites. These sites may identify places of creation or migration, where human beings interacted with their creator, or where they engage in religious and cultural activities today. Often, however, in the United States, these sites are located on lands now owned by the federal government, which purports to use them for recreation, development, or other practices that impede or even destroy Indigenous religions. Guarantees of religious freedom, articulated in the First Amendment of the US Constitution and federal statutes, have failed to protect American Indian religious practitioners in cases involving sacred sites on federal public lands.¹ Understanding the complexity of the situation, this paper nevertheless ventures to suggest one approach to the issue of American Indian religious freedom at sacred sites — and that is interpretation of the First Amendment and religious freedoms statutes through the lens of human rights law and, in particular, the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration).²

1 A note about terminology: In the United States, members of federally recognized tribes usually refer to themselves by their tribal designations, such as Navajo or Cherokee. Collectively, they use various terms, including American Indian and Native American. This paper uses these terms, as well as “Indigenous peoples,” which is more common in the international human rights movement.

2 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) [UNDRIP].

Background: Sacred Sites in the United States

The US federal government has, over several centuries, claimed ownership over many lands that are sacred to Indigenous peoples.³ Federal agencies often permit natural resource development or recreational activities that negatively impact Indigenous religious and cultural practices, for example, by making it difficult or impossible to access sacred sites for prayer or ceremonies, contaminating spiritual plants and waters, or destroying the physical integrity of the site itself.⁴ Indigenous peoples in the United States have tried a number of strategies to deal with this problem, including litigation under the federal constitutional and statutory law framework protecting religious freedom for all citizens. The First Amendment of the US Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise.”⁵ In a number of cases, American Indian tribes and individual religious practitioners have argued that federal activity infringes on their free exercise of religion. The courts have rejected these claims in a series of cases revealing that, as a matter of federal law, American Indians do not enjoy freedom of religion when it comes to prayers and ceremonies that take place at sacred sites now located on federal public lands. Most notably, the US Supreme Court held in *Lyng v Northwest Indian Cemetery Association* (1988) that the federal government may develop Indian sacred sites even if it would “virtually destroy the Indians’...religion.”⁶ More than 30 years later, the *Lyng* case has never been overturned, and the federal government continues to sell, develop and desecrate sacred sites, in many cases making it difficult or impossible for Indigenous peoples to practise their religions.⁷

For decades, American Indian religious practitioners and advocates have tried various means to address this problem, including invoking provisions of the National Historic Preservation Act (NHPA), which requires federal agencies to consult with tribes regarding federal undertakings that may adversely impact “traditional cultural properties”; the passage of the Religious Freedom Restoration Act (RFRA) of 1993, which restores government limits on burdening free exercise; and the Religious Land Use and Institutionalized Persons Act of 2000, which extends certain protections for religious properties and prisoners’ rights.

Advocacy under these and other statutes has produced some success stories. In the two cases discussed below, *Bear Lodge Multiple Use Assn v Babbitt* (1999) and *Wyoming Sawmills v US Forest Service* (2004), agencies and tribes were able to engage in inclusive consultation processes leading to negotiated agreements with the relevant tribes, and these accommodation plans were upheld against judicial challenges. Under the authority granted to him by the Antiquities Act of 1906, in 2016, President Barack Obama approved Bears Ears National Monument, a 1.3-million-acre landscape sacred to the Navajo,

3 See generally Andrew Gulliford, *Sacred Objects and Sacred Places: Preserving Tribal Traditions* (Louisville, CO: University Press of Colorado, 2000); Jack Page, ed, *Sacred Lands of Indian America* (New York: Harry N Abrams, 2001).

4 This paper is based, in part, on the author’s earlier writings on American Indian sacred sites. For a more detailed account of the background of US religious freedoms and property law jurisprudence in this context, see e.g. Kristen A Carpenter, “A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Non-Owners” (2005) 52 UCLA L Rev 1061; Kristen A Carpenter, “Real Property and Peoplehood” (2008) 27:313 Stan Envtl LJ; Kristen A Carpenter, Sonia Katyal & Angela Riley, “In Defense of Property” (2009) 118:6 Yale LJ 1022; Amy Bowers & Kristen A Carpenter, “Challenging the Narrative of Conquest: The Story of *Lyng v. Northwest Indian Cemetery Protective Association*” in Carole Goldberg, Kevin K Washburn & Philip P Frickey, eds, *Indian Law Stories* (New York: Foundation Press, 2010) 489; Kristen A Carpenter, “Limiting Principles and Empowering Practices in American Indian Religious Freedoms” (2012) 45:2 Conn L Rev 387 [Carpenter, “Limiting Principles”]; Kristen A Carpenter, “Individual Religious Freedoms in American Indian Tribal Constitutional Law” in Kristen A Carpenter, Matthew LM Fletcher & Angela R Riley (Los Angeles: UCLA American Indian Studies Center Press, 2012) 159; Angela R Riley & Kristen A Carpenter, “Owning Red: A Theory of Indian (Cultural) Appropriation” (2016) 94:5 Tex L Rev 859.

5 US Const amend I.

6 *Lyng v Northwest Indian Cemetery Protective Association*, 485 US 439 (1988) at 447–51 [Lyng].

7 Lydia Millet, “Selling Off Apache Holy Land”, *The New York Times* (29 May 2015), online: <www.nytimes.com/2015/05/29/opinion/selling-off-apache-holy-land.html>.

Hopi, Ute, Paiute, Apaches and others, for cultural uses, and created an innovative co-management program between federal land management agencies and the tribes.

Recently, however, there has been a disappointing turn away from meaningful accommodations of Indigenous peoples' religious needs on public lands — in most cases because of pressure to keep such lands open for various types of development. Interests in oil and gas development, for example, were said to underlie President Donald Trump's decision to roll back protections for Bears Ears National Monument.⁸ The stakes in these cases are quite high, and when the law fails, Indigenous religious practitioners put their lives on the line to protect sacred sites.⁹ At Standing Rock, North Dakota, for example, when the federal government approved construction of an oil pipeline on treaty-guaranteed lands, thousands of protesters gathered to protect the lands and waters from destruction. Indigenous religious practitioners and their allies were attacked with dogs, mace and water cannons.¹⁰ They continued to protest until they were evicted and jailed by authorities.¹¹ Ultimately, the land was bulldozed and the pipeline was built through gravesites, under sacred waters and over treaty lands.¹² A similar scene is unfolding at Mauna Kea, Hawaii, where Indigenous religious practitioners have occupied the sacred mountain to prevent construction of a giant telescope, approved by the state over their objections.¹³

The destruction of Indian sacred sites, and oppression of Indian religious practitioners, is a troubling reality in a country where the freedom to worship is a foundational value, deeply enshrined in the US Constitution. Americans generally believe in the right to worship one's God and believe that this right should not be limited by race, ethnicity, economics or other factors. When it comes to American Indians, however, we cannot seem to put this belief into practice. There are myriad reasons. The Indian sacred sites cases reveal the doctrinal limits of religious freedom, at least when it comes to minority religious practices of Indigenous peoples. These cases also reveal the doctrinal excesses of protection for land ownership, at least for the federal government as owner.

In addition, there are challenges of world view, such that Indigenous spirituality and ceremonialism around sacred sites may transcend categorization in Anglo-American legal terminology. There are also broader problems of history, including the unremedied aspects of conquest and colonization, continuing racial discrimination, and the entrenchment of a capitalist economy that privileges economically profitable land uses over spiritual or sustainable ones.

A Human Rights Approach to the Problem of Sacred Sites

To advance understanding and resolution of Indigenous peoples' religious freedoms in sacred sites cases, advocates might consider using international human rights law as one tool in a multi-pronged advocacy strategy. The UN Declaration has a number of substantive and procedural provisions relevant

8 Eric Lipton & Lisa Friedman, "Oil Was Central in Decision to Shrink Bears Ears Monument, Emails Show", *The New York Times* (2 March 2018), online: <www.nytimes.com/2018/03/02/climate/bears-ears-national-monument.html>.

9 Kristen A Carpenter & Angela R Riley, "Standing Tall: The Sioux's battle against a Dakota oil pipeline is a galvanizing social justice movement for Native Americans", *Slate* (23 September 2016), online: <<https://slate.com/news-and-politics/2016/09/why-the-sioux-battle-against-the-dakota-access-pipeline-is-such-a-big-deal.html>>.

10 Alleen Brown, "Medics Describe How Police Sprayed Standing Rock Demonstrators with Tear Gas and Water Cannons", *The Intercept* (21 November 2016), online: <<https://theintercept.com/2016/11/21/medics-describe-how-police-sprayed-standing-rock-demonstrators-with-tear-gas-and-watercannons/>>.

11 See Greg Johnson & Siv Ellen Kraft, "Indigenous protective occupation and emergent networks of spirited refusal", *The Immanent Frame* (21 July 2017), online: <<https://tif.ssrc.org/2017/07/21/indigenous-protective-occupation-and-emergent-networks-of-spirited-refusal/>>; Greg Johnson & Siv Ellen Kraft, "Standing Rock Religion(s)" (2018) 65:5-6 Brill 499, online: <https://brill.com/view/journals/nu/65/5-6/article-p499_4.xml?lang=en>.

12 See Troy A Eid, "Beyond Dakota Access Pipeline: Energy Development and the Imperative for Meaningful Tribal Consultation" (2018) 95:3 Denv UL Rev 593 at 599.

13 Nick Bowlin, "Mauna Kea telescope project halted after months of protest", *High Country News* (28 January 2020).

to the sacred sites context.¹⁴ Adopted by the General Assembly in 2007,¹⁵ and supported by the United States in 2010,¹⁶ the UN Declaration is a standard-setting document that articulates a global consensus on human rights in the Indigenous peoples' context.¹⁷ In the United States, Canada, New Zealand, Australia and other countries around the world, government actors are in the process of assessing how to implement the declaration today, with an eye to meeting global norms on human rights. While New Zealand is working on a plan to implement the declaration nationwide,¹⁸ British Columbia recently passed legislation to bring its provincial laws in harmony with the declaration.¹⁹ In other places, such as Belize, national courts have referenced the declaration directly in cases concerning Indigenous peoples' land rights.²⁰

What are the options for using the UN Declaration in the United States?²¹ As in other countries, the declaration could inspire a legislative agenda, including aspects of religious and cultural freedoms for Indigenous peoples. Federal agencies, too, have the power to appeal to international law in their internal policy work. Indeed, of relevance to this paper, the Advisory Council on Historic Preservation has already adopted the UN Declaration as internal policy for its work on sacred sites.²² US courts, too, could look at the declaration for interpretive guidance.²³ In *Roper v Simmons*, in which the Supreme Court struck down the juvenile death penalty under the Eighth Amendment, the court wrote: "The opinion of the world community, while not controlling in our outcome, does provide significant and respected confirmation for our own conclusions."²⁴

The opinion and standards of the world community can be especially illuminating in an area, such as Indigenous peoples' religious freedoms, where the US courts have failed to resolve cases in a way that promotes justice for vulnerable individuals and groups. Moreover, US jurisprudence is both outdated and fraught on this issue. The Supreme Court last opined on American Indian religious freedoms in

14 See Philip P. Frickey, "Domesticating Federal Indian Law" (1996-97) 81:31 Minn L Rev 31 at 75-80 (arguing that because the US Supreme Court originally decided the status of Indian nations in the context of international law, norms of international human rights law should continue to "provide an interpretive backdrop" in contemporary Indian law matters); see also Notes, "International Law as an Interpretive Force in Federal Indian Law" (2003) 116:6 Harv L Rev 1751 at 1756.

15 UNDRIP, *supra* note 2 at para 12; see also Walter R. Echo-Hawk, *In the Light of Justice: The Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous Peoples* (Golden, CO: Fulcrum, 2013) (describing the UN Declaration as "a landmark event that promises to shape humanity in the post-colonial age" at 3).

16 See Office of the Press Secretary, The White House, Press Release, "Remarks by the President at the White House Tribal Nations Conference" (16 December 2010) (announcing the United States' support for the UN Declaration).

17 See US, *Setting the Standard: Domestic Policy Implications of the UN Declaration on the Rights of Indigenous Peoples: Hearing Before the Committee on Indian Affairs*, 112th Cong (2011); Megan Davis, "Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples" (2008) 9:2 Melbourne J Intl L 439 at 440 (discussing how adoption of the UN Declaration "provides an opportunity to expound upon indigenous peoples' experiences of standard-setting" in the United Nations).

18 Ministry of Māori Development, New Zealand Government, "UN Declaration on the Rights of Indigenous Peoples", online: <www.tpk.govt.nz/en/whakamahia/un-declaration-on-the-rights-of-indigenous-peoples>.

19 Simon Little, "British Columbia becomes 1st Canadian province to pass UN Indigenous rights declaration", *Global News* (26 November 2019), online: <<https://globalnews.ca/news/6222331/british-columbia-passes-undrip/>>.

20 See Aurelio Cal v Belize, Supreme Court of Belize (Claims No 171 and 172 of 2007) (18 October 2007), online: <<https://elaw.org/content/belizeaurelio-cal-et-al-v-attorney-general-belize-supreme-court-belize-claims-no-171-and-172>>.

21 Adam Liptak, "Justice Breyer Sees Value in a Global View of Law", *The New York Times* (13 September 2015), online: <www.nytimes.com/2015/09/13/us/politics/justice-breyer-sees-value-in-a-global-view-of-law.html>.

22 Advisory Council on Historic Preservation, "United Nations Declaration on the Rights of Indigenous Peoples", online: <www.achp.gov/indian-tribes-and-native-hawaiians/united-nations-declaration-rights-indigenous-peoples>.

23 See Hurst Hannum, S. James Anaya & Dinah Shelton, *International Human Rights: Problems of Law, Policy, and Practice* (New York: Aspen, 2018) at 471-73 (citing *Roper v Simmons*, 543 US 551 [2005] and *Lawrence v Texas*, 539 US 558 [2003]).

24 *Ibid.*

1988, and the federal appellate courts appear split on how to apply RFRA in sacred sites cases.²⁵ Sources from outside the United States,²⁶ even if not binding law, could help to inform thinking on these issues by advocates and courts alike.²⁷ Indeed, one federal district court in the United States has cited the declaration in an Indigenous land rights case.²⁸ In this spirit, courts, as well as agencies and legislatures, could consider the following points of resonance between current issues in American Indian sacred sites and the declaration.

One of the challenges with free exercise clause jurisprudence affecting tribes is that legal decision makers have failed to see how applicable legal standards “fit” Indigenous religions. The *Lyng* case mentioned above was about Yurok ceremonies involving prayer at sacred rock outcroppings located in a dense national forest. But the available precedents were *Sherbert v Verner*, involving Seventh Day Adventist work/rest practices around the Sabbath, and *Wisconsin v Yoder*, regarding Amish rules on children’s education. In both cases, the Supreme Court held that the government’s proposed activity (denial of unemployment benefits in *Sherbert* and sanctions for non-attendance in *Yoder*) would “coerce activity” in violation of religious freedom. But, when it came time to apply those cases to the Indigenous peoples context in *Lyng*, the court could not see how building a road would coerce individuals to do anything in violation of their religion. The sacred sites could be destroyed, but Indigenous peoples could believe what they wanted about it: this would not violate the right to the free exercise of religion.

The attitude of the court — that destroying sacred sites did not violate the First Amendment’s protections for free exercise of religion — may reflect a struggle with the concept that gathering medicine or praying in a forest is, in fact, a religion at all.

How could the UN Declaration help advance both understanding and solutions to the challenge of Indigenous peoples’ religious freedoms involving sacred sites on US public lands?

First, as a general matter, article 2 of the UN Declaration provides that “Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination.”²⁹ Thus there is no justification for affording religious freedom to certain individuals and groups (white Christians, for example) while denying it to others (American Indians). In article 3, the declaration provides that “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”³⁰ Religious and cultural freedom are critical components of Indigenous peoples’ self-determination.³¹ These rights are both individual and collective, such that harms to the

25 While the Ninth Circuit in *Navajo Nation v US Forest Service* reified *Lyng* by limiting RFRA claims on public lands to facts where the government “coerces” religious belief, see *Navajo Nation v US Forest Service*, 535 F (3d) 1058 (9th Cir 2008) [*Navajo Nation*], a federal district court in *Oklahoma Comanche Nation v United States* applied RFRA to protect an Indian sacred site, noting that the Tenth Circuit had declined to take the narrow view of “substantial burden” adopted by the Ninth Circuit in *Navajo Nation*. See *Comanche Nation v United States*, No CIV-08-849-D, 2008 WL 4426621 (WD Okla 2008).

26 See e.g. FSC United States, “FSC Global Projects”, online: <<https://us.fsc.org/en-us/what-we-do/fsc-global-projects>>.

27 The UN Declaration is a resolution of the UN General Assembly (UNGA) and not a convention or treaty subject to a ratification process by the United States. Yet nothing prevents US courts from citing UNGA resolutions or other sources as they see fit. The status of the declaration is a complex and evolving topic, in particular as courts, executives and legislatures in countries around the world work to understand and implement it.

28 See *Pueblo of Jemez v United States*, 350 F Supp (3d) 1052, 1094, n 15 (“Both international law and other common-law countries’ law recognize aboriginal title”), citing *UNDRIP*, *supra* note 2; *Mabo v Queensland II* (1992), 175 CLR 1 (Austl) (holding that “native title” exists and that Australia’s common law recognizes native title).

29 *UNDRIP*, *supra* note 2, art 2.

30 *Ibid*, art 3.

31 Human Rights Council, *Promotion and protection of the rights of indigenous peoples with respect to their cultural heritage: Study by the Expert Mechanism on the Rights of Indigenous Peoples*, UNHRC, 30th Sess, UN Doc A/HRC/30/53, online: <www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Studyonculturalheritage.aspx>.

entire group (the Yurok, Karuk and Tolowa peoples in *Lyng*) must be considered alongside limitations on individual practitioners (for example, the medicine women who went to the High Country to pray).³²

More specifically under article 11, “Indigenous peoples have the right to practise and revitalize their cultural traditions and customs,”³³ and under article 12, “Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites.”³⁴ The recognition of these religious traditions in a standard-setting document as widely embraced as the UN Declaration can perhaps help to mitigate the skepticism so often expressed by judges who do not accept the legitimacy or understand the scope of Indigenous peoples’ religions.³⁵

In *Lyng*, for example, Justice Sandra Day O’Connor underscored that the Yurok, Karok and Tolowa Indians’ religion required “undisturbed naturalness” in the sacred High Country and that “[n]o disrespect for these practices is implied when one notes that such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property.”³⁶ Her protestations of respect aside, this passage seems to reveal her view that the Indian claims had an aspect of pretext or at least indeterminacy about them, as if the Indians were reclaiming the entire national forest rather than trying to stop destruction of certain prayer sites. In another case, *Badoni v Higginson*, a lower court considered Navajo medicine men’s attempts to protect Rainbow Bridge, a sacred site located in their territory, by analogizing them to hypothetical, idiosyncratic scenarios, as follows: “A person might sincerely believe that he or a predecessor encountered a profound religious experience in the environs of what is now the Lincoln Memorial in Washington, D.C., and that experience might cause him to believe that the Lincoln Memorial is therefore a sacred religious shrine to him. That person, however, could hardly expect to call upon the courts to enjoin all other visitors from entering the Lincoln Memorial in order to protect his constitutional right to religious freedom.”³⁷

According to the court, this might “lead to unauthorized and very troublesome results.”³⁸ The fact that Navajos would actually be burdened by flooding a prayer site in their own homeland, as proposed by the government, was completely lost in this reasoning and they lost the case.

Article 25 of the UN Declaration both confirms the place-based nature of some Indigenous religious traditions and locates them within their territories, stating: “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”³⁹ Moreover, article 24 makes clear that Indigenous peoples have the right to traditional medicines, including the conservation of medicinal plants,⁴⁰ a right that would have been relevant in the *Navajo Nation* case in which religious practitioners claimed the reclaimed water would contaminate medicinal plants.

32 *UNDRIP*, *supra* note 2, art 1.

33 *Ibid*, art 11.

34 *Ibid*, art 12.

35 See Carpenter, “Limiting Principles”, *supra* note 4 at 423–24.

36 *Lyng*, *supra* note 6 at 453.

37 *Badoni v Higginson*, 455 F Supp 641 at 645 (D Utah 1977) [*Badoni*].

38 *Ibid* at 647.

39 *UNDRIP*, *supra* note 2, art 25.

40 *Ibid*, art 24.

While federal ownership of sacred sites (or the past taking of Indian lands through conquest) has been treated as dispositive against Indigenous claims, the UN Declaration makes clear that the spiritual relationship continues despite formal title. Article 26 further provides: “States shall give legal recognition and protection to [Indigenous] lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”⁴¹ Indeed, the Yurok Tribe,⁴² the Navajo Nation⁴³ and many other tribes have extensive documentation of the customs, traditions and land tenure systems identifying and regulating their sacred sites, as well as the intergenerational obligations of the Indigenous peoples to those sites. If courts are sincerely struggling to determine whether, for example, the San Francisco Peaks or the Lincoln Memorial is equally susceptible to Indigenous religious freedoms claims, as in one federal decision, these sources can provide authoritative guidance.⁴⁴

With respect to consultation, here, too, the UN Declaration offers helpful guidance, both to agencies involved in consultation and to courts reviewing it. Both the NHPA and section 106 regulations require that federal agencies “consult” with any Indian tribe or Native Hawaiian organization that attaches traditional religious and cultural significance to historic properties that may be affected by an undertaking. However, in many cases, including *Navajo Nation*, the courts have construed the consultation obligation quite narrowly — it is procedural in nature and requires only minimal process. However, in article 19, the UN Declaration makes clear that consultation must occur in a spirit of “cooperation” such that states must obtain the “free, prior, and informed consent” (FPIC) of Indigenous peoples “before adopting and implementing legislative or administrative measures that may affect them.”⁴⁵

Article 19 reveals that perfunctory consultation is inadequate under human rights standards. Most importantly, consultation regarding sacred sites must occur with full notice and participation, through an ongoing government-to-government relationship, and toward the negotiation of affirmative agreements regarding the substantive standard of care and treatment for sacred sites. If this sounds like a high bar, recall that there are several examples of good practices in this regard.

In *Bear Lodge Multiple Use Ass’n v Babbitt*,⁴⁶ referenced in the section entitled “Background: Sacred Sites in the United States,” the National Park Service supervisor and others engaged in sustained and meaningful consultation with tribal cultural practitioners and local stakeholders regarding the impacts of rock climbing and recreation on a rock tower known as the “Lodge of the Bear,” a sacred site to Plains peoples. The final management plan called for a voluntary ban on climbing during the month of June when the Lakota Sun Dance took place, as well as interpretive signage and programs educating tourists about sacred sites, so they would know to avoid disrupting sweat lodges or taking down prayer bundles. In *Wyoming Sawmills v US Forest Service*,⁴⁷ the US Forest Service took a similarly inclusive and effective approach to management of the Medicine Wheel, an ancient or historic prayer site for tribes, leading to a memorandum of agreement and management plan limiting forestry and road building in the sacred area, and provided for ongoing consultation with tribes regarding future developments.

41 *Ibid*, art 26.

42 Yurok Tribe, “Constitution”, online: <<http://yuroktribe.org/government/councilsupport/documents/Constitution.pdf>>.

43 Diné Bi Beenahaz’áanii (1 NNC §§ 201–206), online: <www.navajocourts.org/dine.htm>.

44 *Badoni*, *supra* note 37 at 645 (rejecting a Navajo religious claim at Rainbow Bridge National Monument, a site figuring in the Navajo creation story).

45 *UNDRIP*, *supra* note 2, art 19.

46 See *Bear Lodge Multiple Use Ass’n v Babbitt*, 175 F (3d) 814 (10th Cir 1999).

47 See *Wyoming Sawmills Inc v US Forest Service*, 383 F (3d) 1241 (10th Cir 2004) (upholding the memorandum of agreement and Historic Preservation Plan between the US Forest Service and American Indian religious practitioners, providing for protection of sacred lands and ongoing consultations before any additional undertakings in Medicine Wheel).

For additional guidance on the current standards for consultation with Indigenous peoples under the UN Declaration's FPIC provisions, legal decision makers could consult authoritative UN studies on this topic.⁴⁸ *Bear Lodge* and *Wyoming Sawmills*, with their advance notice, mutual respect, relational approach and management agreements, reflect major progress toward meeting the requirements for consultation under the declaration. These best practices contrast fully with the consultation in *Navajo Nation* and *Standing Rock*, wherein the agencies failed to reach any agreement with the tribes and went ahead with the developments anyway, a practice that fails to comply with the FPIC standard as envisioned by the declaration.⁴⁹

Consultation in sacred sites cases is conducted by federal agencies that, in some instances, seem well aware of the applicability and utility of the UN Declaration to their work. As mentioned above, the Advisory Council for Historic Preservation, which advises the president and Congress, expressly adopted the UN Declaration as a matter of international policy and has published extensive guidance on complying with its terms in the management of sacred sites.⁵⁰ The US Forest Service⁵¹ and the US Fish and Wildlife Service⁵² both reference the declaration in their policies.

Finally, legal decision makers in all branches of government, as well as Indigenous peoples, can consult the UN Declaration regarding remedies for the violation of rights to sacred lands. Here the declaration sets forth a hierarchy of remedies, from actual restitution of land to monetary compensation, reflecting the distinct nature of Indigenous spiritual relationships with lands. Article 10 provides that Indigenous peoples shall not be forcibly removed from their lands and that no relocation can occur without FPIC, with a right of return or compensation.⁵³ This article is relevant to ongoing threats to Indigenous peoples' access to their sacred sites, potentially including the US Congress decision to sell Oak Flats, an Apache sacred site, to a multinational mining company. Article 11 provides that states shall provide redress, including restitution, for "religious and spiritual property taken without free, prior and informed consent or in violation of their laws, traditions and customs."⁵⁴ A best practice includes Congress's legislative return of the sacred Blue Lake to the Taos Pueblo people in the 1970s. Article 26 provides that states shall give "legal recognition and protection to the lands, territories, and resources of indigenous peoples...with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."⁵⁵ Here consider the sacred Black Hills of the Great Sioux Nation, famously guaranteed by treaty and then taken by the United States, which could be the subject of legal recognition and restitution today, whether by legislation or other means.⁵⁶

48 Human Rights Council, *Free, prior and informed consent: a human rights-based approach. Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UNHRC, 39th Sess, UN Doc A/HRC/39/62 (2018), online: <<https://undocs.org/en/A/HRC/39/62>> (the Expert Mechanism is mandated by the Human Rights Council to provide expertise to states and Indigenous peoples on realizing the aims of the UN Declaration).

49 See *Navajo Nation*, *supra* note 25 (holding that the US Forest Service's consultation process concerning effects on historic properties to which Indian tribes attached religious and cultural significance was substantively and procedurally adequate under the National Historic Preservation Act [NHPA]); *Standing Rock Sioux Tribe v US Army Corps*, 205 F Supp (3d) 4, 13 (DDC 2016) (order denying the motion for preliminary injunction, in part, because tribes had not shown the government failed to meet the standard for consultation under the NHPA).

50 Advisory Council on Historic Preservation, "United Nations Declaration on the Rights of Indigenous Peoples", online: <www.achp.gov/indian-tribes-and-native-hawaiians/united-nations-declaration-rights-indigenous-peoples>.

51 Forest Service & Office of Tribal Relations, United States Department of Agriculture, *Report to the Secretary of Agriculture: USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites* at 10 (recognizing article 12 of the UN Declaration), online: <www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf>.

52 Fish and Wildlife Service, *Intergovernmental Activities*, ch 1 at para 2 ("The Service's Native American Policy"), online: <www.fws.gov/policy/510fw1.pdf>.

53 UNDRIP, *supra* note 2, art 10.

54 *Ibid*, art 11.

55 *Ibid*, art 26.

56 See *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples in the United States of America*, UNGAOR, 21st Sess, UN Doc A/HRC/21/47/Add.1 (2012) at paras 72–84.

Conclusion

The concept and practice of religious freedom is generally cherished in US society, but currently denied to American Indians in cases where they seek to protect sacred sites located on federal public lands from destruction. Application of the UN Declaration has the potential to advance solutions, including paradigms of consensual relationships between tribal governments and the federal government regarding sacred sites management practices. Such an approach would advance democracy and pluralism by helping to ensure that all US citizens — not just some — enjoy the rights promised by the country's Constitution.

About the Author

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Implementing the UN Declaration through Domestic Legislation

A Canadian Example



Brenda L. Gunn

Canada was one of the first common law jurisdictions to propose a legislative approach toward implementing the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration/UNDRIP).¹ Bill C-262, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples,² was a private member's bill introduced by the Honourable Romeo Saganash, a Cree member of Parliament. While the legislation was modest in what it set out to do, it would have been an important first step toward ensuring that the UN Declaration was fully implemented in Canada. This paper describes the bill and its history, the importance of the bill and reactions to the bill, and then makes some suggestions for what other jurisdictions may be able to learn from the Canadian experience in this attempt to implement the UN Declaration in Canadian domestic law.

Overview and Significance of Bill C-262

Before discussing the various responses to Bill C-262, this section provides a brief background on the legislative process of the bill and an overview of the bill. The bill

¹ United Nations Declaration on the Rights of Indigenous Peoples, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

² Bill C-262, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples, 1st Sess, 42nd Parl, 2016 (as passed by the House of Commons 30 May 2018) [Bill C-262].

was introduced on April 21, 2016. When introducing the bill, Saganash explained: “As members know, a central component of the Truth and Reconciliation Commission’s calls to action is to use the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation. Therefore, if this bill is adopted, that would provide the legislative framework for a national reconciliation that is long overdue in this country. This would entail a collaborative process to ensure that federal laws are consistent with the declaration, and a national plan of action.”³

After its second reading, the bill was sent to the Standing Committee on Indigenous and Northern Affairs, where it was considered for several months. The committee heard testimony from several experts and Indigenous peoples’ organizations. The committee sent the bill back to the House without amendment on May 9, 2018. The bill had its third reading in the House of Commons on May 30, 2018, where it was adopted and then introduced to the Senate on May 31, 2018. The bill had its second reading in the Senate on November 29, 2018. Senator Murray Sinclair explained the importance of the bill and implementing the UN Declaration in Canada: “In this era of reconciliation, the time to atone for what was done is now. This bill will help to undo those laws that continue to perpetuate that past history and lays out the foundation to work collaboratively together to address the impact of the destruction those laws have caused.”⁴

The Senate Committee concluded its work on the bill on June 11, 2019. However, despite more than a year to consider the bill, the Senate failed to pass the bill before Parliament rose for the summer on June 21, 2019. As the House of Commons did not sit again before the election in 2019, the bill died.

The bill had five main aspects. First, it clarified that the UN Declaration applies in Canada.⁵ Second, it required the government to take action to ensure that all laws in Canada be consistent with the UN Declaration.⁶ Third, the bill required the government to develop and implement a national action plan to achieve the ends of the UN Declaration.⁷ Fourth, the bill required Canada to report annually to Parliament on the implementation of the national action plan and the measures taken to ensure consistency of Canadian laws with the UN Declaration.⁸ Finally, the bill clarified that the act does not diminish or extinguish any rights recognized and affirmed in section 35(1) of the Constitution Act, 1982.⁹

While the bill provided for modest steps to be taken toward implementing the UN Declaration in Canada, they were important steps. It is important to note that a private member’s bill cannot contain any budgetary obligations; Bill C-262 did not seek to implement any specific sections of the UN Declaration, since the fulfillment of many rights identified in the declaration (such as the right for Indigenous peoples to improve their economic conditions through housing, or the right to establish and control their education systems and institutions) would require funding. Despite this limitation, the bill would have had significant impact in Canada. The bill clarified that the UN Declaration applies in Canadian law because, while the Supreme Court of Canada jurisprudence is clear that declarations such as the UN Declaration can (and should) be used to interpret domestic laws, including the Constitution,¹⁰ there has been hesitation among lawyers and judges to rely on the UN Declaration in interpreting

3 *House of Commons Debates*, 42nd Parl, 1st Sess, Vol 148, No 44 (21 April 2016).

4 *Senate, Journals of the Senate*, 1st Sess, 42nd Parl, Vol 150, No 254 (29 November 2018) at 1550 (George J Furey).

5 Bill C-262, *supra* note 2, s 3.

6 *Ibid*, s 4.

7 *Ibid*, s 5.

8 *Ibid*, s 6.

9 *Ibid*, s 2.

10 For a case where the presumption of conformity was used in Charter litigation, see *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, 2004 SCC 4, [2004] 1 SCR 76, 234 DLR (4th) 257 [Canadian Foundation].

domestic law — mostly due to the lack of understanding of the role of international law domestically.¹¹ The presumption of conformity — where domestic laws (including the Canadian Constitution) are interpreted in accordance with Canada's international human rights obligations — is a well-established principle in Canada.¹² This bill is critical to overcome the reticence and ignorance of many in the legal field on the relevance of the UN Declaration to interpreting Canadian laws, including the Constitution and the recognition and affirmation of Aboriginal and treaty rights in section 35(1) of the Constitution Act, 1982.

While courts may play a role in interpreting the UN Declaration, including consistency of domestic law, interpretation can also occur through general legislative and policy reviews where the necessary amendments are made, as well as through negotiation such as modern treaty negotiations. It is important to remember that law is not static — not international human rights law, nor Canadian constitutional law. A key interpretive principle for the Canadian Constitution is that it is a living tree, with strong roots and an ability to grow and adapt to changing circumstances.¹³ The UN Declaration is key to helping the Canadian Constitution grow and adapt, especially as our understanding of the existing Aboriginal and treaty rights protected under the Constitution continues to evolve to keep pace with developing international human rights standards. Bill C-262's affirmation of the application of the UN Declaration in Canada was an important step to encourage an evolving understanding of Aboriginal and treaty rights in Canada.

Canada may have been considered a leader on the recognition of Indigenous peoples' rights when the Canadian Constitution recognized and affirmed existing Aboriginal and treaty rights in 1985, as it was one of the first Commonwealth countries to constitutionally entrench Indigenous peoples' rights.¹⁴ Unfortunately, Canada no longer leads the world on the protection of Indigenous peoples' rights. In fact, James Anaya, the former UN Special Rapporteur on the rights of Indigenous peoples, raised concerns during a country visit in 2013, stating that the problems faced by Indigenous peoples in Canada had worsened since the 2004 visit and had reached crisis proportions.¹⁵ Adopting Bill C-262 would have played a key role in helping bring Canada back to the forefront of Indigenous rights protection and to fulfill Canada's international human rights obligations.

Bill C-262 was also an important opportunity for Canada to uphold its international human rights obligations. One of the four purposes of the UN Charter is “to achieve international co-operation...in promoting and encouraging respect for human rights”¹⁶; as such, Canada is obligated to uphold human rights, including those articulated in the UN Declaration. Bill C-262 was one way that Canada could have implemented its obligations to protect human rights.

11 See e.g. *Mississaugas of Scugog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada and its Local 444, Great Blue Heron Gaming Company, Ontario Labour Relations Board, Canada (AG) and Ontario (AG)*, 2007 ONCA 814, 287 DLR (4th) 452 at paras 46–47 (leave to appeal to the Supreme Court of Canada refused [32452], 24 April 2008). Justice Robert Sharpe made no less than three errors when he refused to consider the draft UN Declaration on the Rights of Indigenous Peoples, including referring to the declaration as a convention, indicating that Canada had not ratified the declaration, and that the general language of the declaration was not of assistance in understanding the rights asserted in the present case.

12 *Canadian Foundation*, *supra* note 10 at para 31, citing *Ordon Estate v Grail*, [1998] 3 SCR 437 at para 137. The presumption of conformity includes conventions not yet translated into Canadian law and non-binding obligations. See *Baker v Canada*, [1999] 2 SCR 817 at 861; see also 114957 *Canada Ltee (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241 at para 30 (Justice L'Heureux-Dubé held that the municipal bylaw regulating the use of lawn chemicals was consistent with principles of international law and policy). See also Paul Joffe, “Canada's Opposition to the UN Declaration: Legitimate Concerns or Ideological Bias?” in Jackie Hartley, Paul Joffe & Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action* (Saskatoon: Purich, 2010) 201.

13 *Edwards v Canada (AG)*, [1930] AC 124; [1930] 1 DLR 98; [1929] 3 WWR 479; 46 TLR 4 (UK JCPC).

14 Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, (Addendum: The situation of indigenous peoples in Canada)*, UNHRC, 27th Sess, UN Doc A/HRC/27/52/Add.2 (2014).

15 *Ibid* at para 14.

16 *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 1(3).

Finally, the bill would have played an important role in promoting transparency and accountability. Through development of a national action plan and periodic reporting, the federal government would have worked with Indigenous peoples to develop a plan to implement the UN Declaration and then to publicly explain what actions had been undertaken to meet their obligations.

This requirement of periodic reporting was designed to build upon existing work undertaken by the federal government to begin the process to review laws through the Working Group of Ministers announced by Prime Minister Justin Trudeau on February 22, 2017, and led by then Justice Minister Jody Wilson-Raybould. This working group was mandated to “examine relevant federal laws, policies, and operational practices to help ensure the Crown is meeting its constitutional obligations with respect to Aboriginal and treaty rights; adhering to international human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples; and supporting the implementation of the Truth and Reconciliation Commission’s Calls to Action.”¹⁷

While the prime minister’s announcement indicates that this working group was to collaborate with Indigenous leaders, youth and “experts,” it is unknown what came of this work. Further, the announcement stated, “As its first order of business, the Working Group will develop a rigorous work plan and principles, which will reflect a whole-of-government approach that addresses all Indigenous Peoples”; this plan also has not been made public.¹⁸ The Inuit Tapiriit Kanatami (ITK) expressed concern with the federal government’s approach to implementing the UN Declaration because there had been promises that national Indigenous organizations such as ITK “would be invited to participate in an *ad hoc* UNDRIP implementation committee that would help guide the implementation of this important international human rights instrument,” which has yet to happen.¹⁹ With this overview of the modest steps taken toward implementing the UN Declaration, as set out in Bill C-262, the next section discusses some of the responses to the bill.

Varied Responses to the Bill

There were many different responses to Bill C-262. Initially, the Trudeau government opposed the bill. This was disappointing, considering that this government had repeatedly affirmed its support for the UN Declaration and expressed its intention to implement it.²⁰ Wilson-Raybould called the bill “unworkable” at an address to the Assembly of First Nations in July 2016: “So as much as I would tomorrow like to cast into the fire of history the *Indian Act* so that the nations can be reborn in its ashes, this is not a practical option — which is why simplistic approaches, such as adopting the UNDRIP as being Canadian law, are unworkable and, respectfully, a political distraction to undertaking the hard work required to actually implement it.”²¹

Liberal member Robert Falcon-Ouellette introduced his own private member’s bill, C-332, An Act to provide for reporting on compliance with the United Nations Declaration on the Rights of Indigenous

17 Justin Trudeau, Prime Minister of Canada, News Release, “Prime Minister announces Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples” (22 February 2017), online: <<https://pm.gc.ca/eng/news/2017/02/22/prime-minister-announces-working-groupministers-review-laws-and-policies-related>>.

18 *Ibid.*

19 Inuit Tapiriit Kanatami (ITK), Position Paper, “Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada” (January 2017) at 4, online: <www.itk.ca/wp-content/uploads/2017/01/ITK-Position-Paper-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-Peoples-English.pdf>.

20 See *Statement by the Honourable Jody Wilson-Raybould, P.C., M.P., Minister of Justice and Attorney General of Canada, to the Fifteenth Session of the United Nations Permanent Forum on Indigenous Issues* (9 May 2016), online: <<http://cendoc.docip.org/collect/cendocdo/index/assoc/HASH82cd/de4e9c7a.dir/PF16Jody000p.pdf>>; *Statement by the Honourable Carolyn Bennett, M.P., Minister of Indigenous and Northern Affairs, Head of the Delegation of Canada, to the Fifteenth Session of the United Nations Permanent Forum on Indigenous Issues* (10 May 2016), online: <<http://cendoc.docip.org/collect/cendocdo/index/assoc/HASH16ee/fb99dbf6.dir/PF16Carolyn011.pdf>>.

21 Jody Wilson-Raybould [Speech delivered at the Assembly of First Nations Annual General Assembly, Niagara Falls, 12 July 2016], online: <www.canada.ca/en/departement-justice/news/2016/07/assembly-of-first-nations-annual-general-assembly.html>.

Peoples, on December 14, 2016. The only requirement under this bill was for the government to report annually on Canada's compliance with the UN Declaration.²² While this bill did not make it past first reading, it suggests that the Liberal government initially treated Bill C-262 as a partisan issue that they would not support.

By November 21, 2017, however, Wilson-Raybould indicated that the Liberal government would support Bill C-262.²³ While it is difficult and practically impossible to pinpoint what changed the Liberal government's position on the bill, it is fair to say that public pressure and support for the bill at least contributed to the shift.

There was significant grassroots support for Bill C-262. One initiative was the "meet with your member of Parliament in support of the United Nations Declaration on the Rights of Indigenous Peoples," promoted by KAIROS, an interfaith organization in Canada dedicated to working for ecological justice and human rights. This campaign provided information on when and how to meet with MPs to discuss the implementation of the UN Declaration. The Mennonite Central Committee also developed a national postcard-writing campaign for people to express their support for Bill C-262 as it was put before the House of Commons and the Senate.²⁴ These postcards were entitled "Let's walk the talk of reconciliation with Bill C-262." This was part of the broader "adopt and implement" movement, which was supported by several faith communities, including the Mennonite Central Committee. There were also events calling for the government to "adopt and implement," such as a rally in Winnipeg encouraging MPs to vote in favour of Bill C-262.²⁵ Many grassroots organizers used the hashtag #passbillc262 to spread the word, show support and discuss updates. One organization, with the Twitter handle @adoptimplement, encouraged people to write down what Bill C-262 meant to them, take a picture and tweet it; the group also started an online petition.²⁶ In addition, the Coalition for Human Rights of Indigenous Peoples, which includes various Indigenous peoples' organizations, human rights groups and individual experts, made several public statements in support of the bill.²⁷ This broad base of support put significant pressure on the Liberal government to lend its support to Bill C-262.

While most Indigenous peoples and organizations broadly supported the bill, ITK expressed some hesitation. ITK clearly supported implementation of the UN Declaration through legislative action, but "insist that an adequately resourced, comprehensive federal legislative framework, drafted in collaboration with Indigenous peoples, is necessary to begin the process of implementing the UNDRIP."²⁸ As Bill C-262 was developed and proposed by Romeo Saganash, it seems as though one of ITK's concerns may have been that Inuit were not specifically engaged in the drafting of this bill. Another concern that ITK mentioned was a need for national monitoring and compliance mechanisms, which they argued "should be similar to that of the respective treaty body requirements that the Government of Canada must comply with to meet their solemn obligations under international human rights law."²⁹ Here, again, it appears that ITK was concerned Bill C-262 lacked the teeth to enforce the UN Declaration.

22 Bill C-332, *United Nations Declaration on the Rights of Indigenous Peoples Reporting Act*, 1st Sess, 42nd Parl, 2016, cl 2(1) (first reading 14 December 2016).

23 John Paul Tasker, "Liberal government backs bill that demands full implementation of UN Indigenous rights declaration", *CBC News* (21 November 2017), online: <www.cbc.ca/news/politics/wilson-raybould-backs-undrip-bill-1.4412037>.

24 Common Word Bookstore and Resource Centre, "Let's Walk the Talk of Reconciliation with Bill C-262", online: <www.commonword.ca/ResourceView/2/19500>.

25 Bryce Hoyer, "Winnipeg rally urges MPs to adopt UN declaration on Indigenous rights", *CBC News* (23 September 2017), online: <www.cbc.ca/news/canada/manitoba/manitoba-united-nations-indigenous-rights-1.4304259>.

26 Adopt and Implement the Rights of Indigenous People, online: <www.adoptandimplement.com>.

27 Coalition for the Human Rights of Indigenous Peoples, "Statements", online: <www.declarationcoalition.com/statements/>.

28 ITK, *supra* note 19 at 15.

29 *Ibid* at 15.

ITK developed a paper calling for the creation of the Indigenous Peoples Human Rights Commission, which would be “an independent national human rights body...responsible for monitoring compliance within areas of federal jurisdiction and promoting and assessing implementation of the *UN Declaration* nationally.”³⁰ Again, given the inability of private members’ bills to commit funds, Bill C-262 would not have been able to include many of the aspects ITK was advocating.

There was little public opposition to Bill C-262. In fact, only a couple of the 71 witnesses who were called to testify on Bill C-262 spoke against the bill. The most vocal opposition came from two legal practitioners, Thomas Isaac and Arend Hoekstra, whose practice focuses on advising businesses and governments on Aboriginal legal matters. Their criticisms were far-ranging, but in essence they claimed:

Though the mechanics of Bill C-262 are simple in design, that simplicity is problematic. UNDRIP is a blunt instrument, developed in an international setting, that is not reflective of Canada’s world-leading legal protections for Indigenous rights; Canada is the only nation with an established system for limiting unilateral state action against Indigenous peoples. By simply adopting UNDRIP in its entirety into the Canadian context, Bill C-262 misconstrues Canada’s existing and sophisticated Indigenous rights regime and, by adding new uncertainties, risks hindering the pursuit of reconciliation.³¹

Isaac and Hoekstra identified several areas of concern, including uncertain language in the preamble as to how the UN Declaration would apply in Canada, the lack of a definition of “Indigenous” compared to the specific definition of “Aboriginal” in the Constitution, that sections 3 and 4 do not provide enough discretion to the government to abrogate and derogate the rights protected in the UN Declaration, and their concern that the bill did not actually set out intended outcomes from the adoption of the UN Declaration.³² Isaac and Hoekstra then suggested that “while UNDRIP reflects critical elements of Indigenous rights through a lens of human rights, it was designed as a global benchmark and guide, rather than a specific legal instrument to be directly implemented as law.”³³ They stated their opinion that “UNDRIP’s focus on free, prior and informed consent appears to be generally unworkable in the Canadian context.”³⁴

Dwight Newman and Ken Coates raised similar points. They expressed concern that the UN Declaration “was not drafted as a piece of Canadian law and thus did not take into account the complexities of constitutional, legal, and political relations between Indigenous peoples and the Government of Canada.”³⁵ It is important to note that no international human rights instrument is written as a piece of domestic Canadian law, and in the case of the UN Declaration, Canada was an active participant throughout the drafting process. Bill C-262 called for a national action plan for implementation of the UN Declaration, a process whereby a general international instrument would be transformed into the specific Canadian context, taking into account these complex constitutional, legal and political realities.

³⁰ *Ibid* at 2.

³¹ Arend JA Hoekstra & Thomas Isaac, “Implementing UNDRIP in Canada: Challenges with Bill C-262” (1 August 2018), online: Cassells Brock Lawyers <<https://cassells.com/insights/implementing-undrip-in-canada-challenges-with-bill-c-262/>>.

³² *Ibid*.

³³ *Ibid*.

³⁴ *Ibid*.

³⁵ Ken Coates & Dwight Newman, “Bill on implementing UNDRIP ‘simplistic’ and ‘laden with circular tensions’”, *The Hill Times* (14 December 2017), online: <www.hilltimes.com/2017/12/14/bill-implementing-undrip-simplistic-laden-circular-tensions/128903>.

Newman and Coates expressed concern that this bill would shift “a lot more power to courts.”³⁶ Specifically, they warned that other national governments have approached implementation of the UN Declaration with caution, that the bill might start applying the UN Declaration to interpreting Canadian law and the Canadian Constitution, which has “the potential to unleash a legal struggle of titanic proportions,” that courts might determine that modern treaties did not meet the standards set out in the UN Declaration, that adopting UNDRIP could cause uncertainty and impede the slowly developing legal and political partnerships unfolding in Canada, and that this should be a policy conversation rather than a legal one.³⁷ Coates and Newman concluded that the “act could well be opening the door wider...than anyone realizes,” and argued that the government needs to move slowly and cautiously.

Paul Joffe and Sheryl Lightfoot criticized the Newman and Coates piece as “alarmist, misleading and confusing.”³⁸ Rather than being real concerns about the limitations of Bill C-262, Joffe and Lightfoot stated, Newman and Coates’s concerns seemed to misconstrue international law and how general international human rights standards are incorporated into domestic law.³⁹ Further, Joffe and Lightfoot explained that the uncertainties Newman and Coates identified were already addressed within the bill, as it calls for the development of a national action plan in which the specifics of Canadian contexts could be addressed. Joffe and Lightfoot finally commented that Indigenous peoples in Canada continue to have their fundamental human rights violated in very problematic fashions, and that Bill C-262 would be at least a step forward to begin addressing these problems. And while we may not fully know all the impacts of implementing the UN Declaration in Canada, we definitely know the cost of failing to act: poverty, suicide, murdered and missing Indigenous women and girls, lower educational attainment, pollution of traditional lands, lower health outcomes, and the list continues.⁴⁰ It is no longer appropriate for Indigenous peoples in Canada to pay such a high price for Canada to continue to exist and thrive.

Despite the criticisms described above, there was overwhelming support for Bill C-262, including from Indigenous peoples and organizations, the public, members of the House of Commons and many senators. Despite this support, several members of the Senate were successful in delaying the passage of the bill. Starting in committee, Conservative senators, led by Conservative Senator Don Plett, tabled many amendments to the bill and used the maximum time to present their arguments. This group of senators also repeatedly tried to adjourn the meetings, remove officials from the room, move on to other business, and extend speaking time to 20 minutes per person. These filibustering techniques continued when the bill returned to the Senate for its third reading. When Parliament adjourned in June 2019, Bill C-262 died. Despite the ultimate success of these tactics in killing the bill, there are many lessons that can be learned from this experience that may benefit other countries contemplating legislative action to implement the UN Declaration.

What We’ve Learned: Considerations for Other Jurisdictions

While Bill C-262 was limited in the steps it would take to implement the UN Declaration, it was a significant step forward. There are several reasons for the relative success of this bill that other jurisdictions could consider when undertaking a legislative approach to implementing the UN Declaration. First, by only stating that the UN Declaration applies in Canada rather than explicitly stating the legislation would

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Paul Joffe & Sheryl Lightfoot, “Legislative framework essential for UN declaration”, *The Hill Times* (10 January 2018).

³⁹ *Ibid.*

⁴⁰ For more on these, see Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services, 1996); see also Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015).

fully implement the UN Declaration, the bill was able to garner broad public and political support. Second, the focus on developing a national action plan, along with periodic reporting on its success, were important aspects to promote transparency and accountability. Third, the bill provided space for Indigenous peoples and various stakeholders to play an active role in the process of implementing the UN Declaration. This approach would allow for action at the national level, while leaving the necessary space to deal with issues on a local and community-specific level.

Advocates leveraged the strong statements of support that the federal government had previously made on the UN Declaration to push support for Bill C-262 as a tangible step toward implementing the declaration. The strong and coordinated grassroots movement, which engaged in rallies, postcard-writing campaigns and reaching out to MPs and senators, helped garner a great deal of political will for Bill C-262. At the international level, many Indigenous peoples had previously lobbied for Canada to take action, and several treaty-monitoring bodies had made recommendations to Canada to implement the UN Declaration and develop a national action plan. With this culmination of factors, Bill C-262 went from being a private member's bill presented by an Opposition party member to one that was supported by the majority of the House of Commons and the Senate Committee. It is unfortunate that the bill did not complete third reading in the Senate before the Senate rose in June 2019. While Bill C-262 did not become law, the Trudeau government has promised to introduce similar legislation.⁴¹ The province of British Columbia passed the Declaration on the Rights of Indigenous Peoples Act in November 2019.⁴² The act generally mirrors Bill C-262, but also adds a clause regarding agreements with Indigenous peoples. There is also discussion at the territorial level.

Despite the failure of Bill C-262 to become law, it is promising that other jurisdictions are beginning to take action to implement the UN Declaration, including through legislative means.

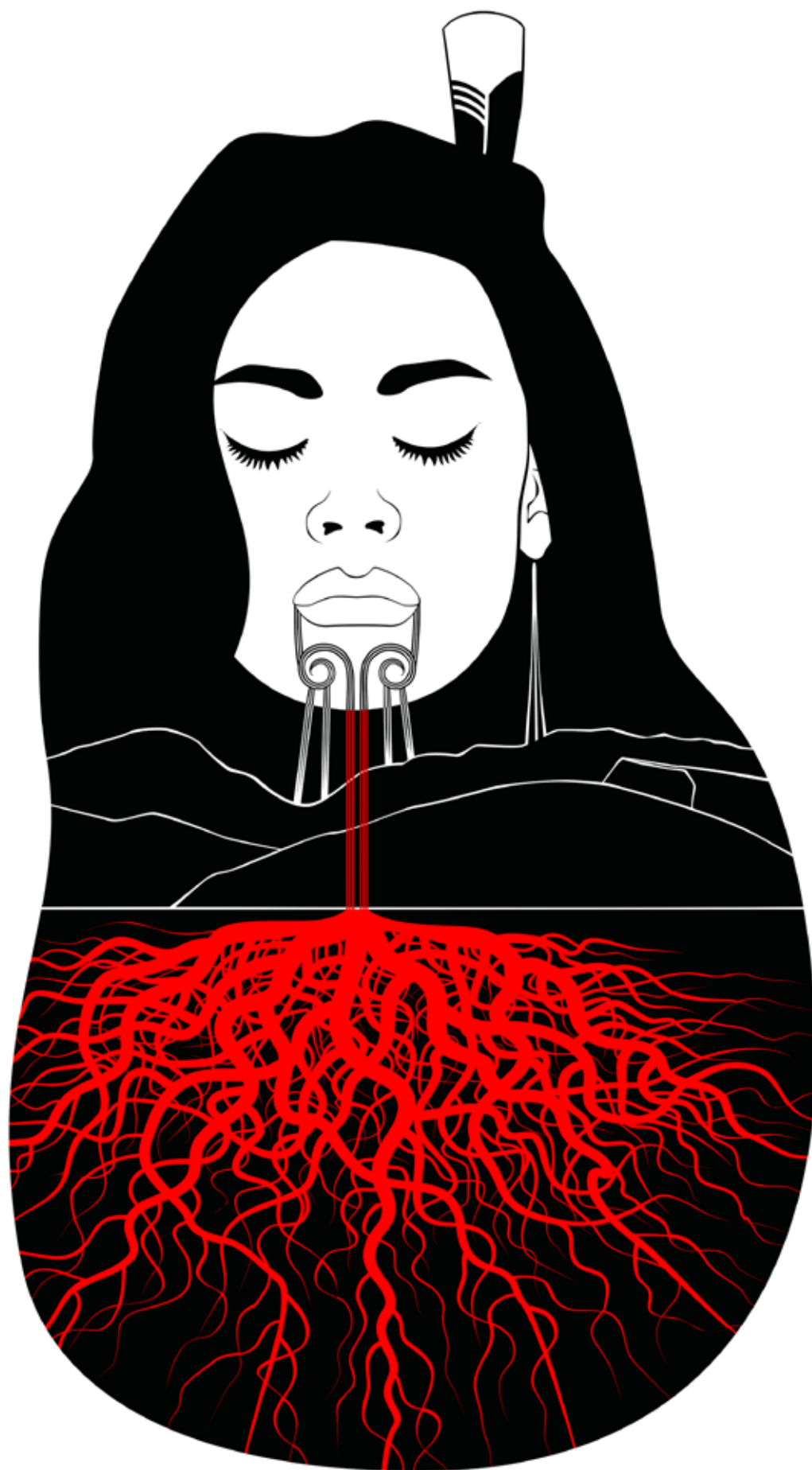
About the Author

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Brenda has worked with First Nations on Aboriginal and treaty rights issues in Manitoba and provided technical assistance to the UN Expert Mechanism on the Rights of Indigenous Peoples in the analysis and drafting of the report summarizing the responses to a survey on implementing UNDRIP. A proud Métis woman, Brenda is recognized for developing the key handbook in Canada on understanding and implementing UNDRIP. She has a B.A. from the University of Manitoba and a J.D. from the University of Toronto. She completed her LL.M. in Indigenous peoples' law and policy at the University of Arizona and was called to the Bars of Ontario and Manitoba.

⁴¹ Joan Bryden, "Trudeau promises to legislate implementation of UNDRIP if re-elected", CTV News (19 June 2019), online: <www.ctvnews.ca/politics/trudeau-promises-to-legislate-implementation-of-undrip-if-re-elected-1.4473659>.

⁴² Bill 41-2019, *Declaration on the Rights of Indigenous Peoples Act*, 4th Sess, 41st Parl, British Columbia, 2019.



Treaties and the UN Declaration on the Rights of Indigenous Peoples

The Significance of Article 37



Kirsty Gover

Drawing largely on jurisprudence and legislation in Canada, Australia and New Zealand, this paper argues that article 37 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)¹ is an important provision that is underutilized in efforts to implement the declaration in domestic law. Article 37 states:

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

By declaring that treaty guarantees are not to be diminished by other provisions in UNDRIP, article 37 appropriately exemplifies the kind of priority that historical collective Indigenous rights must have if they are to be adequately protected from the competing

claims of third parties. If used in advocacy and negotiation, it could assist in making clear that the contents of Indigenous-state agreements protected by UNDRIP should not be “read down” or made subject to the qualifications set out in article 46 of UNDRIP. In domestic law, the article could assist in efforts to protect treaty rights from qualifications that might otherwise be brought to bear on them, including limitations permitted in legislative or constitutional bills of rights.

I take as a starting point the idea that treaties provide a way for Indigenous peoples and states to “contract out” of general public law, in order to emphasize the distinctive historical relationship that pertains between settler governments and Indigenous nations. Article 37 conveys the correct (in my view) understanding of appropriately concluded treaties as quasi-contractual constitutional agreements that are not subject to general norms of distributive justice, individual rights and non-discrimination principles. This idea could be pursued in practice by including article 37 in treaties and agreements, even as preambular passages, and — so far as possible — in the legislative and regulatory mechanisms that enable and facilitate agreement making and provide the mandate of negotiators. It could also be referred to by Indigenous nations in agreement-making processes and advocacy, and in arguments used in negotiation and litigation.

The current treaty-making processes that have been initiated in the Australian states of Victoria and Queensland and in the Northern Territory provide an opportunity to draw on article 37 as support for Indigenous priorities in treaty making. It could also assist with the efforts of First Nations in Canada to ensure that treaty rights, protected by section 35 of the Canadian Constitution, are not read down by reference to the individual rights protected in the Canadian Charter of Rights and Freedoms (including the Charter’s non-discrimination provisions). It provides support for a narrower reading of the permissible legislative limitations on treaty rights than is evident in jurisprudence on section 35, including by supporting a reading of section 25 of the Constitution as a “shield” to protect treaty and Aboriginal title rights from limitations imposed in the service of competing Charter rights. In New Zealand, reference to article 37 could assist to reinforce the priority of treaty rights over public and third party interests in claims settlement processes, litigation and in constitutional debates on the meaning and status of the treaty. It could also assist in arguments intended to protect the treaty and its guarantees from competing third party rights asserted under the New Zealand Bill of Rights Act 1990 (NZBORA). To date, however, in the few instances in which UNDRIP is referred to in the domestic law and policy in these countries, article 37 has received little emphasis.

Drafting History of Article 37

Article 37, and its predecessor, draft article 36, were relatively uncontroversial during the Working Group on the Draft Declaration (WGDD) negotiations, the Human Rights Council vote in 2006 and the 2007 United Nations General Assembly (UNGA) adoption vote. None of the CANZUS states (Canada, Australia, New Zealand and the United States) referred to article 37 as a reason for their negative votes in 2007, and only one state, Nigeria, referred to article 37 to explain its abstention.² The article was cited, however, in the African Group’s *aide-memoire*, a document setting out the group’s concerns with the 2006 text of the declaration. The relevant section of the *aide-memoire* explains that “[t]he African Group has serious reservations regarding the implications of this Article,” but does not elaborate on the detail of those concerns.³

2 UNGAOR, 61st Sess, 108th Plen Mtg, UN Doc A/61/PV.108 (2007) (Mr. Akindele [Nigeria]: “However, my delegation wishes to stress that a number of concerns critical to the interests of my country were not satisfactorily addressed. Some of those concerns include the issue of territorial integrity, self-determination — articles 3 and 4 — the control of lands, territories and resources — article 26 — and article 37, which deals with the important issue of treaties” at 6).

3 African Group, *Draft Aide Memoire: United Nations Declaration on the Rights of Indigenous Peoples* (9 November 2006) at 8.0, online: <http://cendoc.docip.org/collect/cendocdo/index/assoc/HASH0110/1b549795.dir/draft_africangroup.pdf>.

The article was among those on which a “provisional agreement” was reached during consultation exercises in the penultimate and final sessions of the WGDD in 2005 and 2006. The working group chair presiding in these sessions recalls that article 37 was among the least controversial provisions of the declaration: “The other outstanding articles presented no great difficulties and the alternatives retained were those which, in the light of the opinions expressed in the consultations, had the greatest possibility of obtaining a consensus, as in the case of Article 36 (Article 37 of the Declaration as adopted by the UNGA) on treaties, in which the proposal presented by the facilitators was maintained.”⁴

The original (1994) draft text of article 37 (draft article 36) was therefore amended in the 2006 “compromise text”⁵ that was prepared by the working group chair in accordance with the proposals put to him in his consultations before and during the final session of the WGDD. The original formulation of draft article 36 was as follows: “Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, *according to their original spirit and intent*, and to have States honour and respect such treaties, agreements and other constructive arrangements. *Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.*”⁶

As the amended text suggests, states proposed the removal of the final clause of the draft article, which contemplated the submission of treaty disputes to “competent international bodies.”⁷ Proposals to amend the draft article in this way were vehemently rejected by Indigenous peoples’ organizations represented at the working group.⁸ Even while states proposed wording to clarify and reduce the extent of their obligations under article 37 (as they did with other provisions), the article is not among the group of provisions that attracted the most vehement objections from CANZUS states (these being articles 26–28 on land and compensation, articles 3 and 4 on self-determination, and articles 19 and 32 on consultation and free, prior and informed consent).

This may be due, in part, to the fact that the crucially significant second sub-article, article 37(2), was a late addition to the draft text, and was not debated by states in the WGDD plenary sessions of 1996–2006. It first appears in the chair’s summary of proposals at the conclusion of the tenth session of the working group in 2005,⁹ and was discussed in facilitated consultations at the eleventh (and final) session, although no consensus was then reached on the text.¹⁰ Records show that article 37(2) derives from a “proposal by the Indigenous caucus at the Organization of American States (OAS), November 11, 2004,”¹¹ referring to the fourth meeting of the Working Group to Prepare the Draft American Declaration

4 Luis-Enrique Chavez, “The Declaration on the Rights of Indigenous Peoples, Breaking the Impasse: the Middle Ground” in Claire Charters & Rodolfo Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs, 2009) 96 at 105.

5 *Ibid* at 102.

6 Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session, UNESCOR, 62nd Sess, UN Doc E/CN.4/2006/79 (2006) at 25 [emphasis added].

7 See e.g. Amended Text: Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland, UNGAOR, UN Doc E/CN.4/2004/WG.15/CRP.1 (2004), online: <<https://digitallibrary.un.org/record/530255?ln=en>>; Statement of Canada (2002), Indigenous Peoples’ Centre for Documentation, Research and Information (DOCIP) Doc 163a at 5 [on file with author]; see also Statement of Canada (1995), DOCIP Doc 024a at 3 [on file with author]; Statement of Canada, Articles 36, 37 & 39 (1996), DOCIP Doc 228a [on file with author].

8 See e.g. Statement by the International Indian Treaty Council: Norway Proposal, Article 36 (2002), DOCIP Doc 201a [on file with author]; see also Report of the working group established in accordance with Commission on Human Rights resolution 1995/32, UNESCOR, 53rd Sess, UN Doc E/CN.4/1997/102 (1996) recording the opposition of the Grand Council of the Crees and the Australian Aboriginal and Torres Strait Islander Commission.

9 Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its tenth session, UNESCOR, 62nd Sess, UN Doc E/CN.4/2005/WG.15/2 (2005) at 46.

10 Article 37(2) was apparently endorsed by the United States in 2005, when it proposed additional language for article 37(1), but did not propose the removal of the proposed article 37(2). See UN Doc E/CN.4/2006/79, *supra* note 6 at 23, 68.

11 See UN Doc E/CN.4/2005/WG.15/2, *supra* note 9 at 45. See also Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its tenth session, UNESCOR, 61st Sess, UN Doc E/CN.4/2005/89 (2005) at 58.

on the Rights of Indigenous Peoples (ADRIP). It was proposed by the Indigenous Caucus in the OAS forum as text for ADRIP, draft article XXIII.¹² Article 37(2) thus provides a good example of the power of international Indigenous cooperation and collaboration across multiple negotiating fora.¹³ Because of its sub-article (2), article 37 is one of the only articles in the UNDRIP text that escapes the overarching limiting effect of article 46, which is the omnibus limitation clause added (controversially) in 2007 to secure the endorsement of states in the General Assembly.¹⁴

Article 37 in Domestic Law and Policy

Article 37 has not, as yet, appeared in judicial references to UNDRIP in Australia,¹⁵ Canada¹⁶ or New Zealand.¹⁷ The potential significance of article 37's second clause, however, can be illustrated by reference to judicial observations made in a New Zealand case, *Takamore v Clarke*, involving the assertion by a Māori *whanau* (family) of Māori customary law in a dispute concerning the burial of a deceased relative.¹⁸ The case was eventually decided in the Supreme Court without substantive reference to UNDRIP,¹⁹ but in the Court of Appeal's 2011 judgment, all three judges discussed the relevance of the declaration to the case, observing that: "It is noteworthy that the [UNDRIP], to which New Zealand has subscribed, while recognising the rights of indigenous peoples to develop and maintain 'juridical systems or customs' in Article 34, also states in Article 46(2) that nothing in the exercise of the rights under the Declaration undermines 'fundamental freedoms.'"²⁰

As this quotation illustrates, it remains open to judges considering UNDRIP rights in domestic litigation to qualify them at the outset by reference to article 46. Article 37(2) deflects this possibility where treaty rights are at stake. In New Zealand, this is especially important, since the Treaty of Waitangi is not referenced in the NZBORA and has not (to date) been made subject to limitations allowed by that instrument, including individual rights and rights of non-discrimination. On one reading, then, reference to UNDRIP in the *Takamore* Court of Appeal decision appears to enable the qualification of Treaty of Waitangi rights in a way that is not otherwise required in domestic law. In other words, if article 37, which requires that Treaty of Waitangi rights *not* be qualified by other UNDRIP provisions, had been referred to by the court, the limitations contained in article 46 may not have featured in the judges' reasoning. In the New Zealand context at least, Māori rights to maintain their "juridical systems" are encompassed within the right to *tino rangatiratanga* contained in the Treaty of Waitangi. As rights enshrined in that treaty, they receive the extra protection afforded by UNDRIP article 37. In this case, it is at least arguable that the rights protected by article 34, like other treaty rights, should not be read down by reference to article 46's protection of "fundamental freedoms."

12 "Proposals to Amend Articles XIX to XXIII and Section Six of the Draft American Declaration on the Rights of Indigenous Peoples", OAS/Ser.K/XVI GT/DADIN/doc.192/04 rev.1 (11 November 2004) at 23.

13 It is worth noting that the comparable ADRIP provision retains the reference to international dispute resolution fora that was removed from UNDRIP draft article 36.

14 For a more in-depth discussion of this process, see Kirsty Gover, "Settler-State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples" (2015) 26:2 EJIL 345.

15 See e.g. *Wurridjal v Commonwealth*, [2009] HCA 2, 27 CLR 309, 411; *Western Australia v Ward* [2002] HCA 28, 230.

16 *Mitchell v Minister of National Revenue*, 2001 SCC 33 at para 80 (referring to the draft declaration); *Manitoba Metis Federation Inc v Manitoba et al*, 2018 MBQB 131 at para 85; *Ross River Dena Council v Canada (AG)*, 2017 YKSC 59; *Elsipogtog First Nation v Canada (AG)*, 2013 FC 1117 at para 121; *Canada (Human Rights Commission) v Canada (AG)*, 2012 FC 445 at paras 350, 353.

17 *Takamore v Clarke*, 2012 NZSC 116 at para 12 [Takamore]; *New Zealand Māori Council v AG*, 2013 NZSC 6 at para 92; *Wakatū v AG*, [2017] NZSC 17 at 491.

18 *Takamore v Clarke*, 2011 NZCA 587 [Takamore 2011].

19 UNDRIP is referenced but not discussed by Chief Justice Elias in *Takamore*, *supra* note 17 at para 12.

20 *Takamore*, *ibid* at paras 309, 250, n 259.

As Megan Davis observes, article 37 is also of particular relevance to treaty debates in Australia, even though Australia has yet to conclude a treaty with any Indigenous peoples.²¹ As plans for a state-level treaty or treaties proceed in Victoria, Queensland and in the Northern Territory, new opportunities to draw on article 37 will arise. UNDRIP is referenced in the preamble of Victoria's 2018 Treaty Advancement legislation, which establishes the Treaty Advancement Commission, but express note is made only of UNDRIP's protection of "free, prior and informed consent."²² At the time of writing, the newly constituted First Peoples' Assembly of Victoria, tasked with negotiating a treaty framework with the Victorian state to guide treaty making, had concluded its inaugural sitting. UNDRIP forms part of the mandate set out in the assembly's constitution as one of the principles underpinning its work.²³ Consideration could be given to making reference to article 37 in the treaty framework, and in the texts of treaties and agreements themselves. It is also possible, as Davis argues, to read article 37 as expressing a right to conclude treaties, an interpretation that could be of considerable use in Indigenous advocacy in Australia.²⁴

In a sense, the relationship between UNDRIP articles 37 and 46 reproduces some of the sequencing issues that have animated New Zealand debates on the interpretation of the NZBORA (and, in Australia, the Victorian Charter of Human Rights and Responsibilities 2006²⁵). These are centrally concerned with whether the interaction of rights protected in the same instrument should be evaluated before or after those rights have been read down by other qualifying interpretative principles.²⁶ There is much more to be said about this conundrum in proportionality reasoning than can be usefully considered in this paper. Suffice to say that article 37 is unusual both within UNDRIP and in international and domestic human rights law in its express reference to the non-applicability of proportionality tests. In this way, it seems to exemplify the kind of insulation that is needed if historical collective Indigenous rights are to be given full effect in the domestic law of settler states.

Seen in this way, the relationship between article 46 and article 37 goes to the very heart of major legal and political challenges faced by liberal democratic settler states. The tension between historical-collective Indigenous rights and individual human rights is a long-standing and difficult one. Some Indigenous rights, of the kind typically protected by historical and contemporary treaties, are not based on claims to an equitable share of primary goods on terms equal to those of other individuals, but to *particular* property and powers, those that were held by the predecessors of Indigenous communities and have been or should have been inherited by their descendants. These rights are not necessarily, or as a matter of principle, "capped" by measures of equality and non-discrimination in the way that individual human rights are. This makes it difficult to shoehorn them into prospective liberal human rights frameworks. The risk is that when Indigenous rights are placed in competition with individual rights, strict adherence to ahistorical and monistic equality principles will result in their qualification or abrogation.

Treaties provide a way to protect historical rights to property and authority that is not subject to the distributive regimes used in human rights instruments. They typically sit outside of individual human rights frameworks and are not directly qualified by the rights of non-parties. Section 35 of the Canadian

21 Megan Davis, "Indigenous Struggles in Standard-setting" (2008) 9 Melbourne J Intl L 439 at 462. See also James Anaya, "The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era" in *Charters & Stavenhagen*, supra note 4 at 192.

22 *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) ([T]he State recognises the importance of the treaty process proceeding in a manner that is consistent with the principles articulated in the United Nations Declaration on the Rights of Indigenous Peoples, including free, prior and informed consent" at Preamble). For a survey of the ways that UNDRIP has been considered in the Victorian treaty-making process, see Harry Hobbs, "Treaty making and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia" (2019) 23:1-2 Intl J Human Rights 174.

23 *Constitution of the First Peoples' Assembly of Victoria Ltd*, s 1.1.5.

24 Megan Davis, "To Bind or not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On" (2012) 19 Austl Intl LJ 17 at 26. This is a less obvious interpretation, but a vitally important one in Australia, as it is for Indigenous peoples in Canada and elsewhere who lack treaties.

25 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

26 See *Momcilovic v R*, [2011] 245 CLR 1.

Constitution, which protects the Aboriginal rights and treaty rights of Indigenous Canadians, is an example of this practice. It is insulated (to a contested degree) from Charter rights by section 25, which provides that: “The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.”²⁷

A state-Indigenous treaty is to be interpreted in Canadian law in accordance with its status as “an exchange of solemn promises” that is “sacred,”²⁸ and in a manner “which maintains the integrity of the Crown” and does not admit the “appearance of ‘sharp dealing.’”²⁹ Any ambiguities must be resolved in favour of the Aboriginal parties to the treaty, and any limitation that “restrict[s] the rights of Indians under treaties must be narrowly construed.”³⁰ However, treaty rights, like Aboriginal rights, *can* be infringed by “justified” legislation that meets the “valid legislative objective” test set out in cases such as *Sparrow*³¹ and *Badger*.³² In order to satisfy this test, the federal Parliament’s objective must be valid (in the sense of serving a valid public interest)³³ and the act in question must be consistent with the honour of the Crown and the Crown’s special trust and fiduciary responsibilities to Aboriginal peoples.³⁴ Further, in order to assess whether the infringement of treaty rights is valid, a court will consider whether the act effects as little infringement as is necessary to achieve the valid objective, whether fair compensation is paid, and whether consultation has taken place with the affected group.³⁵ As was explained in *Badger*, the “valid legislative objective” test is directed to public interest concerns: “This standard of scrutiny requires that the Crown demonstrate that the legislation in question advances important general public objectives in such a manner that it ought to prevail.”³⁶ Against this backdrop of legal principles that are protective of treaties, the logic encompassed within article 37 can assist arguments that call for a narrow reading of permissible infringements where treaty rights are at stake.

Despite the protective function of section 25, there is also some suggestion in Canadian law that rights protected by section 35, such as treaty rights, should be “balanced” with the Charter rights of third parties. In effect, such an analysis places treaty rights in direct competition with Charter rights, which include the right to be free from discrimination. In *Badger*, for example, the majority cited with approval the approach taken by Justice Robert Blair in *R v Agawa*. While Justice Blair noted that section 35 is not included in the Charter and is not subject to section 1 of the Charter (which provides that limitations to Charter rights must be demonstrably justified in a free and democratic society),³⁷ he went on to say: “Indian treaty rights are like all other rights recognized by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing with the interests and values involved in the rights of others. This is recognized in section 1 of the Canadian Charter of Rights and Freedoms, which provides that limitation of Charter rights must be justified as reasonable in a free and democratic society.”³⁸

27 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11, s 25.

28 *R v Badger*, [1996] 1 SCR 771 at paras 41 and 47 [*Badger*]; *R v Sioui*, [1990] 1 SCR 1025 at 1063; *Simon v R*, [1985] 2 SCR 387 at para 51.

29 *Badger*, *supra* note 28 at para 41. See also *R v Agawa*, (1988) 28 OAC 201 (CA) at 215–16.

30 *Badger*, *supra* note 28 at 794.

31 *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*].

32 *Badger*, *supra* note 28.

33 *Sparrow*, *supra* note 31 at 1113.

34 *Ibid* at 1114.

35 *Ibid* at 1119.

36 *Badger*, *supra* note 28 at 814.

37 *Sparrow*, *supra* note 31 at 1108–9; *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11, s 1.

38 *Badger*, *supra* note 28 at para 80.

This statement overlooks a crucial difference between the infringement test articulated in *Sparrow*, which is attentive to matters of public interest, and the “ordinary” balancing or proportionality tests used to resolve competition between individual rights (as typified by section 1). First, section 25 of the Constitution is expressly designed to prevent section 35 rights from being abrogated by deference to competing Charter rights. Second, treaty rights are qualitatively different from human rights. As the court in *Badger* noted, treaties are “analogous to contracts,” and this respect should be understood to generally exclude consideration of the interests of third parties in accordance with ordinary privity rules. Even if such a principle could be said to correctly express the relationship between section 35 and the Charter, treaty rights should not in any case be conflated with Aboriginal rights, even while both are protected by section 35. Treaty rights need not, for example, satisfy the probative tests required to prove that an Aboriginal community holds Aboriginal rights. Unlike Aboriginal rights, treaty rights need not be tied to “a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right,” in accordance with the *Van der Peet* test.³⁹ Canadian courts have acknowledged elsewhere that treaties can protect rights more extensive than, and different in kind to, those recognized in domestic law as Aboriginal rights (so long, it seems, as those rights are ones generally within the collective sovereign and constitutional powers of the state parties).⁴⁰ As the Supreme Court held in *Badger*:

There is no doubt that aboriginal and treaty rights differ in both origin and structure. Aboriginal rights flow from the customs and traditions of the native peoples.... Treaty rights, on the other hand, are those contained in official agreements between the Crown and the native peoples. Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties. It follows that the scope of treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by this Court.⁴¹

With this in mind, section 25 therefore seems (on its face) intended to play a role similar to that of UNDRIP article 37(2), shielding treaty rights from limitations that might otherwise be imposed in favour of third parties. This is important, because the meaning and effect of section 25 are contested in Canadian law, and article 37 may yet find purchase in those debates as a way to bolster a reading that assigns section 25 a strong protective function where treaty rights are in question. As was discussed in *R v Kapp*, the Supreme Court has not yet decided whether (in the words of the majority judges) section 25 provides “an absolute bar” to Charter-based claims against section 35 rights, or is instead “an interpretive provision informing the construction of potentially conflicting Charter rights.”⁴² This indeterminacy suggests that UNDRIP article 37(2) could make a difference in debates about the relation between treaty and Charter rights. In the minority judgment offered by Justice Michel Bastarache in *R v Kapp*, the judge was of the view that section 25 should be read in its strongest, most protective light, and would have dismissed the conflicting Charter claim in favour of full protection of the impugned section 35 right.⁴³ This judgment, I suggest, proposes a reading consistent with UNDRIP article 37, and importantly, as will be explained, this is an approach consistent with the federal government’s recent legislative and policy undertakings.

39 *R v Van der Peet*, [1996] 2 SCR 507 at para 46.

40 *Campbell v BC*, (2000) BCSC 1123 at para 76. See also para 9, noting that the Nisga’a Treaty “modifies” the underlying Aboriginal rights of the Nisga’a Nation. See also *Nisga’a Final Agreement* (4 August 1998) at paras 23(a), 24.

41 *Badger*, *supra* note 28 at para 76.

42 *R v Kapp*, [2008] 2 SCR 483 at para 64 [Kapp]. The question of whether the right in question was in fact protected by section 35 was not decided by the majority judges, who elected to resolve the dispute by reference to the substantive equality protections provided by the Charter’s section 15(2).

43 *Kapp*, *supra* note 42.

In mid-2019, the Canadian Parliament contemplated a private member's bill that would have obligated the government to take "all measures necessary to ensure that the laws of Canada are consistent with the [UNDRIP],"⁴⁴ suggesting that new opportunities to assert article 37 are contemplated. The bill passed the House of Commons, but failed to pass in the Canadian Senate and thus was not enacted.⁴⁵ On November 28, 2019, British Columbia's legislature enacted the Declaration on the Rights of Indigenous Peoples Act 2019.⁴⁶ The act requires the provincial government to take "all measures necessary" to ensure the consistency of provincial law with UNDRIP, in consultation and cooperation with Indigenous peoples.⁴⁷ The British Columbia government has also undertaken "to work with Indigenous peoples to jointly design, construct and implement principled, pragmatic and organized approaches informed by [UNDRIP]."⁴⁸ Of particular importance, the British Columbia Treaty Commission, the host of Canada's most comprehensive treaty-making process, reports that it intends to implement UNDRIP as part of final stage treaty negotiations.⁴⁹ In December 2018, the government of British Columbia, the federal government of Canada and the First Nations Summit⁵⁰ signed a Principals' Accord in which they recognize that "treaties are one of the principal mechanisms for implementing [UNDRIP],"⁵¹ and in September 2019, they adopted a new negotiating policy in which treaties will "provide for the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (2007), including rights to redress and 'free, prior and informed consent.'"⁵² The policy refers specifically to UNDRIP in the policy's commitments to self-determination,⁵³ redress⁵⁴ and title.⁵⁵ In 2018, the outgoing chief treaty commissioner announced that "[t]he BC treaty negotiations process is the best mechanism to implement [UNDRIP]."⁵⁶ Further, the Treaty Commission recently sought and published a legal opinion on whether the treaty process is consistent with UNDRIP's provisions on free, prior and informed consent.⁵⁷ Strikingly, none of these legislative or policy commitments expressly references article 37 of UNDRIP.

44 Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016, s 2(4); see also Crown-Indigenous Relations and Northern Affairs Canada, *Overview of a Recognition and Implementation of Indigenous Rights Framework* (September 2018), online: <www.rcaanc-cirnac.gc.ca/eng/1536350959665/1539959903708>.

45 Justin Brake & Todd Lamirande, "UNDRIP bill caught up in Senate dispute amid Conservative protest", *APTN News* (12 June 2019), online: <<https://aptnnews.ca/2019/06/12/undrip-bill-caught-up-in-senate-dispute-amid-conservative-protest/>>; Maham Abedi, "Why a UN declaration on indigenous rights has struggled to become law", *Global News* (2 November 2019), online: <<https://globalnews.ca/news/6101723/undrip-indigenous-relations-canada/>>.

46 Bill 41-2019, *Declaration on the Rights of Indigenous Peoples Act*, 4th Sess, 41st Parl, British Columbia, 2019.

47 See "UN Indigenous rights bill approved unanimously in B.C.", *CBC News* (26 November 2019), online: <www.cbc.ca/news/canada/british-columbia/b-c-first-nations-leaders-worry-u-n-indigenous-rights-bill-may-be-in-trouble-1.5374095>.

48 See e.g. *Poverty Reduction Strategy Act*, SBC 2018, c 40, s 4(c); see also British Columbia, *Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples*, online: <www2.gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft_principles.pdf>.

49 British Columbia Treaty Commission, *Annual Report 2018* at 12, online: <www.bctreaty.ca/sites/default/files/BCTC-AR2018.pdf>.

50 First Nations Summit, online: <<http://fns.bc.ca/>> ("The First Nations Summit is comprised of a majority of First Nations and Tribal Councils in British Columbia and provides a forum for First Nations in BC to address issues related to Treaty negotiations as well as other issues of common concern").

51 *Principals' Accord on Transforming Treaty Negotiations in British Columbia* (1 December 2018), s 8, online: <www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/principals_accord_signed_dec_1_2018.pdf>.

52 *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia* (4 September 2019) at para 18(h), online: <www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/recognition_and_reconciliation_of_rights_policy_for_treaty_negotiations_in_bc_aug_28_002.pdf>.

53 *Ibid* at para 37.

54 *Ibid* at para 43.

55 *Ibid* at para 47.

56 British Columbia Treaty Commission, Press Release, "BC treaty negotiations transforming Indigenous rights recognition" (10 October 2018), online: <www.bctreaty.ca/bc-treaty-negotiations-transforming-indigenous-rights-recognition-0>.

57 British Columbia Treaty Commission, *Legal Opinion, Treaty Process and the Realization of Free, Prior and Informed Consent* (2018).

In New Zealand, jurisprudence on the principles of the Treaty of Waitangi so far supports an approach in which Treaty of Waitangi rights are not limited by the competing rights of third parties. Article 37 can be drawn upon to bolster and stabilize this approach. At the risk of over-simplifying complex debates about the meaning of the Treaty articles and principles, the rights of Māori to *tino rangatiratanga*⁵⁸ are not expressly qualified in the Treaty's text by the rights of non-Māori. Instead, the guarantees to Māori set out in article 2 rights stand in relation to the Crown's sovereignty or *kawanatanga*⁵⁹ asserted in article 1 and the guarantee of equal citizenship rights to Māori in article 3. While courts have made it clear that the Crown's Treaty obligations to Māori are not "absolute and unqualified,"⁶⁰ and that the Crown has "other responsibilities as the government of New Zealand," jurisprudence to date has not suggested that Māori Treaty rights can be limited by the rights of other citizens, for example, by the rights enumerated in the NZBORA (which include the right to be free from discrimination).⁶¹ Instead, judges have suggested that the Treaty expresses a limit on the authority of New Zealand's public government by recording the conditional consent of Māori signatories. In the words of the Privy Council, for example, the Treaty embodies "the obligations which the Crown undertook of protecting and preserving Māori property...in return for being recognised as the legitimate government of the whole nation by Māori."⁶²

Conclusion

Treaties have an expressly reparative and constitutive character, rather than a basis premised on distributive justice. Because of the distinctive nature of the entitlements to property and authority they protect, treaties invite us to look back to the establishment of the state to address the liberal concept of "consent" that is thought necessary for legitimate governance. The historical and persistent lack of Indigenous consent to settler governance, coupled with the frequency of state breaches of treaty commitments, undermine the premises of the settler state's claim to legitimately represent a single sovereign people. Popular sovereignty does not supply the necessary "will of the people" where the consent of Indigenous nations is missing. Agreement making offers a way for settler states to negotiate limited Indigenous consent (consent to some features of the settler state infrastructure, in return for fewer encroachments on Indigenous sovereignty), but those agreements must be insulated from distributive principles that would otherwise require primary goods to be allocated among all citizens in a way that is formally non-discriminatory.

Article 37 can assist in making clear that the rights protected in Indigenous-state treaties are not to be treated as just another part of the corpus of human rights protections. They are constitutional and constitutive bargains that establish the limits of the state's authority to govern.

58 The Māori terms here are those that appear in the Māori language version of the treaty. See the authoritative translation of the Treaty of Waitangi by I.H. Kawharu, who explains that in this context *rangatiratanga* means "the unqualified exercise of chieftainship." IH Kawharu, ed, *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) at 319.

59 *Ibid.* "Sovereignty" is used in the English version of the treaty; *kawanatanga* is translated as "government."

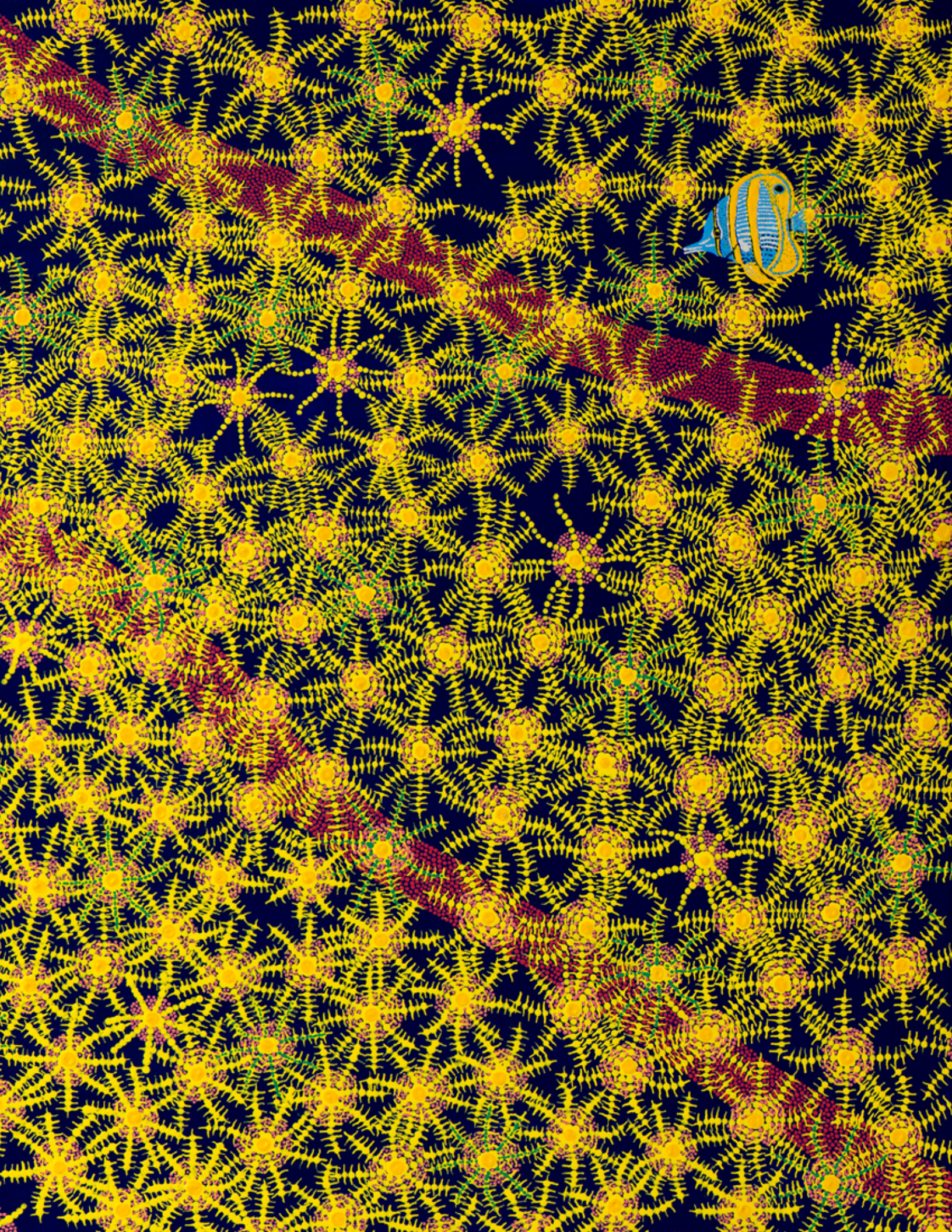
60 *New Zealand Māori Council v Attorney-General (Broadcasting Assets)* [1994] 1 NZLR 513, 517.

61 *Ibid.*

62 *Ibid.*

About the Author

Kirsty Gover's research addresses the law and political theory of Indigenous rights and jurisdiction, and the role played by Indigeneity in settler state political theory and international law. She is the author of *Tribal Constitutionalism: States, Tribes and the Governance of Membership* (Oxford University Press, 2010). She is currently working on a book entitled *When Tribalism Meets Liberalism: Political Theory and International Law* (Oxford University Press). Kirsty is Melbourne Law School's associate dean for Indigenous recognition and was awarded a 2019 Australian Research Council Future Fellowship for her project entitled "Recognising Indigenous Law and Legal Systems: Constituent Power, Legal Personality and External Relations in Written Indigenous Law."



Implementing the UN Declaration on the Rights of Indigenous Peoples

Protecting Traditional Cultural Expressions and Traditional Knowledge



Patricia Adjei

Aboriginal and Torres Strait Islander peoples are the first peoples of Australia. Traditional cultural expressions (TCEs) and traditional knowledge (TK) reflect the 60,000-year-old culture, among the oldest cultures in the world. Each Aboriginal and Torres Strait Islander community in Australia has a unique set of customary laws. These laws are often expressed in a range of traditional and contemporary cultural expressions such as paintings, photographs, body art, weaving, carvings, jewellery, ceramics, glasswork, multimedia, performances, music, oral songs and stories, dance, experimental arts and crafts. Senior Bundjalung curator Djon Mundine states the importance of art to Aboriginal peoples: “For Aboriginal people, art is a cultural expression, a history of a people, a statement of self-definition through the representation of life experiences, a recounting of an untold story, the bringing to light of a truth of history, and a statement unable to be made in any other way.”¹ Thus, TCEs contain or embody laws from different

My country –
Yuin landscape
Lloyd Gawura Hornsby

¹ *They are Meditating: Bark Paintings from the MCA's Arnott's Collection* (Museum of Contemporary Art exhibition guide, Djon Mundine & Keith Munro, curators) at 30.

Aboriginal and Torres Strait Islander communities, whether in a remote community in the Kimberley region or in an urban setting such as Sydney.

Indigenous peoples in Australia see TCEs and TK as intertwined and interlinked. However, distinctions between the two are often made at the international level by non-Indigenous peoples. TK may also include ecological systems, medicinal knowledge, land management practices, know-how, astronomy, oral knowledge and sciences, passed down from generation to generation. All these should be protected by Australian laws, as they are a part of Australian history, identity and culture. There are intellectual property (IP) laws that protect a work created by an individual, for a certain time period and for limited subject matter. These existing laws, however, leave gaps in protection and do not fully protect TK and TCEs. Some examples of the gaps include limited time protection, lack of recognition of intergenerational passing of knowledge, and narrow definitions of subject matter for TCEs and TK.

For decades, many advocates in Australia, both Aboriginal and non-Aboriginal, have requested that there be separate and specific laws to protect TK and TCEs where IP laws leave gaps in protection. Proper consultation with Indigenous communities is needed to address these issues and hear the voices of Indigenous artists, cultural custodians and their communities.

As Australian laws are lacking in protection of TCEs and TK, one must look to international laws for an avenue for advocacy. Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) states that “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.”² Article 31 and other relevant articles of this declaration have not been fully received into Australian law, despite the Australian Government’s endorsement of the UN Declaration in 2009. In the meantime, the creative industries, community organizations, and Aboriginal and Torres Strait Islander communities use protocols and specific contractual clauses to bridge these gaps in protection.

This paper looks at the importance of art production for Aboriginal and Torres Strait Islander peoples; gaps in protection of TK and TCEs; the efforts of advocates, courts, parliamentarians and international organizations such as the World Intellectual Property Organization (WIPO) to fill these gaps; and policy proposals designed to fill the gaps and strengthen the cultural rights of Aboriginal and Torres Strait Islander peoples in Australia, consistent with implementation of article 31 of the UN Declaration.

The Importance of Indigenous Art Production in Australia

Art production is a vital source of commercial income for many remote communities. There are Aboriginal and Torres Strait Islander art centres across the country, which provide employment opportunities, income, social well-being and health benefits, and have also been found to reduce crime rates in a community.³ Many Aboriginal and Torres Strait Islander artists who participate at local art centres enjoy better physical and mental health and report greater happiness; they are also more likely to complete secondary school and be employed.⁴

2 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007), art 31.

3 “Healing ways: Art with intent”, *Emotional Wellbeing in Australian Indigenous Art* (Joint project with the Dax Centre in Melbourne and Papunya Tjupi Arts, Charlotte Christie, curator, 2014), online: <www.daxcentre.org/portfolio/healing-ways-art-with-intent/>.

4 Australia Council for the Arts, *Arts Nation: An Overview of Australian Arts* (2015) at 31.

Between 2008 and 2012, remote Aboriginal and Torres Strait Islander art centres generated around AU\$53 million in art sales, with AU\$30 million paid to artists.⁵ Avid collectors and investors⁶ have helped to boost the sales of the Aboriginal art market in Australia. Senior Tjala artist and chairman of the Amata community in South Australia Frank Young has stated, “Whitefellas make art for all sorts of reasons, looking around the world for ideas and stories. *Anangu* [meaning “people” in the Pitjantjatjara and Yankunytjatjara languages of Central Australia] stories come from families and from country. It is made from the heart and is governed by cultural and family rules.”⁷ The uniqueness of Australian Aboriginal and Torres Strait Islander cultures, supported by their art centre movement, has resulted in a rich cultural art industry. The practice of using TCEs in a new, contemporary way — that is, on canvas or sculptures or wool or fabric or new media — is accepted and embraced by the art market.

Gaps in Protection of TCEs

Along with the substantial economic, social and personal value of artistic and cultural expressions for Aboriginal and Torres Strait Islander peoples, there is significant opportunity for harm through the misappropriation of Aboriginal art products or the production of inauthentic art products, harm that can be exacerbated by a lack of meaningful legal protection. While WIPO has not yet defined misappropriation, legal scholar Brigitte Vézina defines cultural misappropriation as “the act by a member of a dominant culture of taking a TCE whose holders belong to a minority culture and repurposing it in a different context, without the authorization, acknowledgement and/or compensation of the TCE holder(s).”⁸

Two legal challenges and two national inquiries are relevant when considering the gaps in existing Australian law to protect Indigenous artistic and cultural expressions.

The case of *Milpurrruru v Indofurn Pty Ltd*⁹ highlighted the problem of lack of law in cases of TCE exploitation. Justice John Von Doussa gave special consideration for the “cultural harm” caused by such exploitation. It was the first case to address the issue of protecting TCEs as contemporary art rather than as ethnographical works. The case was also used in the discussions around the commencement of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) on TCEs and TK.

In 2007, a Senate Standing Committee led an inquiry into unethical practices in the Aboriginal and Torres Strait Islander arts sector.¹⁰ The committee heard from hundreds of Indigenous artists, advocates, arts workers, advocacy groups, lawyers, government officials, dealers and galleries that work in the

5 *Ibid.*

6 In 2011, the Australian Government amended its self-managed superannuation laws so that art consumers and collectors could not use their superannuation to invest in artworks. Many critics saw the introduction of these changes and the global financial downturn as assisting in the decrease in the Australian Aboriginal art market. See Cassandra Lehman-Schultz, “How super laws are killing the market for indigenous art”, *The Conversation* (31 October 2013), online: <<http://theconversation.com/how-super-laws-are-killing-the-market-for-indigenous-art-19591>>.

7 Meaghan Wilson-Anastasios, “Desert artists draw a line in the sand”, *Sydney Morning Herald* (4 May 2013), online: <www.smh.com.au/entertainment/art-and-design/desert-artists-draw-a-line-in-the-sand-20130503-2iyew.html>.

8 Brigitte Vézina, “Curbing Cultural Appropriation in the Fashion Industry” CIGI, CIGI Papers No 213, 3 April 2019, online: <www.cigionline.org/sites/default/files/documents/paper%20no.213.pdf>.

9 *Milpurrruru v Indofurn Pty Ltd*, [1994] FCA 975; 30 IPR 209.

10 Australia, Senate Standing Committee on Environment, Communications and Information Technology and the Arts, *Indigenous Arts – Securing the Future: Australia’s Indigenous visual arts and craft sector* (2007), online: <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Completed_inquiries/2004-07/indigenousarts/report/index>.

Aboriginal arts and craft industry. It was the first time since the 2002 Myer Report¹¹ into the Australian contemporary visual art and craft industry that these issues had been addressed on a national level.

After the 2007 inquiry, there was the 2016 Parliamentary Committee Inquiry into the Inauthentic Aboriginal and Torres Strait Islander Art. This committee also heard from hundreds of Indigenous artists, organizations, advocates, lawyers, galleries, art centres, dealers and government officials. It highlighted the estimated loss to Indigenous artists of AU\$200 million from inauthentic Aboriginal and Torres Strait Islander art products in the market. The 2007 Senate Committee Inquiry in 2010 led to a number of recommendations, some of which have been adopted, such as the introduction of the Indigenous Art Code, which acts to preserve and protect ethical trading in Indigenous art.¹²

A recent case in Australia, however, reveals the continuing vulnerability of Indigenous arts and cultural expressions. In a suit brought by the Australian Competition and Consumer Commission (ACCC), the Federal Court of Australia found that a private company, Birubi Art, was “misleading” consumers by selling inauthentic Aboriginal-style art and craft merchandise.¹³ From July 2015 to November 2017, Birubi Art sold more than 18,000 boomerangs, bullroarers, didgeridoos and message stones to retail outlets around Australia. These products, despite featuring designs associated with Australian Aboriginal art, as well as words such as “Aboriginal Art,” “genuine” and “Australia,” were made in Indonesia. This case is a blatant example of misappropriation or misuse of TCEs from Australian Aboriginal communities, in particular those communities that still make, practise and maintain their cultural links through instruments such as the boomerang, the didgeridoo or the yidaki.

Although consumer protection laws were used to prosecute the company for “false and misleading conduct,” there is still “no law in Australia that says you can’t make fake art or you can’t misappropriate Aboriginal and Torres Strait Islander culture,” in the words of Gabrielle Sullivan, chief executive officer of the Indigenous Art Code; “all the law says is that if you are doing that you need to be up front about it.”¹⁴ The case clearly illustrates the gaps in the existing IP laws to fully protect Indigenous art. If the UN Declaration were to be fully implemented into Australian laws, it would be possible to develop specific protections and remedies framed around article 31.

With the evidence gathered through two important legal cases and two major investigations by government bodies, it is now time to take what has been learned and introduce legislation that effectively implements article 31. The next section looks at some approaches being taken in international and national fora, and the possibility of developing legislation for the Australian context.

11 Austli, Commonwealth Department of Communications, Information Technology and the Arts, *Report of Contemporary Visual Arts and Craft Inquiry* [Myer Report] (Canberra: Commonwealth Copyright Administration, Intellectual Property Branch, Department of Communications, Information Technology and the Arts, 2002).

12 Indigenous Art Code, online: <<https://indigenousartcode.org>>.

13 The Federal Court of Australia found in favour of the ACCC that Birubi Art misled consumers in selling works that were not hand-painted by Indigenous Australian artists or even made in Australia; the company was fined AU\$2.3 million. See *Australian Competition and Consumer Commission v Birubi Art Pty Ltd* [2018] FCA 1595; see ACCC, News Release, “Court finds that Birubi Art misled consumers over fake Indigenous Australian art” (24 October 2018), online: <www.indigenous.gov.au/news-and-media/announcements/accc-court-finds-birubi-art-misled-consumers-over-fake-indigenous>; ACCC, News Release, “\$2.3M penalty for fake Indigenous Australian art” (26 June 2019), online: <www.accc.gov.au/media-release/23m-penalty-for-fakeindigenous-australian-art>.

14 Lorena Allam, “Birubi Art fined \$2.3m for selling fake Aboriginal art made in Indonesia”, *The Guardian* (26 June 2019), online: <www.theguardian.com/artanddesign/2019/jun/26/birubi-art-fined-23m-for-selling-fake-aboriginal-art-made-in-indonesia>.

Ways Forward

WIPO IGC Negotiations

At meetings of the WIPO IGC for the negotiation of draft instruments to protect TCEs and TK,¹⁵ Indigenous representatives and the Indigenous caucus have argued that the UN Declaration should be reflected in the principles of the instruments being negotiated.¹⁶ They state that the WIPO draft TCEs and TK instruments must be aligned to the existing UN instruments that protect the human rights of Indigenous peoples. The current 2018–2020 chair of the IGC, Ian Goss, has reiterated this point in several meetings and brought this point to the attention of the committee.¹⁷ While some delegates consider human rights to be outside the WIPO mandate, others understand the human rights dimensions of the issues being negotiated.

Arts Protocols

The Australia Council for the Arts publishes protocols for working with Indigenous artists in all art forms and Screen Australia develops protocols specific to working in film and television.¹⁸ Many of these protocols are drafted by Indigenous lawyers, artists and communities. These protocols aim to show best practice guidance to non-Indigenous peoples on how to engage, interact, consult, respect and collaborate with Indigenous peoples in the use of their TCEs and TK. These protocols aim to fill the gaps left by existing IP and consumer laws, and draw on UN Declaration concepts of self-determination, respect, consent, benefit sharing, maintenance and control of TCEs and TK. If an artist, filmmaker or organization is going to work with Indigenous content, stories, art, themes and people, they need to consult and comply with the relevant protocols. Funding applications to the two major federal agencies that finance Australian arts and film must also demonstrate compliance with these protocols. The development and use of these protocols may assist Parliament in drafting laws to provide protection for TCEs.

Establishing a National Indigenous Arts and Cultural Authority

The proposal to establish a National Indigenous Arts and Cultural Authority (NIACA) has its foundations in article 31 of the UN Declaration. It is to be a new advocacy body that will ensure the protection of the rights of Indigenous peoples to their art and culture. James Anaya, the former UN Special Rapporteur on the rights of Indigenous peoples, has attested that the UN Declaration is “the result of a cross-cultural dialogue that took place over decades,” and “the product of years of advocacy and struggle by Indigenous peoples themselves.”¹⁹ This is the premise of the proposed NIACA, a concept that grows out of discussions between the Australia Council for the Arts and the National Indigenous Arts Reference Group formed by the Aboriginal and Torres Strait Islander Arts Board in 2007. Aboriginal IP lawyer Terri Janke first proposed, in 2009, a National Indigenous Cultural Authority (NICA).²⁰ A NICA would assist

15 WIPO, *Draft Provisions/Articles for the Protection of Traditional Knowledge and Traditional Cultural Expressions, and IP & Genetic Resources* [WIPO, *Draft Articles*], online: <www.wipo.int/tk/en/igc/draft_provisions.html>.

16 WIPO, *Report, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, 37th Sess, WIPO/GRTKF/IC/37/17 (2018) at para 17, online: <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_37/wipo_grtkf_ic_37_17.pdf>.

17 *Ibid*; see also WIPO, *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, 31st Sess, online: <www.wipo.int/meetings/en/details.jsp?meeting_id=40386>.

18 Australia Council for the Arts, “Protocols for Working with Indigenous Artists”, online: <www.australiacouncil.gov.au/about/protocols-for-working-withindigenous-artists/>; Screen Australia, “Pathways & Protocols: A Filmmaker’s Guide to Working with Indigenous People, Culture and Concepts”, online: <www.screenaustralia.gov.au/about-us/doing-business-with-us/indigenous-content/indigenous-protocols>.

19 Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, UNHRC, 15th Sess, UN Doc A/65/264 (2010), as cited in Megan Davis, “To bind or not to bind: The United Nations declaration on the rights of indigenous peoples five years on” (2012) 19 *Austl ILJ* 17 at 37.

20 Terri Janke, “Beyond Guarding Ground: A vision for a national Indigenous cultural authority” (2019) at 15, online: <www.terrijanke.com.au/beyond-guarding-ground>.

Aboriginal and Torres Strait Islander peoples in the maintenance, control, protection and development of their TCEs and TK. The proposed NICA is broader than the proposed NIACA, as it would aim to protect and advocate on all forms of TK, including genetic resources, land management, fishing rights and ecological knowledge.

The proposed NIACA would be exclusively for Indigenous arts and culture. As such, it could play a leadership role in addressing the current gaps in IP law that leave Aboriginal and Torres Strait Islander peoples with little protection for their TCEs and few opportunities for economic and cultural development. A NIACA could promote the negotiated use, including commercial use, of tradition-based creativity and innovation, where deemed appropriate by the relevant cultural owners. It could provide a structure to facilitate the free, prior and informed consent and the negotiation of mutually agreed terms to ensure the sharing of benefits. The role of a NIACA would be to give effect to local and regional decision-making processes by providing a framework that supports owners of TCEs and TK exercising full autonomy over their culture. A NIACA could have the following roles:

- advocating for Indigenous cultural rights to industry, arts organizations, art galleries and dealers, and to federal and state governments;
- assisting users to identify pathways for TCEs rights clearance with Indigenous cultural owners (for example, by providing contact information and networking opportunities for Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians in the relevant industries);
- setting standards for free, prior and informed consent;
- providing model agreements for negotiating terms;
- setting national standards for protocols for use, attribution and enforcement;
- developing and promoting the NIACA branding with the use of a registered trademark to establish that the product or service has met the relevant standards; and
- providing a transparent and low-cost method of alternative dispute resolution.²¹

The NIACA could open up the dialogue with government and establish the proper administration of laws that aim to protect TCEs. The NIACA could administer any new rights that the Australian government implements for TCE protection. The NIACA could be the first port of call for those wishing to use or interact with any TK or TCEs. There would also be a strong advocacy and awareness-raising arm of the NIACA that could educate and inform the wider community about issues around the appropriate use of TCEs. It could be a collective Indigenous voice to lobby the government on issues related to the protection of TCEs.

The NIACA could look to examples of *sui generis* laws on the protection of TCEs from other countries, for example Panama's Act 20 of 2000.²² The NIACA could assess how successful these countries have been in the implementation of their *sui generis* laws and what improvements are needed to make NIACA successful in protecting TK and TCEs in Australia. The Australia Council for the Arts has held consultation sessions around Australia with the Indigenous arts sector and communities about establishing a NIACA. It is acting as secretariat for the Indigenous arts and cultural sector to help establish this authority, which, once established, would be separate from the Australia Council for the Arts. So far, the discussions have heard from many First Nations artists and cultural custodians, talking about arts

21 National Congress of Australia's First Peoples, "The call for a national Indigenous cultural authority" (2013) at 6–7.

22 Panama, Gaceta Oficial No 24,083 (2000), *Special System for the Collective Intellectual Property Rights of Indigenous Peoples*, 2000, online: <www.wipo.int/edocs/lexdocs/laws/en/pa/pa015en.pdf>.

and cultural business in their communities and self-determination in relation to their Indigenous arts, consistent with the principles of the UN Declaration. A national summit in October 2020 will bring together First Nations artists from across the country to discuss Indigenous arts and cultural issues in Australia as the first step in establishing a NIACA.²³

Sui generis Legislation in Australia

The current version of WIPO's draft TCE instrument is the best avenue currently available in drafting new legislation to protect TCEs.²⁴ The draft articles list the objectives, subject matter of protection, beneficiaries, scope of protection, administration of rights, exceptions and limitations, term of protection, sanctions and remedies, transitional measures, relationship with other international agreements, national treatment and capacity building. For example, article 3.1(2) refers to the protection criteria, which sees protection of TCEs being linked to and maintained by Indigenous peoples, and recognizes intergenerational transmission of knowledge.²⁵ This article connects with article 31 of the UN Declaration in recognizing that it is common practice for TCEs to pass from generation to generation in Indigenous communities.

These articles are still in draft form, but the substantive work is there and has been discussed for more than 19 years, with Indigenous representatives present.²⁶ The preamble to the draft articles endorses the adoption of the UN Declaration. These draft articles can be considered by national legislators as guidance on how to address the issue of misappropriation of TCEs because Indigenous peoples have contributed to the drafting since the commencement of negotiations. These draft articles reflect the hard work of representatives of Indigenous peoples, including Mattias Ahren, Terri Janke, Les Malezer, Gregory Younging, and WIPO Indigenous IP law fellows Jennifer Tali Corpuz, Qapaj Conde and Hai Yuen Tualima.

Conclusion

Despite more than 40 years of Australian advocacy for the protection of TCEs, more action needs to be taken. The UN Declaration, which was largely drafted by Indigenous peoples, should be implemented into Australian national laws to include the voices, self-determination and sovereignty of its Indigenous peoples. The declaration represents, as Megan Davis states, “the Indigenous domain challenging the might of the Westphalian state — and calling into question the legitimacy of the territorial integrity of the state today.”²⁷ The years of advocacy, the protocols, the governmental inquiries, the legal challenges and the 19 years of discussion at the WIPO IGC have fleshed out the potential issues, identified the gaps and proposed solutions and a way forward. Article 31 of the UN Declaration provides guidance for legislation.

As Anaya points out in his study on Indigenous peoples in international law, in the 1970s Indigenous peoples began to turn to international law as a consequence of the protection gap in human rights in domestic jurisdictions and the lack of recognition for Indigenous peoples' rights.²⁸ It continues to be true that Indigenous peoples turn to international law for protection when national governments

23 See National Indigenous Arts and Cultural Authority, online: <www.niaca.com.au>.

24 WIPO, *Intergovernmental Meeting on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Draft Instrument on Traditional Cultural Expressions*, 39th Sess, WIPO/GRTKF/IC/39/5 (2019), online: <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_39/wipo_grtkf_ic_39_5.pdf>.

25 WIPO, *Intergovernmental Meeting on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, 40th Sess, WIPO/GRTKF/IC/40 (2019), online: <www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/wipo_grtkf_ic_40_5.pdf>.

26 For reports from the IGC, see WIPO's Traditional Knowledge Division, online: <www.wipo.int/tk>.

27 Davis, *supra* note 19.

28 *Ibid.*

unfairly compromise or act without consideration of their needs. As discussions continue at WIPO, there is hope that the IGC can develop international instruments to protect TCEs and TK that are consistent with the UN Declaration.

There are signs — such as the development of protocols, the work of the IGC, and discussions on the establishment of a NIACA — that First Nations peoples in Australia can come together to protect their cultures and determine the way forward. Parliament has much to consider and rely upon when it finally legislates to implement article 31 of the UN Declaration into Australian law. As Anaya has asserted, what really matters in terms of impact is state practice: when and where states are implementing the UN Declaration, and the UN mechanisms monitoring that implementation.²⁹

About the Author

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Patricia has served on the Aboriginal and Torres Strait Islander Advisory Panel of the City of Sydney and the Moogahlin Performing Arts Board. In 2010, she worked at WIPO in Geneva as the Indigenous Intellectual Property Law Fellow. She has also worked as a lawyer at the Arts Law Centre of Australia and for National Indigenous TV. She is a published author on Indigenous cultural IP rights.

²⁹ *Ibid.*



Comparative Perspectives on Implementing the UN Declaration on the Rights of Indigenous Peoples



Valmaine Toki

Asserting the Rights of the UN Declaration

In 2011, New Zealand reversed its former position and declared support for the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration). For Māori, and indeed the international Indigenous rights community, this was a small but significant step toward the hope that the fundamental rights espoused in the UN Declaration would be implemented and realized. James Anaya, the former Special Rapporteur on the rights of Indigenous peoples, noted that support for the declaration was one of the recent significant strides made by the New Zealand government.¹

Although New Zealand has now officially endorsed the UN Declaration,² these rights — including what is perhaps the most paramount of rights, the right of self-determination — remain, at present, legally unenforceable. Despite the potential relevance of orthodox administrative law principles, such as mandatory relevant consideration,³ to implement the declaration, it is still a declaration that has not been directly incorporated into

¹ Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya (Addendum: The situation of Māori People in New Zealand)*, UNGAOR, 18th Sess, UN Doc A/HRC/18/XX/Add.Y (2011).

² New Zealand Parliament, *Ministerial Statements: UN Declaration on the Rights of Indigenous Peoples – Government Support* (20 April 2010), [Statement on UNDRIP].

³ *Tavita v Minister of Immigration*, [1994] 2 NZLR 257 [Tavita].

domestic statute.⁴ Equally, although the judiciary has made tantalizing references to the role of the declaration and the New Zealand government's obligations to act consistent with its international obligations, the courts have not found the rights to be directly enforceable.⁵ Under the law as it currently stands, the UN Declaration is, at best, purely an aid to legislative interpretation or a mandatory relevant consideration in certain government processes.

The unenforceability of the UN Declaration is neither new nor unexpected, given the influence of state sovereignty. As a result, it is unsurprising that the implementation of the declaration is the focus of a number of creative legal arguments and articles. It is perhaps due to these creative legal arguments (although not only) that Supreme Court decisions have recently referred to the declaration. This opens some very exciting judicial avenues for Māori to seek “legal” enforceability of the declaration.

However, judicial evolution of norms and rules takes time. Judicial action can also be costly. In light of this, alternative methods to realize and implement the rights of the declaration are also worthwhile to consider. There are other ways to breathe life into these rights, and doing so may help to give legal effect to these rights.

One such option is considering *tikanga Māori* (traditional Māori rules and customs) as a way to incorporate the rights of the declaration into the common law. Others include looking to the fiduciary principle, recently reconsidered by the Supreme Court (although this would require specific facts), and perhaps also revisiting the Treaty of Waitangi principle of “partnership” and what this may require.

In addition to exploring the role of *tikanga* to assist the implementation of the rights in the declaration, this paper will discuss how practically asserting these rights, rather than waiting for the rights to crystallize at domestic law and therefore be legally enforceable, may be a prudent (and importantly supplementary) approach. One example where this has occurred is the Iwi Monitoring Mechanism (IMM), an Indigenous mechanism tasked with monitoring the implementation of the UN Declaration, and, in doing so, asserting the right of self-determination.

Asserting rights requires two parts: first, the ability to do so; second, the attitude of not waiting for those rights to be legally recognized. This subtle shift in language — from enforcing existing norms to asserting rights not yet legally enforceable — starts with an entirely new and forward-focused mindset. It is the premise of this paper that these fundamental rights exist, irrespective of the UN Declaration and that, consequently, Māori should not wait (and indeed have not waited) for the rights of the declaration to be legally provided for, but that they should assert these rights wherever they responsibly can, for instance, continuing to speak their own language, *te Reo Māori*.

In the first part, I discuss the UN Declaration, focusing on the right of self-determination and the possible relationship with *tino rangatiratanga* (the right of self-government). This will provide context for *tikanga*-based ideas in the second part of this paper. After revisiting the legal status of the UN Declaration, I will explore the nexus between the acknowledgement that *tikanga* is part of the common law and the rights within the declaration. Finally, I explore the assertion of self-determination in practice through the IMM and what this may mean for the future implementation of the UN Declaration.

Importantly, this note does not suggest that the practical assertion of the rights of the UN Declaration is the *only* way to implement those rights. As with most advocacy efforts, it is but one step in a multitude of steps that can be taken to realize rights. However, it does suggest that it is a creative, forward-focused

4 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 243 at 261.

5 *Takamore v Clarke*, [2012] NZSC 116 at para 12, reference to art 12(1) per Elias CJ, at 35 [Takamore]; *Proprietors of Wakatū v New Zealand (AG)* [2015] NZSC 13, [2017] NZSC 17 at para 598, reference to art 40 at 657, 668, 679 [Wakatū].

and practical step that can be taken by Māori now, rather than in the future, which will supplement existing strategic legal efforts (such as the tikanga approach) and may also, as part of the wider political forces at play, contribute to the assertion, legalization, realization and implementation of the rights of the UN Declaration.

The UN Declaration and the Right of Self-Determination

The UN Declaration has been lauded as the most significant international Indigenous peoples' rights document. While it does not create any new rights, it is indeed significant as it, for the first time, articulates the human rights of Indigenous peoples in one document at international law. The UN Declaration is comprised of 23 preambular paragraphs that are broad in scope and 46 articles that are more specific and detailed, covering a range of topics from rights to language, culture and land, to rights of assembly, governance and health.

Of all the rights espoused, perhaps best known is article 3, the right of self-determination. The content of the right of self-determination is somewhat controversial.⁶ There are claims that it could allow for the right of secession.⁷ This was the fear of the CANZUS states (Canada, Australia, New Zealand and the United States) during the declaration's negotiations.⁸ However, it is more likely that the right provides for the right of self-government, akin to the right of tino rangatiratanga under the Treaty of Waitangi Te Tiriti o Waitangi.⁹

For Māori, the right of self-determination would facilitate claims for Māori to regulate and govern their futures, similar to the right of tino rangatiratanga. It is necessary here to briefly discuss the relationship between self-determination and tino rangatiratanga, for two reasons. First, any implementation of the rights of the UN Declaration must be reconciled with the existing legal rights regime of Māori in New Zealand. This necessarily will invoke the rights guaranteed to Māori under the Treaty of Waitangi. This discussion, therefore, is a small example of the kind of examination that will take place when considering *how* the rights of the declaration generally will be implemented in New Zealand vis-à-vis the established Māori rights regime — that is, what the rights look like in practice. Second, it will assist in the discussions in the second part of this paper regarding the use of tikanga Māori as a means to implement the rights of the declaration.

Article 2 of the Māori text of the Treaty of Waitangi provides that Māori retain the right of tino rangatiratanga. This term is accepted to mean “chiefly authority” or “tribal self-government.”¹⁰ Although its definition is largely established, much like self-determination, the precise ambit of what tino rangatiratanga means in practice is not settled.¹¹

In theory, self-determination and tino rangatiratanga are complementary rights. Both tino rangatiratanga and self-determination are aspirational rights, representing ideals as opposed to fixed standards. Both tino rangatiratanga and self-determination advocate legal pluralism, under which *iwi* (nations) practise

6 K Toki, *supra* note 4 at 244.

7 *Ibid* at 252, 253.

8 *Ibid*.

9 The Treaty of Waitangi is an agreement between the Crown and Māori signed in 1840. There was an English text and a Māori text. A translation of article 2 of the Māori text states: “The Queen ratifies [whakarite] and agrees to the unfettered chiefly powers [tino rangatiratanga] of the rangatira, the tribes and all the people of New Zealand over their lands, their dwelling-places and all of their valuables [taonga].” See Anne Salmond, “Brief of Evidence for the Waitangi Tribunal Wai 1040” (17 April 2010). See also K Toki, *supra* note 4.

10 K Toki, *supra* note 4.

11 *Ibid*.

internal self-government and manage their own affairs. Both rights recognize and affirm forms of Indigenous authority prior to colonization.¹²

There are differences, however, between the two rights. These differences can be seen as both positive and negative from a Māori perspective. Tino rangatiratanga could be conceived of as a more familiar or Indigenous Māori term translated as “chiefly authority,”¹³ whereas self-determination is a non-Indigenous, anthropocentric term first expressed in the 1860s and now viewed as a fundamental principle of international law.¹⁴ Tino rangatiratanga is certainly more unique to Māori, applying only to Māori in New Zealand. Self-determination, on the other hand, is a right applicable to all Indigenous peoples (indeed, to all peoples: it is not unique to Indigenous peoples). Accordingly, tino rangatiratanga will always be more of an Indigenous term exercised by Māori, through an Indigenous perspective.

However, some aspects of self-determination may need to meet non-Indigenous legal constructs and tests before it is available. For example, secession requires certain international law tests to be met before it is available.¹⁵ And, finally, unlike the right of tino rangatiratanga, which can be extinguished by Parliament, self-determination, as a norm that exists due to the human condition, may not be so readily extinguishable.¹⁶

These differences do not, however, change the fact that both tino rangatiratanga and self-determination provide for the ability of Māori to assume more control over their own affairs. They both recognize a right to exercise authority to determine their political status to pursue economic, social and cultural development. Notwithstanding these differences, the rights are therefore complementary to one another. As discussed below, although Māori would prefer to base most political action on their own worldview and tikanga, the right of self-determination at international law is also of assistance to assert these rights.

Legal Effect and the Use of Tikanga to Implement the Rights of the UN Declaration

The orthodox view is that the UN Declaration is soft law¹⁷ and, similar to the Treaty of Waitangi, will not be legally binding upon the state¹⁸ unless it is incorporated into domestic legislation.¹⁹ The doctrine of state sovereignty provides a restriction on international instruments, such as the declaration, to regulate matters within the realm of the state.²⁰

12 See Valmaine Toki, *Indigenous Courts, Self-determination and Criminal Justice* (Abingdon, UK: Routledge, 2019). See also K Toki, *supra* note 4.

13 See Richard Benton, Alex Frame & Paul Meredith, eds, *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law, compiled for Te Matahauariki Institute* (Wellington: Victoria University Press, 2013) (citing Sir Apirana Ngata’s comment: “No Toi raua ko Potiki te whenua, no Tuho te mana me rangatiratanga” [“From Toi and Potiki, the land; from Tuho, the mana and chiefly authority”] at 333). See also Sir Hugh Kawharu’s translation of “tino rangatiratanga” as “the exercise of chieftainship over lands” in IH Kawharu, ed, *Waitangi: Māori and Pakeha Perspectives of the Treaty* (Auckland: Oxford University Press, 1989).

14 It is worth noting here, however, that it is recognized that “tino rangatiratanga” was used in the Treaty of Waitangi, possibly because the Māori version of the treaty was not translated by Māori but by the British. Compare, for example, the 1835 Declaration, which was written by Māori and used the far more “Māori” term *mana* to capture the idea of sovereignty.

15 K Toki, *supra* note 4.

16 *Ibid.*

17 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.

18 Ian Brownlie, *Principles of Public International Law*, 7th ed (Abingdon, UK: Oxford University Press, 2008) 4.

19 *Te Heu Heu Tukino v Aotea District Māori Land Board*, [1941] 2 All ER 93 at 98; [1941] NZLR 590.

20 See James Anaya, “The Rights of Indigenous People to self-determination in the post-Declaration era” in Claire Charters & Rodolfo Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Working Group for Indigenous Affairs, 2009) 194.

In the absence of direct incorporation by statute, there are different methods of recognizing international human rights instruments, including recourse through administrative law. First, the (outdated) concept of legitimate expectation in Australia,²¹ and mandatory relevant consideration in New Zealand,²² have been utilized to treat unincorporated international obligations as considerations for the decision maker. Also, the presumption of consistency, a common law principle of statutory interpretation, recognizes that Parliament is presumed not to legislate intentionally in breach of its obligations.²³ *Zaoui v Attorney-General* applied this presumption using New Zealand's international law obligations.²⁴

As creative and valuable as these avenues are, the reality is that the UN Declaration remains unenforceable. However, with the recent Supreme Court decisions regarding the rights of Māori, there exist some interesting avenues to consider to challenge the declaration's current legal status. One possible avenue could be to explore the recognition by the Supreme Court in *Wakatū*²⁵ that the Crown can, at times, owe a fiduciary duty to Māori. This would require unique facts, of course. Another is to revisit the Treaty of Waitangi concept of partnership.²⁶

However, another possible and innovative avenue is the Supreme Court's recognition in *Takamore* that tikanga is a part of the common law.²⁷ This bold statement arguably raises far more questions than it answers. For example, who is bound by tikanga? What is included in tikanga and who decides? Which tikanga would apply and when would tikanga be defeated by other rules in the common law? These are but a few questions that have been asked. Assuming, however, that tikanga is a part of the common law, then in theory the rights in the declaration could be given traction where these rights are similar to tikanga. This would be in addition to the existing approach where the declaration assists in the application and enforcement of tikanga Māori generally.

To further examine this, one possible right that could be enforced through tikanga at common law could be the concept of tino rangatiratanga. One question is whether tino rangatiratanga is part of tikanga or not. If it were, then an expression of the right of self-determination would certainly be given some teeth. However, accepting that tino rangatiratanga may be a part of the common law (and this is not certain, by any means) is not the end of the exercise. As the courts have noted, rules of common law are defeated by other rules of common law and legislation. It is likely that tino rangatiratanga may be outweighed or defeated by statute. However, these possible legal hurdles do not preclude the possibility that there may exist some areas where such rights have not been legislated away, as happened in *Ngati Apa*.²⁸

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

22 *Tavita*, *supra* note 3.

23 Philip Joseph, *Constitutional and Administrative Law in New Zealand*, 3rd ed (Wellington: Brookers, 2007) at 533; Treasa Dunworth, "Public international law" (2000) NZLR 217 (this area is "shrouded in much uncertainty" at 225); see e.g. *Brind v Secretary of State (Home Department)*, [1991] 1 All ER 720 (UK).

24 [2004] 2 NZLR 339. Note also Claudia Gieringer's comments that the application of the presumption in the context of administrative process may be more significant than elsewhere. It is not intended to make any such distinction, beyond noting that there may be differences of application in different contexts. Claudia Gieringer, "International law through the lens of Zaoui: Where is New Zealand at?" (2006) 17 PLR 318.

The IMM: An Example of Māori Asserting Self-determination

With the rise of the Māori economy, there are many examples that one can draw upon to illustrate not just the fact that Māori are economically astute but also how they are asserting the rights of the declaration. One example is the IMM.

The IMM arose from Matike Mai Aotearoa, the Independent Working Group on Constitutional Transformation,²⁹ established by Māori to provide a report with recommendations on constitutional transformation.³⁰ The IMM is also a working group created by Māori and is independent of government, with the goal of promoting, protecting and monitoring the implementation of the declaration, and holding the government to account and working in partnership for the implementation of the UN Declaration and the Treaty of Waitangi.

Members of the IMM are selected by their iwi and endorsed by the National Iwi Chairs Forum³¹ to act as independent experts. The IMM produces an annual report on the implementation of the UN Declaration.

Key areas of concern highlighted in the 2018 report included constitutional transformation to better respect Māori rights of self-determination and free, prior and informed consent; Māori interests in natural resources and water rights; equity in Treaty of Waitangi settlements between the state and Indigenous peoples; and the development of a national plan of action to facilitate better implementation of the UN Declaration.

The composition, workings and outputs of the IMM are small examples of how Māori can, and do, assert their right to self-determination in practice. The IMM is organized, run and funded by Māori. It operates on tikanga Māori values and its very *kaupapa*, or ethos, is to hold the government to account for its obligations. The formation of the IMM expresses to the government that Māori are autonomous, self-governing people, whether or not they have the legal capability to do so. Importantly, the IMM is not unique in its assertions: Māori organizations, such as Māori companies and trusts, are also asserting such rights.³²

This assertion of rights to self-determination is exciting for two reasons. First, asserting rights is a proactive step that Māori can take now, rather than waiting for the recognition of legal rights at law, which may, over time, contribute to rights recognition and enforceability. For Māori to take the initiative to assert these rights, even if they are not yet legally enforceable, is a positive change. Secondly, this asserting of rights and the benefits of doing so are not purely academic endeavours. With the rise of the Māori economy, asserting rights may become a common practice among Māori groups, as Māori will have the financial resources to “walk the talk”; for some iwi Māori, this will be for the first time since colonization. Notwithstanding this economic growth, intrinsic to Māori organizations are cultural requirements and a “cultural” arm that support tikanga, te reo, education and similar initiatives.

These assertions of rights, like self-determination, are indeed promising. However, another question to consider is what, if anything, do these acts of asserting rights have on the realization of those rights at law? Law does not operate in a vacuum, but is affected by political realities.³³ The act of asserting rights may influence political norms and realities, and as a result may affect the legal realization of

29 Matike Mai Aotearoa, the Independent Working Group on Constitutional Transformation, was first promoted at a meeting of the Iwi Chairs Forum in 2010. See *The Report of Matike Mai Aotearoa*, [“The Terms of Reference given to the Working Group were deliberately broad: ‘To develop and implement a model for an inclusive Constitution for Aotearoa based on tikanga and kawa, He Whakaputanga o te Rangatiratanga o Niu Tirenī of 1835, Te Tiriti o Waitangi of 1840, and other indigenous human rights instruments which enjoy a wide degree of international recognition’” at 13].

30 *Ibid.*

31 The National Iwi Chairs Forum is the national collective of iwi chairpersons. It functions in accordance with tikanga and meets regularly to discuss and act collectively on a raft of issues – that is, how government policy and practice impact on Māori – and engage in regular dialogue with government. Unlike the New Zealand Māori Council, the National Iwi Chairs Forum is not a statutory body.

rights.³⁴ Under this theory, asserting the rights of the UN Declaration may therefore, over time, and in a supplementary way, contribute to the normalization and ultimately the enforceability at law of certain rights under the declaration. Thus, this initiative of asserting rights and taking power back into Māori hands may, over time, affect the very recognition of those rights. Given the current unenforceability of the Treaty of Waitangi and the UN declaration, this is an exciting prospect to consider.

Of course, as mentioned in the introduction, this paper does not suggest that the practical assertion of the rights of the declaration is the *only* way to implement those rights. As with most advocacy efforts, it is but one step in a multitude of steps that can be taken to realize rights. However, asserting rights is a creative, forward-focused and practical step that can be taken by Māori now, rather than in the future, which can supplement existing strategic legal efforts (such as the *tikanga* approach discussed earlier) and may also, as part of the wider political forces at play, contribute to the legalization, realization or implementation of the rights of the UN Declaration.

Conclusion

More than a dozen years have passed since the adoption of the declaration by the United Nations General Assembly in September 2007. Although the declaration has been referred to by the New Zealand Supreme Court, its unenforceability remains a problem for Māori who seek to rely on its provisions. In addition to exploring some creative judicial options to have these rights implemented, this paper focused on how *iwi* Māori can take steps to assert the rights of the declaration. The IMM is one small example of how Māori are already doing so. With the rise of the Māori economy, Māori can and should continue their assertion of such rights, together with creative judicial proceedings to realize the rights of the declaration. By taking such proactive steps, Māori themselves may normalize aspects of the UN Declaration, which in turn can assist the long-term efforts of those seeking *tino rangatiratanga*.

Author's Note

Nga mihi ki tāku tamāhine, Kiri, mo te tautoko i tenei pepa. Gratitude to my daughter, Kiri Toki (B.A., LL.B. [Hons.], LL.M. [Harvard], D.Phil. candidate [Oxford]), for her assistance with this paper.

About the Author

Valmaine Toki is of Ngatiwai, Ngapuhi and Ngati Whatua descent and holds a B.A., LL.B. (Hons.), M.B.A., LL.M. and Ph.D. She is an associate professor in law and deputy dean at Te Piringa, Faculty of Law, at the University of Waikato. Valmaine was the first New Zealander appointed as an expert member of the United Nations Permanent Forum on Indigenous Issues, where she served two terms. Her research and writing interests lie within the area of recognizing and realizing Indigenous issues. Her expertise in Indigenous issues is often called upon with international keynotes to UN agencies and invitations to provide assistance on ministerial advisory committees. As practising counsel, Valmaine has panel presided over Māori Land Court hearings and recently represented her *iwi* (nation) in successful judicial review proceedings in the High Court, which turned on the failure to recognize an Indigenous right. She is active in tribal governance and local government matters. Her current research project reviews World Bank programs through an Indigenous lens. In addition, she is researching the concept of an Indigenous court underpinned by *tikanga Māori*.

34 *Ibid.*

Artist Credits

Cover *Pisonia with acidification graph*
Judy Watson
2009, 214.5 × 191.5 cm, acrylic and
chinagraph pencil on canvas
Courtesy of Milani Gallery

8 *Spine and teeth (mundirri banga mayi)*
Judy Watson
2019, 262.5 × 181 cm, acrylic and
graphite on canvas
Courtesy of Milani Gallery

32 *Rangiaowhia*
Hiria Anderson (Rereahu, Ngāti
Maniapoto, Ngāti Apakura)
2015, 840 × 735 cm, oil on canvas
Courtesy of Tim Melville Gallery

42 *Pononga (true and genuine)*
Bronwyn Waipuka-Callander
2018, graphic illustration
Courtesy of the artist

56 *Among Sacred Places*
Melanie Yazzie
2018, 30" x 22", monotype
Courtesy of Glenn Green
Galleries

66 *A Masked Identity*
Grace Edwards
2019, 1' x 2', acrylic on canvas
Courtesy of the artist

76 *Papatūānuku (Earth Mother)*
Bronwyn Waipuka-Callander
2013, graphic illustration
Courtesy of the artist

88 *My country — Yuin landscape*
Lloyd Gawura Hornsby
2016, 76 × 76 cm, acrylic on canvas
Courtesy of Gawura Gallery

98 *Rima*
Theresa Reihana
2007, 60 × 90 cm, acrylic on canvas
Courtesy of the artist

Title Pages
Sweetgrass
Peter Pomart
2017, photograph
Courtesy of the artist

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