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# The Protection of Māori Cultural Heritage: Post-Endorsement of the UN Declaration on the Rights of Indigenous Peoples

Jessica Christine Lai\*

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### ABSTRACT

In April 2010, New Zealand gave its approval to the UN Declaration on the Rights of Indigenous Peoples (considered to be the most comprehensive text on the rights of Indigenous peoples), after having failed to do so with the UN General Assembly in 2007. The initial reasons given by New Zealand for its negative vote are assessed herein. Following this, the paper addresses the role that the Declaration will play at the national and international level, despite that it is not legally binding. It surmises that it is an important political tool at the national level, able to be used in direct negotiations between the Māori and governments. It could further be used as an interpretive tool by the courts and government agencies. The proliferation of Declaration-consistent norms at the national level could result in either the formation of international law or the placement of such norms in bi- or multilateral agreements. The final part of this paper discusses particular Articles within the Declaration that may be used to protect Māori cultural identity and cultural heritage and their legal applicability.

### KEY WORDS

UN Declaration on the Rights of Indigenous Peoples, protection of Māori cultural heritage, cultural intellectual property rights, cultural diversity.

\* Jessica Christine Lai is a research fellow, working on the IT ICH (International Trade of Indigenous Cultural Heritage) project, and a member of the i-call (International Communications and Art Law Lucerne) research centre, at the University of Lucerne. Contact at [jessica.lai@unilu.ch](mailto:jessica.lai@unilu.ch). The author would like to thank Christoph B. Graber and Karolina Kuprecht for their comments. The support from the Swiss National Science Foundation is gratefully appreciated.

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## THE PROTECTION OF MĀORI CULTURAL HERITAGE POST- ENDORSEMENT OF THE UN DECLARATION ON INDIGENOUS RIGHTS

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## 1. INTRODUCTION

In 2007, the General Assembly of the United Nations adopted the Declaration on the Rights of Indigenous Peoples (“the Declaration”),<sup>1</sup> after almost twenty-five years of negotiation.<sup>2</sup> The Declaration has been described as the “most progressive and comprehensive international instrument dealing exclusively with the rights of Indigenous peoples.”<sup>3</sup> Previous general human rights instruments had neither addressed the importance of culture to peoples themselves nor to society as a whole.<sup>4</sup> Though some other means to protect certain aspects of cultural heritage (such as through intellectual property) do exist, such mechanisms do not fully meet the interests of Indigenous peoples, as the theories underlying the mechanisms cannot perceive culture as a way of life, rather than as commodities or objects of creativity.<sup>5</sup> This is particularly due to the individual nature of intellectual property mechanisms, which cannot cope with the collective nature of Indigenous culture. Instead, there has been a tendency to propertise culture, which is clear from the commonly used term “cultural property”, despite that most Indigenous peoples do not view culture as being “owned”, but as a living part of their community.<sup>6</sup> Moreover, existing instruments do not fully address the right of Indigenous peoples to cultural autonomy or protect them from the appropriation and misuse of their cultural heritage.<sup>7</sup> The Declaration is potentially much broader in scope, referring rather to cultural identity, cultural diversity and property rights over cultural heritage, traditional knowledge (TK) and traditional cultural expressions (TCE).

The adoption of the Declaration was not unanimous, with eleven states abstaining from the vote and four voting against its adoption.<sup>8</sup> These four states were New Zealand, Australia, Canada and the USA, all countries with large populations of Indigenous peoples. With the change of the Australian Government, at the end of 2007, the Declaration was endorsed by Australia in 2009.<sup>9</sup> Just over a year later, New Zealand

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<sup>1</sup> UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007) GA Res. 61/295 (UN Doc. A/61/L.67 and Add.1) (13 September 2007).

<sup>2</sup> For an outline of the history of the Declaration, see Erica-Irene Daes, ‘The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal’, in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford and Portland, Oregon: Hart Publishing, 2011, pp. 11-40 [hereinafter Daes, ‘Declaration Background and Appraisal’].

<sup>3</sup> Claire Charters, ‘The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples’ (2007) *New Zealand Yearbook of International Law*, 4, pp. 121-133, at p. 123 [hereinafter Charters, ‘Declaration Adoption’].

<sup>4</sup> Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, Cambridge: Cambridge University Press, 2007, at p. 199 [hereinafter Xanthaki, ‘Indigenous Rights and United Nations Standards’].

<sup>5</sup> *Ibid.*, at pp. 206-209.

<sup>6</sup> Christoph B. Graber, ‘Aboriginal Self-Determination vs the Propertisation of Traditional Culture: The Case of Sacred Wanjina Sites’ (2009) *Australian Indigenous Law Review*, 13 (2), pp. 18-34, at pp. 19-20 [hereinafter Graber, ‘Aboriginal Self-Determination vs Propertisation’].

<sup>7</sup> Xanthaki, ‘Indigenous Rights and United Nations Standards’, *supra* note 4, at p. 214.

<sup>8</sup> The eleven countries who abstained were: Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, Ukraine.; Sixty-first General Assembly of the United Nations, ‘General Assembly Adopts Declaration on Rights of Indigenous Peoples: “Major Step Forward” Towards Human Rights for All, Says President’, 107th & 108th Meetings (UN Doc. GA/10612, 2007) [hereinafter UN, ‘GA Adoption of Declaration’].

<sup>9</sup> John Miles, ‘Government Endorses UN Declaration on Indigenous Peoples’, *Survival International* (3 April 2009), available at [www.survivalinternational.org/news/4415](http://www.survivalinternational.org/news/4415) (all online sources were accessed 19 June 2011).

also decided to change its opposing stance.<sup>10</sup> Soon after, Canada and the USA announced their support of the Declaration.<sup>11</sup>

As with Australia, part of the reason for the reversal of opinion was a change in the New Zealand Government, in 2008. However, it is questionable whether the situation in New Zealand, between the time of rejection and that of adoption, had changed significantly such that the reasons given by the Government in 2007 were no longer relevant in April 2010. Perhaps it is rather that the reasons were never justified. This paper discusses the grounds that were put forth by New Zealand to support their negative vote and whether these were substantive. Given that declarations are not *prima facie* binding, the next part of the paper assesses whether the Declaration may nevertheless impact on New Zealand domestic law and the shape that this would take. Following this, it discusses how the endorsement of the Declaration could potentially affect the position and protection of Māori cultural heritage. Specifically, it discusses the Declaration in light of the concept of self-determination over cultural heritage and the proposal that the Māori must be allowed to control and benefit from the trade (or non-trade) of their cultural heritage, particularly for the purposes of strengthening their cultural identity, for their socio-economic benefit and, ultimately, to improve their political self-determination.

## 2. THE DECLARATION AND NEW ZEALAND'S U-TURN

### 2.1 NEW ZEALAND'S INITIAL PARTICIPATION

The Declaration is the only declaration of the UN that has been actively drafted with the intended rights-holders.<sup>12</sup> To begin with, New Zealand was an enthusiastic member of the negotiations and formation of the Declaration. This participation, however, has been argued to be undermined by the failure to show good faith and involve the Māori in the process or in consultations, despite requests from Māori organisations and representatives for this to occur.<sup>13</sup> Initially, there was some involvement of the Māori, including in drafting the document.<sup>14</sup> However, from 2001, consultation with the Māori became non-existent. This is despite the fact that the

<sup>10</sup> Pita Sharples (Māori Party Co-Leader), 'Supporting UN Declaration Restores NZ's Mana', *Press Release* (20 April 2010), available online at <http://www.beehive.govt.nz/release/supporting+un+declaration+restores+nz039s+mana> [hereinafter Sharples, 'Supporting UN Declaration'].

<sup>11</sup> 'Canada Endorses the United Nations Declaration on the Rights of Indigenous Peoples', *Indian and Northern Affairs Canada News* (12 November 2010), available at <http://www.ainc-inac.gc.ca/ai/mr/nr/s-d2010/23429-eng.asp>; and 'VICTORY!: U.S. Endorses UN Declaration on the Rights of Indigenous Peoples', *Cultural Survival News* (12 December 2010), available at <http://www.culturalsurvival.org/news/united-states/victory-us-endorses-un-declaration-rights-indigenous-peoples>.

<sup>12</sup> Victoria Tauli-Corpuz (Chairperson of the UN Permanent Forum on Indigenous Issues), 'On the Occasion of the Adoption by the General Assembly of the Declaration on the Rights of Indigenous Peoples', *UN Permanent Forum on Indigenous Issues Press Release* (13 September 2007) [hereinafter Tauli-Carpuz, 'Adoption of Declaration']; and Megan Davis, 'The United Nations Declaration on the Rights of Indigenous Peoples' (2007) *Australian Indigenous Law Reporter*, 11 (3), pp. 55-63, at pp. 55-57.

<sup>13</sup> Claire Charters, 'The Rights of Indigenous Peoples' (2006) *New Zealand Law Journal*, pp. 335-337, at p. 337 [hereinafter Charters, 'The Rights of Indigenous Peoples'].

<sup>14</sup> Pita Sharples (Māori Party Co-Leader), 'UN Declaration on the Rights of Indigenous Peoples Celebration Luncheon', *Speech* (10 May 2010), available at <http://www.beehive.govt.nz/speech/un+declaration+rights+indigenous+peoples+celebration+luncheon> [hereinafter Sharples, 'UN Declaration Celebration Luncheon'].

Ministry of Foreign Affairs and Trade's policy that "[i]n some cases Māori concerns will be one of the most important factors in developing the government's position" and that Māori should have the opportunity for involvement during all phases of a treaty making process.<sup>15</sup> A possible reason for this apparent departure from Government policy is that it refers to treaties and not to non-binding texts, such as declarations.<sup>16</sup>

As will be discussed further throughout this part of the paper, the New Zealand Government played a large role in the negotiations and development of the Declaration. However, despite this involvement at all stages, New Zealand did not support the Declaration when it was adopted by the UN General Assembly. The reasons for this are examined in the following.

## 2.2 PROBLEMS WITH THE DECLARATION?

That the Declaration, even in its final form, was potentially problematic was acknowledged by a far greater number of states than merely those which voted against its adoption or abstained from voting. Many states commented on the fact that the Declaration was far from perfect, yet they felt the need to vote in favour of the text, due to the significance it represented for Indigenous peoples.<sup>17</sup> In partial justification for adopting the Declaration, several states noted that the Declaration was political in nature and not binding,<sup>18</sup> that it did not create any new rights,<sup>19</sup> and that it would not affect a state's sovereignty.<sup>20</sup> In other words, many states voted for the Declaration but made it clear that they would not implement it in any practical way. Several states also qualified their acceptance of the Declaration by providing their own interpretations of certain Articles, particularly those relating to self-determination.<sup>21</sup>

Even the drafting of the Declaration was considered controversial by the opposing states along with several of those which abstained. Both Australia and the USA stated having deep disappointment in not having been given the chance to participate in the negotiations, despite making requests for this.<sup>22</sup> No opportunity was made to allow for states to discuss the final document collectively. Russia, which abstained from the vote, also commented on the non-transparent forum that had been chosen to negotiate the text, which excluded states with significant Indigenous populations.<sup>23</sup> Russia further found the document to be lacking in balance, particularly, the Articles regarding land and natural resources and the procedures for compensation and redress. The concern with the Articles relating to land and resources was also why Nigeria abstained, as was the issue of self-determination. Colombia abstained from the vote, wanting the decision

<sup>15</sup> Ministry of Foreign Affairs and Trade, 'Strategy for Engagement with Māori on International Treaties', (13 July 2010), available online at <http://www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/Engagement-with-Maori.php>. This is discussed in Naomi Solomon, 'Was the New Zealand Government Justified in Voting Against the Declaration on the Rights of Indigenous Peoples?' (2008) *Te Kāhui Kura Māori*, 1 (electronic version).

<sup>16</sup> Solomon, *supra* note 15.

<sup>17</sup> For example, Indonesia, Pakistan; UN, 'GA Adoption of Declaration', *supra* note 8.

<sup>18</sup> For example, Guyana and Turkey; *ibid*.

<sup>19</sup> For example, Guatemala and Nepal; *ibid*. For a contrary opinion, see David J. Round, 'UN Declaration on the Rights of Indigenous Peoples' (2009) *New Zealand Law Journal*, pp. 392-395, at p. 394.

<sup>20</sup> For example, Brazil, Egypt, India, Jordan, Mexico, Namibia, Philippines, Turkey, Paraguay, Suriname and Sweden; UN, 'GA Adoption of Declaration', *supra* note 8.

<sup>21</sup> Charters, 'Declaration Adoption', *supra* note 3, p. 132.

<sup>22</sup> UN, 'GA Adoption of Declaration', *supra* note 8.

<sup>23</sup> *Ibid*. See also Claire Charters, 'Indigenous Peoples Rights Under International Law' (2007-2008) *New Zealand Yearbook of International Law*, 5, pp. 199-207, at pp. 199-200.

to be held in abeyance until a Declaration suitable for all states could be achieved.<sup>24</sup> Colombia felt that it could not approve of a text with Articles that were in complete contradiction to its internal legal system, despite that the Declaration is not binding. Similarly, Bangladesh did not like that the text did not enjoy consensus.<sup>25</sup> Additionally, the ambiguities in the text were a concern for Bangladesh, who specifically did not like that “Indigenous people” is not defined in the Declaration.<sup>26</sup>

All four opposing states affirmed their commitment to the idea of the Declaration, but each casted a negative vote for similar reasons. Canada expressed its dissatisfaction that the text was not “meaningful and effective” and Australia and the USA similarly found the text unable to be universally accepted, observed or upheld. Rather the text was considered to be written in confusing terms, capable of a wide range of interpretations, non-transparent and not capable of implementation, as was stated by the representative for the USA.

New Zealand specifically had problems with Article 26 on land and resources, Article 28 on redress and Articles 19 and 32 on a right of veto over the State. The representative for New Zealand stated that these four provisions were “fundamentally incompatible with New Zealand’s constitutional and legal arrangements, the Treaty of Waitangi and the principal of good governance of all its citizens”<sup>27</sup> and was further against the countries democratic processes.<sup>28</sup> New Zealand noted that Article 31 concerning intellectual property was also problematic, but this was not elaborated upon.<sup>29</sup>

New Zealand further noted that the text would not be able to be implemented by a number of states, including most who had voted in its favour. In 2007, New Zealand did not want to sign a document to which it could not give legal effect. Thus, despite other states being willing to vote for the Declaration, as it was only aspirational and not binding, New Zealand did not accept that a state could responsibly take such a stance towards a document that purported to declare the contents of the rights of Indigenous people.

## 2.3 NEW ZEALAND’S REASONS AND THEIR JUSTIFIABILITY

### 2.3.1 Self-Determination

During negotiations, by far the most divisive and controversial objection to the Declaration raised by New Zealand and many states was that relating to Article 3 on

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<sup>24</sup> UN, ‘GA Adoption of Declaration’, supra note 8.

<sup>25</sup> Ibid.

<sup>26</sup> Siegfried Wiessner has noted that the failure to define “Indigenous peoples” more clearly is a valid criticism of the Declaration. Though this formulation offers flexibility, it lacks legal specificity. Siegfried Wiessner, ‘Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples’ (2008) *Vanderbilt Journal of Transnational Law*, 41, pp. 1141-1176, at pp. 1163-1164 [hereinafter Wiessner, ‘Indigenous Sovereignty’].

<sup>27</sup> UN, ‘GA Adoption of Declaration’, supra note 8; and Rosemary Banks (New Zealand Permanent Representative to the United Nations), ‘Explanation of Vote’, *MFAT Speeches* (13 September 2007), available online at <http://www.mfat.govt.nz/Media-and-publications/Media/MFAT-speeches/2007/0-13-September-2007.php>.

<sup>28</sup> UN, ‘GA Adoption of Declaration’, supra note 8. See also Michael Cullen (Deputy Prime Minister at the time), ‘Questions for Oral Answer: Crown Land—Protection’ (9 October 2007) *Hansard (Parliamentary Debates)*, 642, pp. 12123-12202, at p. 12125.

<sup>29</sup> Banks, supra note 27.

self-determination, which has been called the “heart and soul” of the Declaration.<sup>30</sup> Indigenous peoples claimed that the text would not be accepted if this right was not recognised.<sup>31</sup> However, the Article was also the reason why adoption of the Declaration by the UN General Assembly was stalled in 2006.<sup>32</sup> For this reason, it is discussed here, even though it was not a specific ground given by New Zealand for rejecting the Declaration, in 2007.

Self-determination of peoples was already part of international law and that conferred by the Declaration is no different from the right of all other peoples.<sup>33</sup> Though the definition of peoples is by no means settled,<sup>34</sup> the controversy lay in the fact that sub-national groups had never before been considered as “peoples” at international law (but rather as minorities),<sup>35</sup> and there was fear that such recognition would be used as a ground for secession.<sup>36</sup> Many academics have discussed why this was not a valid concern. Firstly, Article 3 must be read with Article 4,<sup>37</sup> which states that “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.” Secondly, Article 46.1 states that nothing in the declaration may be interpreted as authorising action “which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”<sup>38</sup> General international law only allows for

<sup>30</sup> The observer for the Chittagong Hill Tracts Peace Campaign quoted in UN Economic and Social Council, Commission on Human Rights, ‘Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32’, 53rd session (UN Doc. E/CN.4/1997/102, 1996), at para. 339. See also Caroline Foster, ‘Indigenous Peoples’ Right to Self-Determination’ (2007) *New Zealand Law Journal*, pp. 45-46, at p. 45 [hereinafter Foster, ‘Indigenous Peoples’ Right to Self-Determination’]; and Caroline Foster, ‘Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples’ (2001) *European Journal of International Law*, 12, pp. 141-157, at pp. 142-143 [hereinafter Foster, ‘Articulating Self-Determination’].

<sup>31</sup> Xanthaki, ‘Indigenous Rights and United Nations Standards’, supra note 4, at p. 109.

<sup>32</sup> The African bloc (of fifty-three countries) caused the deference of the consideration of the Declaration from the 2006 to the 2007 General Assembly; Wiessner, ‘Indigenous Sovereignty’, supra note 26, at pp. 1159-1160.

<sup>33</sup> Ian Brownlie, *Principles of Public International Law*, 7th edn, Oxford: Oxford University Press, 2008, at pp. 579-582; and Alexandra Xanthaki, ‘Indigenous Rights in International Law Over the Law 10 Years and Future Developments’ (2009) *Melbourne Journal of International Law*, 10, pp. 27-37, at p. 30 [hereinafter Xanthaki, ‘Indigenous Rights in International Law’]. See also Charter of the United Nations (1945) 1 UNTS XVI (26 June 1945, entered into force on 24 October 1945), Articles 1.2 and 55; UN, International Covenant on Civil and Political Rights (CCPR) (1976) GA Res. 2200A (XXI) (16 December 1966, entered into force 23 March 1976), Article 1; and UN, International Covenant on Economic, Social and Cultural Rights (CESCR) (1976) GA Res. 2200A (XXI) (16 December 1966, entered into force 3 January 1976), Article 1.

<sup>34</sup> See Daniel Thürer and Thomas Burri, ‘Self-Determination’, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, at paras 18-21, available online at [www.mpepil.com](http://www.mpepil.com), last updated 2008.

<sup>35</sup> Xanthaki, ‘Indigenous Rights in International Law’, supra note 33, at p. 30.

<sup>36</sup> For example, it has been called “apartheid” in the sense of the “parallel development of two peoples in one land”; see Michael Laws, ‘Ripples from this DRIP Will be Far Reaching’, *Sunday Star Times* (25 April 2010), available online at <http://www.stuff.co.nz/sunday-star-times/opinion/3619989/Ripples-from-this-DRIP-will-be-far-reaching>. In New Zealand, there appears to be a fear of the existence of multiple identities. There is a rhetoric that New Zealand is “multi-cultural”, but we are all “New Zealanders”. Other affiliations are “of secondary importance”.

<sup>37</sup> John M. van Dyke, ‘Draft Interim Report: Rights of Indigenous Peoples’, *International Law Association, The Hague Conference* (2010), at p. 9; and Wiessner, ‘Indigenous Sovereignty’, supra note 26, at p. 1166. Wiessner stated that it is the “guarantee of internal self-determination” or the “right to autonomy or self-government”, as defined by Article 4 (emphasis added).

<sup>38</sup> This wording is also used in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (Declaration on Friendly Relations) (1970) Res. 2625 (XXV) (24 October 1970). See Charters, ‘The Rights of Indigenous Peoples’, supra note 13, at p. 336; and S. James Anaya and Siegfried Wiessner, ‘The UN Declaration on the Rights of



secession under specific circumstances, which the Declaration does not affect one way or the other.<sup>39</sup> Article 46 was added as a concession by Indigenous peoples, as a result of constant objections by many states (including New Zealand), and is the reason why the Declaration was eventually accepted.<sup>40</sup> The addition of Article 46 is likely why self-determination was not raised as a specific reason as to why New Zealand casted a negative vote.<sup>41</sup>

Self-determination is a “notoriously elusive concept”,<sup>42</sup> however many Indigenous peoples made it clear that they had no desire to secede or to “threaten territorial integrity or political unity”.<sup>43</sup> Rather, they wanted “indigenous sovereignty” in the sense of “cultural and spiritual reaffirmation”.<sup>44</sup> Indeed, no Indigenous representatives spoke of secession during the development of the Declaration.<sup>45</sup> The Indigenous peoples, who took part in the Working Group, believed that the right to self-determination applied to all peoples, not just Indigenous peoples, and the right does not constitute absolute sovereignty.<sup>46</sup> It must also be remembered that many Indigenous peoples do not view sovereignty in the Western sense of political power over land and people, but as cultural integrity.<sup>47</sup>

There are also those who believe that the New Zealand Government was correct in its hesitation towards the Article on self-determination. This is because international law recognises self-determination as protecting people’s freedom to exercise their choice as they wish, which some fear is too broad a right in the hands of the Māori.<sup>48</sup> It is, however, also arguable that self-determination has different meanings in different contexts and is flexible. There is a strong proposition that self-determination in the Declaration refers to political participation, representative government and ensuring that there is Indigenous participation in public policymaking and implementation,<sup>49</sup>

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Indigenous Peoples: Towards Re-empowerment’ (2007) *Third World Resurgence*, 206, available at [www.twinside.org](http://www.twinside.org). For a discussion about why Article 46 is a complete contradiction to all the preceding Articles, making it unworkable, see Round, *supra* note 19, at p. 395.

<sup>39</sup> Charters, ‘The Rights of Indigenous Peoples’, *supra* note 13, at p. 336. According to the Vienna Declaration and Programme of Action and the 1970 Declaration on Friendly Relations, for states to invoke territorial integrity, they must be “conducting themselves in compliance with the principle of equal rights and self-determination of peoples”.

<sup>40</sup> Wiessner, ‘Indigenous Sovereignty’, *supra* note 26, at p. 1165.

<sup>41</sup> Solomon, *supra* note 15.

<sup>42</sup> Helen Quane, ‘The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights’, in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford and Portland, Oregon: Hart Publishing, 2011, pp. 259-287, at p. 260.

<sup>43</sup> Erica-Irene Daes (Chairperson of the Working Group on Indigenous Populations), ‘Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples’, (UN Doc. E/CN.4/Sub.2/1993/26/Add.1, 1993), at para. 28 [hereinafter Daes, ‘Explanatory Note’].

<sup>44</sup> Anaya and Wiessner, *supra* note 38; and Charters, ‘Declaration Adoption’, *supra* note 3, at p. 57.

<sup>45</sup> Patrick Thornberry, *Indigenous Peoples and Human Rights*, Manchester: Manchester University Press, 2002, at p. 385.

<sup>46</sup> Davis, *supra* note 12, at pp. 57-58.

<sup>47</sup> Wiessner, ‘Indigenous Sovereignty’, *supra* note 26, at pp. 1167-1173.

<sup>48</sup> Foster, ‘Indigenous Peoples’ Right to Self-Determination’, *supra* note 30, at p. 45.

<sup>49</sup> Brownlie, *supra* note 33, at p. 580; Erica-Irene Daes, ‘An Overview of the History of Indigenous Peoples: Self-Determination and the United Nations’ (2008) *Cambridge Review of International Affairs*, 21, pp. 7-26, at pp. 23-24; Daes, ‘Explanatory Note’, *supra* note 43, at paras 25-26; Steve Wheatley, ‘Draft Interim Report: Rights of Indigenous Peoples’, *International Law Association, The Hague Conference* (2010), at p. 12; Foster, ‘Articulating Self-Determination’, *supra* note 30, at pp. 143-150; Xanthaki, ‘Indigenous Rights and United Nations Standards’, *supra* note 4, at pp. 157-159 (for a discussion on the range of interpretations self-determination can have, see pp. 146-173); and Thornberry, *supra* note 45, at pp. 383-384. See also Julian Burger, ‘The UN Declaration on the Rights of Indigenous Peoples: From Advocacy to Implementation’, in Stephen Allen and

rather than secession as in the UN declaration for decolonisation.<sup>50</sup> In other words, self-determination is “essentially ... linked to political power”<sup>51</sup> and may be exercised by a people internally within a state without entitling the people to a separate independent state.<sup>52</sup> This interpretation is supported by the general principle embodied in Article 18, which states that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights”.<sup>53</sup> It is also consistent with the historical development of self-determination, which began as a political concept and a principle and process of legitimacy of governance.<sup>54</sup> Moreover, the UN Human Rights Committee (HRC) has stated that, with respect to Article 1.1 of the UN International Covenant on Civil and Political Rights (CCPR), which is virtually identical to Article 3 of the Declaration,<sup>55</sup> what are relevant are constitutional and political processes that in practice allow the exercise of the right to self-determination.<sup>56</sup>

This perspective was also taken by Indigenous peoples, who linked self-determination to political participation and democratic governance.<sup>57</sup> Even S. James Anaya, one of the main champions of viewing the Declaration as “harder” law, has stated that self-determination needs to be undertaken in “a spirit of partnership, by both States and indigenous peoples”<sup>58</sup> and that the Declaration affirms “a large degree of autonomy in managing ... internal and local affairs.”<sup>59</sup> Indeed, the preambular text of the Declaration itself states that it creates a “standard of achievement to be pursued in a spirit of partnership and mutual respect”. Moreover, the negotiations over the Declaration and the text itself make it clear that the intention is that Indigenous peoples exercise the rights outlined therein within the state of which they are a part.<sup>60</sup>

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Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford and Portland, Oregon: Hart Publishing, 2011, pp. 41-59, at p. 45, who notes that there are possibly as many solutions to what is “self-determination” as there are Indigenous peoples, and that the Declaration “is focused emphatically on the application of the right of indigenous peoples to participate” (at p. 47).

<sup>50</sup> UN, Declaration on the Granting of Independence to Colonial Countries and Peoples (1960) GA Res. 1514 (XV) (UN Doc. A/RES/15/1514) (14 December 1960). See also Dominic O’Sullivan, ‘The Politics of Indigeneity and Contemporary Challenges to Māori Self-Determination’, Australasian Political Studies Association Conference (Adelaide, 29 September – 1 October 2004), at pp. 3-4, available at [http://www.adelaide.edu.au/apsa/docs\\_papers/Others/O%27Sullivan.pdf](http://www.adelaide.edu.au/apsa/docs_papers/Others/O%27Sullivan.pdf). O’Sullivan generally views self-determination of Indigenous peoples as giving the maximum autonomy possible, while allowing states to maintain their territorial integrity and retain their ultimate sovereignty. Moreover, he states that this is achieved through representative government and full and effective political participation.

<sup>51</sup> Xanthaki, ‘Indigenous Rights and United Nations Standards’, supra note 4, p. 157. For a contrasting view, see Claire Charters, ‘Review: Alexandra Xanthaki, *Indigenous Rights and United National Standards: Self-Determination, Culture and Land* (Cambridge: Cambridge University Press, 2007) (2009) *Human Rights Law Review*, 9 (3), pp. 511-517, at p. 513. Charters views the right to political participation as more “in tune” with the claims made by minorities.

<sup>52</sup> Thúrer and Burri, supra note 34, at paras 23 and 33-39.

<sup>53</sup> See Burger, supra note 49, at p. 46.

<sup>54</sup> The history is outlined in Thúrer and Burri, supra note 34, at paras 1-11.

<sup>55</sup> It is also identical to Article 1.1 of the CESC.

<sup>56</sup> Human Rights Committee, ‘The Right to Self-Determination of Peoples (Article 1)’, CCPR General Comment No. 12 (1984), para. 4.

<sup>57</sup> Davis, supra note 12, at p. 58.

<sup>58</sup> S. James Anaya (Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People), ‘Promotion and Protection of All Human Rights, Civil, Political, Economical, Social and Cultural Rights, Including the Right to Development’, (UN Doc. A/HRC/9/9, 2008), at para. 74.

<sup>59</sup> *Ibid.*, at para. 75.

<sup>60</sup> Foster, ‘Articulating Self-Determination’, supra note 30, at p. 153; and Thornberry, supra note 45, at p. 382. See also van Dyke, supra note 37, at p. 10.

The idea of partnership means that the application of self-determination should be specifically tailored at a national level through negotiations between states and Indigenous peoples.<sup>61</sup> That each Article of the Declaration can be interpreted relative to the regional or national context is also supported by other academics.<sup>62</sup> At a regional meeting on an earlier draft of the Declaration (Suva, Fiji, 4 September 1996), Aroha Mead stated that:<sup>63</sup>

The right to self-determination of Pacific Indigenous peoples will in some cases mean the creation of new UN member states, but it does not mean that this is what all Indigenous peoples are seeking. For some, their right to self-determination means a renegotiation of the system of governance to enable greater autonomy for them in political, economic, social and cultural decision-making. We must respect the different visions of Indigenous peoples, acknowledge there are differences, identify the commonalities and work towards constructive agreements that do not predetermine how Indigenous peoples throughout the world will realise their right to self-determination. The fundamental area of commonality, is the experience of colonisation and the wish therefore to de-colonise, *but the journey of de-colonisation will be different according to the needs and aspirations of respective Indigenous peoples and of how they view their future relationship with colonising governments.*

It is further supported by the preambular text, which states that the General Assembly recognises that “the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.”

It should be noted that self-determination could be different in the New Zealand context than from the context of other states. This is because the Māori ceded “absolutely and without reservation all the rights and powers of Sovereignty” to Her Majesty Queen Victoria of England in the Treaty of Waitangi.<sup>64</sup> This Article of the Treaty of Waitangi is, of course, controversial as the Māori version of the text ceded *kawanatanga*, which translates more as governance rather than sovereignty. In any case, the modern policy of “partnership” in New Zealand, rather than mere government-citizen relationships (as in Australia) or more government-government relationships (as

<sup>61</sup> Quane, *supra* note 42, at p. 271. Quane further notes that this means that self-determination in the Declaration (as compared to in international law) is not only restricted to being internal, it is also limited to what can be agreed between Indigenous peoples and the states in which they reside.

<sup>62</sup> Rodolfo Stavenhagen, ‘Making the Declaration on the Rights of Indigenous Peoples Work: The Challenge Ahead’, in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford and Portland, Oregon: Hart Publishing, 2011, pp. 147-170, at pp. 152 and 162. Stavenhagen notes that though such an approach may appear to detract from the universality of the rights in the Declaration, the rights must be made to apply at the regional and national level. He further states that the “various facets of the right to self-determination” must be interpreted and applied within the specific context of countries. However, Stavenhagen does also state that the right to self-determination is more a “territorial” than “political” right.

<sup>63</sup> Aroha Mead, ‘Cultural and Intellectual Property Rights of Indigenous Peoples of the Pacific’, in Leonie Pihama and Cheryl Waerea-i-te-rangi Smith (eds), *Cultural and Intellectual Property Rights. Economics, Politics & Colonisation*, vol. II, Auckland, New Zealand: International Research Institute for Māori and Indigenous Education, University of Auckland, 1997, pp. 20-29, at p. 20 (emphasis added). See also Mary E. Turpel, ‘Indigenous Peoples’ Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition’ (1992) *Cornell International Law Journal*, 25, pp. 579-602, at pp. 592-593; and Claire Charters, ‘A Self-Determination Approach to Justifying Indigenous Peoples’ Participation in International Law and Policy Making’ (2010) *International Journal on Minority and Group Rights*, 17, pp. 215-240, at pp. 225-226.

<sup>64</sup> Treaty of Waitangi, Article 1 (English version).

in Canada and the USA), puts New Zealand in a rather unique position. Unlike government-government relationships, which involve two parties interacting with one another, a partnership implies two parties working together as one towards a common goal. Thus, it is possible to argue that, even if the above proposed definition of self-determination as political participation is rejected by other countries, such as the USA and Canada, it may not be by New Zealand.<sup>65</sup>

The interpretation of self-determination as a right of political representation and good governance is also arguably more suited to New Zealand than other nations because the Māori are the largest minority in the country. Proportional political representation is likely to be sufficient for the Indigenous perspective to be heard. Comparatively, in nations where Indigenous peoples are proportionately far smaller in number and more greatly marginalised, such an interpretation is likely to be of limited use to Indigenous peoples.<sup>66</sup> Furthermore, this understanding would be consistent with a line of academic thinking that perceives the Treaty of Waitangi as endowing rights in political groupings (*iwi*, tribes), and is political rather than racial in character.<sup>67</sup>

When Australia adopted the Declaration, in 2009, it noted that, regarding self-determination:<sup>68</sup>

the Declaration recognises the entitlement of Indigenous peoples to have control over their destiny and to be treated respectfully. ... We want Indigenous peoples to participate fully in Australia's democracy. Australia's Indigenous peoples must be able to realise their full potential in Australian and international affairs. We support Indigenous peoples' aspirations to develop a level of economic independence so they can manage their own affairs and maintain their strong culture and identity

Australia here supported the interpretation of self-determination outlined above and further indicated that there is also an external component to self-determination. Though Article 3 self-determination is internal in nature, as indicated by Articles 4 and 46.1,<sup>69</sup> the Declaration does have a minor external aspect of self-determination in Article 36.1.<sup>70</sup> This Article affirms that "Indigenous peoples, in particular those divided by

<sup>65</sup> It is unlikely that Australia, New Zealand or the USA would reject this interpretation, as they proposed to define the right to self-determination in the Declaration as the right "to freely participate in" determining their political status. See UN Economic and Social Council, Commission on Human Rights, 'Indigenous Issues', (UN Doc. E/CN.4/2006/79, 2006), annex I, at p. 22.

<sup>66</sup> Quane, *supra* note 42, at p. 267.

<sup>67</sup> Claire Charters, 'Do Māori Rights Racially Discriminate Against Non Māori?' (2009) *Victoria University of Wellington Law Review*, 40, pp. 649-668, at p. 656 [hereinafter Charters, 'Racial Discrimination?']. Interestingly, in the USA, government legislation specifically for Native people is justified to be not discriminatory, as they are for separate political, rather than racial, groups; see *Morton v Mancari* (1974) 417 US 535 (SC).

<sup>68</sup> Jenny Macklin (Federal Minister for Indigenous Affairs), 'Federal Government Formally Endorses the Declaration on the Rights of Indigenous Peoples', *Press Release: Parliament House* (3 April 2009).

<sup>69</sup> Stavenhagen, *supra* note 62, at pp. 162-163; and Quane, *supra* note 42, at p. 265.

<sup>70</sup> van Dyke, *supra* note 37, at p. 10. Connected to the issues relating to self-determination and the "external" component, some states were concerned with Article 37, which requires that states abide by their "treaties, agreements and other constructive arrangements" with their Indigenous peoples. The trepidation over this Article was due to its suggestion that Indigenous peoples have a state-like quality and, thus, the treaties have the status of international law; Charters, 'Declaration Adoption', *supra* note 3, at p. 131. Both Canada and the USA believe that the treaties with their Indigenous peoples are domestic rather than international and should, thus, be dealt with at a domestic level and not through an international tribunal or court; Thornberry, *supra* note 45, at p. 395. New Zealand takes a similar view; Gudmundur Alfredsson, 'Indigenous Peoples, Treaties with', in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, at para. 9, available online at [www.mpepil.com](http://www.mpepil.com), last updated 2007. See *infra*, section 2.4.1; and Claire Charters, 'An Imbalance of Powers: Māori land Claims and an Unchecked Parliament' (2006) *Cultural Survival: Bridging the Gap Between Law and Reality*, 30 (1), available online at <http://www.culturalsurvival.org/print/3077>.

international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.”

### 2.3.2 Powers of Veto

With regard to Articles 19 and 32, New Zealand did not like the so-called “rights of veto” that are conferred therein. Australia and Canada agreed. These Articles require that states consult and cooperate in “good faith” in order to obtain free, prior informed consent before adopting and implementing legislative or administrative measures that may affect Indigenous peoples, and any project affecting their lands, territories and resources.<sup>71</sup> These Articles were drafted to ensure that states exercise government functions in a way that avoids unjustified interferences with the ways of life of Indigenous peoples.<sup>72</sup> The representative of New Zealand stated that this is effectively a right to veto over the democratically elected legislature and national resource management. Moreover, New Zealand and Australia both objected to the Declaration’s implication that there are different classes of citizenship, as Indigenous peoples would have a right to veto that other groups or individuals would not have. The New Zealand representative described this as “discriminatory in the New Zealand context”.<sup>73</sup> These rights have further been argued to be contrary to the concepts of equality and democracy.<sup>74</sup>

In answer to this objection, Claire Charters (a leading academic on Māori rights in international law) stated that, though a “legitimate state concern”, it was “misstated and misplaced”, as obtaining consent is different from a veto right.<sup>75</sup> Whether this is a realistic distinction depends on the interpretation given to “in order to obtain”. If the obligation is only to “consult and cooperate in good faith” *to try* and obtain consent, then it is clearly different from a power of veto. Anaya has stated that consultation must be “with the objective” or “view to obtaining” the consent,<sup>76</sup> which favours this approach. However, if “in order to obtain” is interpreted such that the Articles mean that prior informed consent is a necessary outcome of the consultation and cooperation,<sup>77</sup> this is in effect a right of veto. This latter interpretation has been taken by

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<sup>71</sup> New Zealand did not object to Article 18, which is similar, stating that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.” Presumably, this was not objected to as affecting “rights” is far narrower in scope than affecting the people. In parallel to Articles 18, 19 and 32, the Wai 262 dispute (at the Waitangi Tribunal) claims a right to participate in the general exercise of government, including to develop legislation, policy and international agreements that affect the ability of *iwi* to exercise their rights over their *taonga*, as per Article 2 of the Treaty of Waitangi; see Delegation of New Zealand, ‘Specific Legislation for the Legal Protection of Traditional Cultural Expressions – Experiences and Perspectives of New Zealand’, in WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), Secretariat, ‘Presentations on National and Regional Experiences with Specific Legislation for the Legal Protection of Traditional cultural Expressions (Expressions of Folklore)’, (WIPO Doc. WIPO/GRTKF/IC/4/INF/2, 2002), annex II, at para. 40.

<sup>72</sup> Wheatley, *supra* note 49, at p. 14.

<sup>73</sup> Banks, *supra* note 27.

<sup>74</sup> Round, *supra* note 19, at p. 395.

<sup>75</sup> For examples, Charters, ‘The Rights of Indigenous Peoples’, *supra* note 13. This is also stated by Solomon, *supra* note 15.

<sup>76</sup> Anaya, *supra* note 58, at paras 39 and 78. This is similar wording to that used in Article 6(2) of the ILO Convention 169.

<sup>77</sup> As it is by most of the Declaration’s opponents. See, for example, Laws, *supra* note 36.

some academics.<sup>78</sup> The author here believes that the words “good faith” indicate that the “to try” interpretation must be the correct one. Moreover, the “to try” interpretation is more coherent with the above argument that self-determination in the Declaration does not remove the sovereignty of the state, but requires political participation.<sup>79</sup> It is also consistent with the New Zealand High Court finding that the Crown must act in “good faith” when deciding matters affecting Māori interests.<sup>80</sup>

Charters further stated that concern is invalid as the coverage of Articles 19 and 32 do not apply to all state actions, but are limited to those that “may affect” the Māori, or will affect their lands, territories and other resources. However, taken literally, this is much wider in coverage than Charters implies. In New Zealand, the Māori make up 17.7 % of the population and are the largest minority group.<sup>81</sup> Arguably all legislative and administrative measures and projects could fall into one of the categories requiring consultation. As most legislation covers all citizens and the Māori are citizens, only very specific legislation would not be covered by Article 19. It is difficult to imagine legislative or administrative measures that would not potentially affect Māori. Therefore, the author does not agree with Charter’s statement. Rather it appears that the scope of Articles 19 and 32 is overly broad and imprecise, and “may affect” needs to be interpreted to be narrower than its ordinary meaning.

More to the point is the fact that both the Declaration and the current line of thought regarding the Treaty of Waitangi focus on a partnership between the Indigenous peoples (the Māori) and the State (the Crown).<sup>82</sup> This alone is a stronger argument of why pre-consultation with the Māori should take place. It would shift the idea of “partnership” from mere rhetoric to actual practice.<sup>83</sup>

In giving its explanation for its negative vote, New Zealand expressed its concern that Articles 19 and 32 created a separate class of citizenship, through giving Māori rights that others would not have. If we take “consultation” to be something substantively beyond the normal operation of a democratic process, which it must have

<sup>78</sup> For example, Round, *supra* note 19, at p. 395; Wheatley, *supra* note 49, at pp. 14-15; and Jérémie Gilbert and Cathal Doyle, ‘A New Dawn Over the Land: Shedding Light on Collective Ownership’, in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford and Portland, Oregon: Hart Publishing, 2011, pp. 290-328.

<sup>79</sup> For a discussion on the inter-connectedness of the participatory rights in the Declaration and the right to self-determination, see Quane, *supra* note 42, at pp. 272-284.

<sup>80</sup> *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 687, at pp. 682-683 Richardson J (HC), stating: “I think the better view is that the responsibility of one treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith. In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.” See also Robert K. Paterson, ‘Taonga Māori Renaissance: Protecting the Cultural Heritage of Aotearoa/New Zealand’, in James A.R. Nafziger and Ann M. Nicgorski (eds), *Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce*, Leiden, The Netherlands: Martinus Nijhoff Publishers, 2009, pp. 107-133, at pp. 114-115.

<sup>81</sup> Statistics New Zealand, ‘QuickStats About Māori’, *New Zealand Census 2006* (2007), at p. 9. This is the percentage of Māori by descent.

<sup>82</sup> UNDRIP, preamble; Anaya, *supra* note 58, at paras 74-78; and *New Zealand Māori Council v Attorney-General*, *supra* note 80.

<sup>83</sup> For an example of the “partnership” being mere rhetoric, see Louise Humpage, ‘A State-determined “Solution” For Maori Self-determination: The New Zealand Public Health And Disability Bill’ (2003) *Political Science*, 55 (5), pp. 5-19.

to have any real value to the Māori – for example, holding a *hui* (a gathering or assembly, which is usually closed to specific members, such as representatives of particular *iwi*), compared to a general public consultation – then this is conceivably true, particularly if “may affect” is given a wide interpretation. There are many ways to address this point. One is that there is no inconsistency between the recognition of the political rights of the Māori and equality before the law.<sup>84</sup> It has also been suggested that the New Zealand legal system has always recognised that different laws apply to people in different circumstances,<sup>85</sup> and as the Indigenous peoples of New Zealand and party to the Treaty of Waitangi, the Māori are entitled to rights of “citizen-plus matter”.<sup>86</sup> Though this may be so, it would be easier and less controversial to either: (1) widen the scope of consultation beyond only the Māori; (2) interpret “may affect” narrowly; or (3) both.

For the first option, the Declaration requires that Māori be consulted in good faith for consent, but does not limit the State from also consulting with other affected groups. The Declaration itself requires that “all human rights and fundamental freedoms of all ... be respected” and allows for limitations of the Declaration rights to be in accordance with international human rights obligations and to secure the rights and freedoms of others in a democratic society.<sup>87</sup> The provisions of the Declaration are to be interpreted in “accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith”.<sup>88</sup>

On the other hand, the interests of non-Māori could also be protected by a narrow interpretation of “may affect”. The meaning of “affect” would need to be refined to something of real consequence and not some remote and minor effect.<sup>89</sup> Māori should only be consulted about legislative or administrative measures that may affect particular concerns, specific to the relationship between the state and Indigenous communities and their history. For example, land would clearly be such a concern for probably all Indigenous communities.<sup>90</sup> Other examples, in the context of New Zealand, could be found in the Treaty of Waitangi, such as fisheries and “treasures” (protected in Article 2). However, finding the particular concerns that require consultation should by no means be limited to what can be literally found in the Treaty of Waitangi. For example, in the realm of criminal law, consultation with the Māori about the best means to rehabilitate youth criminals could not be directly extrapolated from the Treaty. However, it may be something worthy of consultation if it is possible to attribute the high rates of Māori youth criminals to colonisation and its subsequent effects, in other words, it is a reflection of the particular history in New Zealand.

Seeing as the Declaration is meant to reflect the special position of Indigenous peoples, as a consequence of their histories and relationships to their states, the second option is preferable to the first. Moreover, the first option does not solve the issue that

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<sup>84</sup> Charters, ‘Racial Discrimination?’, supra note 67; and Solomon, supra note 15. Charters warns against perceiving Māori rights as discriminating against non-Māori without looking at the justifications behind those rights. It is vital to ask if it is really discriminatory against non-Māori, taking into account the context of the right and the position of the Māori.

<sup>85</sup> Solomon, supra note 15.

<sup>86</sup> Ibid.

<sup>87</sup> UNDRIP, Article 46.2.

<sup>88</sup> UNDRIP, Article 46.3.

<sup>89</sup> This would be consistent with the Court ruling in *New Zealand Māori Council v Attorney-General*, supra note 80, at pp. 682-683 Richardson J, where it is stated that consultation only needs to take place in some circumstances, for example when their maybe Treaty implications (text outlined above, supra note 80).

<sup>90</sup> For a discussion on how all Indigenous interests can be attributed back to their land rights, see Graber, ‘Aboriginal Self-Determination vs Propertisation’, supra note 6, at pp. 19-20.

an ordinary meaning of “may affect” is far too broad for any practical application and expanding its application to non-Māori would only further this problem.

It could be said that, as a reflection of good governance, the Government should always consult with groups that may be affected by legislative or administrative measures, so long as “affect” is defined narrowly. This would be option 3. It is important to keep in mind that “affect” would be conceptually different for Māori and non-Māori, because it should mirror the particular relationship between the people being consulted with and the state. Indeed, as a democratically elected parliament is (in theory) representative of the people of New Zealand, the existing system already reflects a consultation of sorts. As parliament predominantly represents the majority and not minorities, it is arguable that New Zealand does not need to do anything extra to satisfy the right of consultation of non-Māori (the majority). Therefore, taking the third option would be functionally equivalent to adopting the second.

Regarding the Māori and the Declaration, the intention of the Government as to the meaning of “may affect” is unclear. In New Zealand’s announcement of support for the Declaration, it was stated that the principles for Indigenous involvement in decision-making “range from broad guarantees of participation and consultation to particular instances in which a requirement of consent is appropriate”, but it was also said that “Māori have an interest in *all* policy and legislative matters”.<sup>91</sup> Currently, the practice of consultation (whether it be by the executive, Crown ministries or institutes) varies depending on many differentials, including statutory law, non-legislated policies and, sometimes, depends on whether there is a realisation that there may be both a Māori concern and related fiduciary duty.<sup>92</sup> Although the practice of consultation occasionally leaves something to be desired (from the perspective of the Māori),<sup>93</sup> over the past two decades, the New Zealand Government has been comparatively good at both consulting the relevant Māori *iwi* concerned and taking on board their interests, keeping in mind that the Government must balance the interests of the Māori against those of the greater public.

### 2.3.3 Land, Territories and Resources

Article 26 stipulates that Indigenous peoples have the right to own, use, develop or control lands, territories and resources that they traditionally owned, occupied or used. New Zealand stated that this Article potentially encompasses all of New Zealand, taking no account of the interests of third parties. Similar reservations were made by Australia. It was further argued that the Article did not take into account the customs, traditions and land tenure systems of the Indigenous peoples concerned. The last issue that New Zealand had with Article 26 was that it implied that Indigenous peoples had rights that others did not have.

A related Article that New Zealand opposed (Article 28) deals with the right of redress for the lands, territories and resources traditionally owned, occupied or used,

<sup>91</sup> Sharples, ‘Supporting UN Declaration’, *supra* note 10; and Simon Power (Minister of Justice), ‘UN Declaration on the Rights of Indigenous Peoples—Government Support’ (20 April 2010) *Hansard (Parliamentary Debates)*, 662, pp. 10229-10240, at p. 10231 (emphasis added).

<sup>92</sup> For an outline of the New Zealand Government policy for Māori consultation and involvement for the purposes of international treaties, see Ministry of Foreign Affairs and Trade, *supra* note 15.

<sup>93</sup> Maui Solomon, ‘Intellectual Property Rights and Indigenous Peoples Rights and Obligations’, *Workshop on Instruments for Access and Benefit Sharing from Genetic Resources and Related Traditional Knowledge Issues*, Global Biodiversity Forum 15, United Nations Environment Programme (Gigiri, Nairobi, Kenya, 12-14 May 2000), available at <http://www.inmotionmagazine.com/ra01/ms2.html>.



but confiscated, taken, occupied used or damaged without their free, prior and informed consent. This Article was objected to for similar reasons as Article 26, that it potentially includes all of New Zealand, it does not consider the interest of third parties in the land, and it ignores that there are overlapping claims to the same land by different *iwi* in New Zealand. Canada noted similar problems with the Articles relating to land and resources as being overly broad, unclear and open to a wide variety of interpretation. New Zealand had earlier sought to have the Article amended to limit Indigenous peoples' right to land and resources (or redress thereof) that had become the property of non-Māori.<sup>94</sup>

These concerns are easily dismissed as exaggerated. Article 26(3) specifically states that legal recognition and protection should be conducted with due respect to the customs, tradition and land tenure systems of the Indigenous peoples concerned. Article 28 addresses the fact that restitution may not be possible and Article 46 protects the rights of others. Furthermore, there is nothing in the Declaration to prevent a state from investigating into traditional ownership. In other words, there is nothing to stop the Waitangi Tribunal<sup>95</sup> from continuing to evaluate if an *iwi* or which *iwi* actually "traditionally owned or otherwise occupied or used" the "lands, territories and resources" at issue, before attending to redress, whether through restitution or compensation.

#### 2.3.4 Summary

New Zealand's initial hesitations over the Declaration as potentially allowing for secession, giving veto powers to the Māori (thus, discriminating against non-Māori) and requiring the return of all land in New Zealand and not allowing for any way to deal with competing land disputes (whether between different *iwi* or Māori and non-Māori) were ill-founded. Within the context of the Declaration, self-determination and the related right to consultations in "good faith" can be interpreted as being rights to political representation and good governance, tying in nicely with the concept of "partnership" between the Māori and Crown. Moreover, the Declaration specifically states that it is not a means for secession and that land disputes (indeed any disputes) may take into account third-party interests.

### 2.4 THE EVENTUAL ENDORSEMENT AND ITS CONSEQUENCES

#### 2.4.1 The Intention of the New Zealand Government

Unsurprisingly, many pro-Māori-rights activists and academics were displeased with New Zealand's initial rejection of the Declaration.<sup>96</sup> With a change in government in 2008, New Zealand announced its commitment to the Declaration on 19 April 2010,

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<sup>94</sup> Charters, 'Declaration Adoption', supra note 3, at p. 128.

<sup>95</sup> The Waitangi Tribunal has the task of issuing reports "for the observance, and confirmation" of the principles of the Treaty of Waitangi; see Treaty of Waitangi Act 1975, preamble. The Treaty Principles were discussed and developed in *New Zealand Māori Council v Attorney-General*, supra note 80.

<sup>96</sup> See, for example, Aziz Choudry, 'New Zealand is Not Fit to Sit on UN Human Rights Council' (2007) *Third World Insurgence*, 206, available online at [www.twinside.org](http://www.twinside.org); Sandy Gauntlet, 'Land of Hope and Glory' (2007) *Third World Insurgence*, 206, available online at [www.twinside.org](http://www.twinside.org); Charters, 'The Rights of Indigenous Peoples', supra note 13, at p. 337; and Solomon, supra note 15.

after prolonged negotiations between the leading National Party and the Māori Party.<sup>97</sup> What is interesting is the difference in meanings taken from the affirmation by different groups. Many Māori appeared to view the announcement as a significant step towards the protection of Māori rights.<sup>98</sup> However, Prime Minister John Key repeatedly stipulated that the Declaration is not legally binding and only aspirational and symbolic.<sup>99</sup> Thus, whereas the previous Labour Government was not willing to support a Declaration that could not endow “real and meaningful” progress to the rights and interests of the Māori,<sup>100</sup> the National Government was willing to take the perspective that many of the original affirming states took that the non-binding nature meant that implementation was not required. In fact, though the Declaration was obviously generally and symbolically important to the Māori Party, there was also recognition by the Māori Party that the Declaration would have limited domestic effect.<sup>101</sup> For example, Māori Party MP Rahui Katene noted that Article 46 indicated its restricted application.<sup>102</sup> Additionally, in a press release, Pita Sharples (a co-leader of the Māori Party and the Minister of Māori Affairs) stated that “New Zealand has developed, and will continue to rely upon, its own distinct processes and institutions that afford opportunities to Māori for such involvement”.<sup>103</sup> He further acknowledged that the “ongoing national dialogue is grounded in the Treaty of Waitangi”.<sup>104</sup>

However, it appears that the Māori Party were not aware that the Prime Minister intended to place a literal and declared caveat on the Government’s support.<sup>105</sup> Seeing the Declaration as a possible tool for future use, Sharples, stated:<sup>106</sup>

The Declaration is not part of New Zealand law – but it is now part of our *tikanga*. As part of the values we have publicly espoused, the Declaration will gradually inform the laws we make, and influence the way our courts interpret legislation – just as the Treaty of Waitangi has become part of our common law.

<sup>97</sup> ‘Nats Still to Commit to UN Rights Declaration’, *The Dominion Post* (18 March 2010), available online at <http://www.stuff.co.nz/dominion-post/national/politics/3468497/Nats-still-to-commit-to-UN-rights-declarationNats>; Tracy Watkins, ‘NZ Does U-Turn on Rights Charter’, *The Dominion Post* (20 April 2010), available online at <http://www.stuff.co.nz/dominion-post/politics/3599023/NZ-does-U-turn-on-rights-charter>. Edith M. Lederer, ‘New Zealand Reverses Opposition to UN Declaration on Indigenous Rights, US Reviewing Stance’, *LA Times* (19 April 2010), available online at <http://www.latimes.com/news/nationworld/nation/wire/sns-ap-un-un-indigenouspeoples,0,4515537.story>; and Sharples, ‘Supporting UN Declaration’, supra note 10.

<sup>98</sup> Nanaia Mahuta (Labour MP), ‘UN Declaration on the Rights of Indigenous Peoples—Government Support’ (20 April 2010) *Hansard (Parliamentary Debates)*, 662, pp. 10229-10240, at p. 10232.

<sup>99</sup> John Key (Prime Minister), ‘National Government to Support UN Rights Declaration’, *Press Release* (20 April 2010), available online at <http://www.beehive.govt.nz/release/national+govt+support+un+rights+declaration>. See also Watkins, supra note 97; and Tracy Watkins, ‘How Key Could Sign Where Clark Couldn’t’, *The Dominion Post* (24 April 2010), available online at <http://www.stuff.co.nz/dominion-post/comment/3616961/How-Key-could-sign-where-Clark-couldn-t>.

<sup>100</sup> Mahuta, supra note 98, at p. 10233.

<sup>101</sup> Tracy Watkins, ‘Act Fuming Over “Covert” Indigenous Rights U-turn’, *The Dominion Post* (21 April 2010), available online at <http://www.stuff.co.nz/dominion-post/politics/3603314/ACT-fuming-over-covert-indigenousrights-U-turn>.

<sup>102</sup> Rahui Katene (Māori Party MP), ‘UN Declaration on the Rights of Indigenous Peoples—Government Support’ (20 April 2010) *Hansard (Parliamentary Debates)*, 662, pp. 10229-10240, at p. 10235.

<sup>103</sup> Sharples, ‘Supporting UN Declaration’, supra note 10; and Power, supra note 91, at p. 10231.

<sup>104</sup> *Ibid.*

<sup>105</sup> NZPA, ‘UN Declarations “Are Obligations”’, *The Press* (21 April 2010), available online at <http://www.stuff.co.nz/world/americas/3605481/US-to-review-stance-on-indigenous-rights>.

<sup>106</sup> Sharples, ‘UN Declaration Celebration Luncheon’, supra note 14 (emphasis in original).

During a parliamentary debate, Prime Ministry John Key confirmed that New Zealand only supports texts that it is able to implement, but not two sentences later he additionally stated that the Declaration “is an expression of aspiration; it will have no impact on New Zealand law and no impact on the constitutional framework. ... so affirming it would have no effect whatsoever.”<sup>107</sup> The Prime Minister stated that there is no intention that the Declaration be superseding in effect and that the Declaration would only be supported when consistent with existing New Zealand law, constitutional arrangements and the Treaty of Waitangi.<sup>108</sup> In other words, there is a caveat that the existing New Zealand law define the support of the Declaration. It was further stated by the Deputy Prime Minister that “it is a total waste of time to ... make some kind of claim under this declaration. The Government has a framework in place for dealing with Treaty of Waitangi claims”.<sup>109</sup> Moreover, the Minister of Foreign Affairs placed a further limit on the support of the Declaration and stated that there are Articles of the Declaration that will not be followed, as they are contrary to the “national agenda”.<sup>110</sup>

There is a contradiction in these statements. On the one hand, the Government is saying that they support the text and are able to implement it. However, on the other hand, the Government clearly does not mean to change New Zealand law in any way to implement the Declaration and the Declaration is only relevant so far as it is already consistent with New Zealand law.

Despite the statements by the Government that the commitment to the Declaration is merely symbolic and cannot change New Zealand law, the Declaration may nevertheless have such an effect. This is due to parts of it potentially becoming part of international law or being used as a backdrop for interpretation of existing and future New Zealand law. These possible impacts on national law are discussed in the following paragraphs.

## 2.4.2 Existing Customary International Law?

There exists a great amount of debate as to whether certain Articles of the Declaration are already a part of customary international law. Though New Zealand generally has a dualist legal system, customary international law is automatically part of the common law,<sup>111</sup> meaning that it is automatically able to be applied by the courts. Thus, if rights within the Declaration are already a part of customary international law, they are legally enforceable, regardless of Government statements otherwise.

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<sup>107</sup> John Key (Prime Minister), ‘UN Declaration on the Rights of Indigenous Peoples—Government Support’ (20 April 2010) *Hansard (Parliamentary Debates)*, 662, pp. 10229-10240, at p. 10238.

<sup>108</sup> *Ibid.*, at p. 10239.

<sup>109</sup> Bill English (Deputy Prime Minister), ‘UN Declaration on the Rights of Indigenous Peoples—Government Support’ (22 April 2010) *Hansard (Parliamentary Debates)*, 662, pp. 10229-10240, at p. 10239; and NZPA, ‘Iwi Uses UN Declaration to Seek Return of Waitangi’, *stuff.co.nz National* (22 April 2010), available at <http://www.stuff.co.nz/national/politics/3611020/Iwi-uses-UN-declaration-to-seek-return-of-Waitangi>.

<sup>110</sup> Murray McCully (Minister of Foreign Affairs) cited in Tracy Watkins, ‘Hide: Indigenous Declaration Breaches Deal’, *The Southland Times* (20 April 2010), available online at <http://www.stuff.co.nz/southland-times/news/national-news/3600224/Indigenous-rights-supportcomes-with-caveats>.

<sup>111</sup> Claire Charters, ‘Developments in Indigenous Peoples’ Rights Under International Law and Their Domestic Implications’ (2005) *New Zealand University Law Review*, 21, pp. 511-553, at p. 523.

Whether or not state practices are part of customary international law is determined according to the ICJ ruling of *North Sea Continental Shelf*,<sup>112</sup> which held that the practice needs to be very widespread and representative among states, including the specially affected states. The practice needs to be “virtually uniform”,<sup>113</sup> but it is not required that every state implement the practice in “absolute rigorous conformity”.<sup>114</sup> It also need not be practiced among all states, though there must not be substantial dissent from other states.<sup>115</sup> Additionally, *North Sea Continental Shelf* stated that the practice must be “carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the rule of law requiring it” (*opinio juris*).<sup>116</sup> In many cases, the ICJ has been willing to assume *opinio juris* from evidence of general practice, and it is only in a minority of cases that the Court has required actual positive evidence of such.<sup>117</sup> If the elements are satisfied, states are bound by the laws, irrespective of formal acceptance. Historically, it has been difficult for norms to reach the status of customary international law.<sup>118</sup>

#### (a) The Declaration as a Whole

In ascertaining the existence of customary international law, it is incorrect to assess the Declaration as a whole, as each principle or practice must be analysed individually.<sup>119</sup> Nevertheless, states and individuals have attempted to do so such a general analysis. New Zealand and the USA specifically argued that it was impossible that the document is or could become customary international law, due the evidentiary lack of support by several states.<sup>120</sup> The initial opposition by the four states is an indication that the contents of the Declaration are not part of the customary international law.<sup>121</sup> However, due to the change of heart displayed by the formerly dissenting states, much of the discussion over the meaning of the negative votes, with respect to customary international law, is no longer relevant. Conversely, it has been put forth that the support of the Declaration by 143 states is an expression of the desire to develop binding customary international law and the opposition by four states cannot undermine this.<sup>122</sup> However, the ICJ has ruled that customary international law cannot be gleaned from General Assembly resolutions in and of themselves,<sup>123</sup> though

<sup>112</sup> *North Sea Continental Shelf* (FRG/Den; FRG/Neth) [1969] 169 ICJ Rep 3, at p. 42. What constitutes as customary international law (particularly with respect to Indigenous peoples' land rights) is explored by Charters, *ibid.*, at pp. 523-532.

<sup>113</sup> *North Sea Continental Shelf*, *supra* note 112, at p. 74.

<sup>114</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) (Merits) [1986] ICJ Reports 14, at para. 186.

<sup>115</sup> *Ibid.*

<sup>116</sup> *North Sea Continental Shelf*, *supra* note 112, at p. 44.

<sup>117</sup> Brownlie, *supra* note 33, at pp. 8-9.

<sup>118</sup> Davis, *supra* note 12, at p. 60.

<sup>119</sup> Tullio Treves, 'Customary International Law', in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, at para. 72, available online at [www.mpepil.com](http://www.mpepil.com), last updated 2006; and Brownlie, *supra* note 33, at p. 6.

<sup>120</sup> UN, 'GA Adoption of Declaration', *supra* note 8.

<sup>121</sup> Charters, *supra* note 23, at p. 206.

<sup>122</sup> *Ibid.*, at p. 205; Wiessner, 'Indigenous Sovereignty', *supra* note 26, at pp. 1162 and 1165; and Federico Lenzerini, 'Draft Interim Report: Rights of Indigenous Peoples', *International Law Association, The Hague Conference* (2010), at p. 43 [hereinafter Lenzerini, 'Draft Interim Report'].

<sup>123</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, *supra* note 114, at paras 184 and 188.

they may embody rules that are subsequently deemed to be such.<sup>124</sup> Additionally, many of the statements of states who voted for the Declaration made it clear that they did not intend to make it customary international law,<sup>125</sup> and that they only casted positive votes because it was not binding (see above, section 2.2).<sup>126</sup> Moreover, the Declaration is not written in a way as to lend itself to be read as such.<sup>127</sup>

Anaya has argued that the Declaration does not create special or separate rights from fundamental human rights, rather it “elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples.”<sup>128</sup> Alexandra Xanthaki has similarly stated that the first Article makes it clear that the provisions of the Declaration are based on established international law norms, as it indicates that the Declaration merely affirms existing international human rights for Indigenous peoples.<sup>129</sup> However, both of these statements are overly broad and fail to address the aforementioned necessity that each principle be assessed individually to determine whether it is customary international law. The statements further miss the fact that the “elaboration” may in fact pull the Declaration Articles outside of the margins of existing international law.

In summary, statements that the Declaration as a whole is customary international law are both ill-conceived and *prima facie* incorrect.

## (b) Individual Principles of the Declaration

The *North Sea Continental Shelf* dicta means that the initial negative votes and statements limiting application do not automatically dictate that parts of the Declaration cannot be or become part of customary international law. All states (including the initial dissenters) indicated their support of the principles and aspirations behind the Declaration. Indeed, all four opposing states even commented on the fact that they already practised many of the provisions in the Declaration.<sup>130</sup> They only opposed specific Articles.<sup>131</sup> This lead Charters to state that a state’s negative vote or attempts at caveats “cannot in and of itself exempt it from the application of that pre-existing customary international law on Indigenous peoples’ rights.”<sup>132</sup> If state practices uniformly align themselves with Articles of the Declaration, such that the *North Sea Continental Shelf* requirements are satisfied, their caveats and self-described interpretations cannot be used to deny that these practices are part of customary

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<sup>124</sup> Stephen Allen, ‘The UN Declaration on the Rights of Indigenous Peoples: Towards Global Legal Order on Indigenous Rights’ (2009), at p. 4, available at <http://ssrn.com/abstract=1400665> [hereinafter Allen, ‘Towards Global Legal Order’].

<sup>125</sup> Stephen Allen, ‘The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project in the Indigenous Context’ (2009), at pp. 3-4, available at <http://ssrn.com/abstract=1497946> [hereinafter Allen, ‘The Limits of the International Legal Project’].

<sup>126</sup> Emmanuel Voyiakis, ‘Voting in the General Assembly as Evidence of Customary International Law?’, in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford and Portland, Oregon: Hart Publishing, 2011, pp. 209-223, at p. 213.

<sup>127</sup> Xanthaki, ‘Indigenous Rights in International Law’, supra note 33, at p. 36; and Allen, ‘The Limits of the International Legal Project’, supra note 125, at p. 22.

<sup>128</sup> Anaya, supra note 58, at para. 40.

<sup>129</sup> Xanthaki, ‘Indigenous Rights and United Nations Standards’, supra note 4, at p. 105.

<sup>130</sup> The representative of New Zealand stated that it “had been implementing most of the standards in the Declaration for many years”; Banks, supra note 27.

<sup>131</sup> Charters, supra note 23, at p. 206.

<sup>132</sup> *Ibid.*, at p. 206.

international law.<sup>133</sup> However, this requires actual evidence of such practice and of *opinio juris*.

There is a line of argument that most provisions were in accordance with existing international law (though they may not have been in general human rights instruments) and also in different national laws.<sup>134</sup> The particular Articles that have been given as examples as such are those relating to the preservation of culture, language, religion and identity,<sup>135</sup> economic and social development and collective protection of lands and resources,<sup>136</sup> self-determination,<sup>137</sup> and basic rights of consultation and consent.<sup>138</sup> The following discourse will limit itself to the rights of self-determination and prior informed consent. The international legal status on rights relating to cultural diversity/preservation and control and protection over Indigenous cultural heritage, TK and TCEs is discussed below (sections 3.1 and 3.2, respectively).

As previously stated, there is no dispute that self-determination of peoples was already part of international law. However, to include it in this list is somewhat deceptive seeing as the Declaration is the first to include Indigenous peoples within the concept. The right to consultation and consent *per se* also does not belong on this list, especially when interpreted as a veto right. Importantly, if these two rights are interpreted such that they are aspects of the right of political participation and good governance (as argued above, sections 2.3.1 and 2.3.2), they arguably would fit into existing international law. This is because the right of Indigenous peoples to political participation and good governance is already protected under regimes that protect minorities.<sup>139</sup> However, given that such an interpretation is rather innovative and possibly not globally applicable, it is unlikely that these rights, as per the Declaration, could be considered part of customary international law.

There have also been strong arguments against the Declaration having positive status in international law. It has been said that statements that the Declaration contains no new rights are incorrect, as the provisions “reveal significant innovations”,

<sup>133</sup> Anaya and Wiessner, *supra* note 38.

<sup>134</sup> Xanthaki, ‘Indigenous Rights in International Law’, *supra* note 33, at p. 30. See also Siegfried Wiessner, ‘Draft Interim Report: Rights of Indigenous Peoples’, *International Law Association, The Hague Conference* (2010), at p. 2; and Lenzerini, ‘Draft Interim Report’, *supra* note 122, at pp. 44-52.

<sup>135</sup> Anaya and Wiessner, *supra* note 38; and Wiessner, ‘Indigenous Sovereignty’, *supra* note 26, at p. 1157.

<sup>136</sup> Lorie Graham, ‘Trade Trumps Basic Human Rights?: Why the United States Should Endorse the UN Declaration on the Rights of Indigenous Peoples’ (2009), available at <http://ssrn.com/abstract=1515932>; Siegfried Wiessner, ‘Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Perspective’ (1999) *Harvard Human Rights Journal*, 12, pp. 57-128; and Wiessner, ‘Indigenous Sovereignty’, *supra* note 26, at p. 1157.

<sup>137</sup> Victoria Tauli-Corpuz (Chairperson of the UN Permanent Forum on Indigenous Issues), ‘On the Occasion of the Adoption by the General Assembly of the Declaration on the Rights of Indigenous Peoples’, 61st Session of the UN General Assembly (13 September 2007) [hereinafter Tauli-Corpuz, ‘GA Adoption’], referencing the Charter of the UN, CCPR, ICESCR and the Vienna Declaration and Programme of Action; and Wiessner, ‘Indigenous Sovereignty’, *supra* note 26, at p. 1157. See also Federico Lenzerini, ‘Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples’ (2006-2007) *Texas International Law Journal*, 42, pp. 155-190, at pp. 180-187. Though Lenzerini concludes that Indigenous sovereignty has become part of customary international law, this is limited by his finding that the concept of “Indigenous sovereignty” is “self-government” or “internal self-determination”, which may vary in form from state to state, but is always subordinate to the sovereignty of the national government (at p. 165).

<sup>138</sup> Graham, *supra* note 136.

<sup>139</sup> Such as in the legally binding CCPR (Articles 19, 21, 22, 25 and 27). Thürrer and Burri state that reading the protection of minorities for political rights in Articles 19, 21, 22, 25 and 27 of the CCPR in light of Article 1 self-determination is an example of internal self-determination; see Thürrer and Burri, *supra* note 34, at para. 39. Political rights of the CCPR are implemented in the New Zealand Bill of Rights Act 1990, ss 12-18.

particularly with regard to self-determination and participatory rights.<sup>140</sup> Regarding whether the rights to repatriation of human remains, ceremonial objects and other artefacts, and access thereto, within the Declaration (Articles 11 and 12), Karolina Kuprecht has stated that determining whether a practice is part of customary international law requires more than assessing only the “inner-state level”, rather the “cross-state level” must also be analysed.<sup>141</sup> If there is no cross-state level practice, it cannot be said that there is international acceptance. Due to the controversial nature of both of the right to self-determination and right to consultation, it is unlikely that states would agree that they have any “cross-state” dimension, regardless of how they are interpreted.

Stephen Allen is another academic who does not believe that Articles of the Declaration are inherently customary international law merely from their presence in the text. Though he concedes that the Declaration’s provisions are substantially informed by international law,<sup>142</sup> Allen argues that participation in a standard-setting exercise is not evidence of consent to be bound by the resultant instrument<sup>143</sup> and that it is wrong to assume that because the Declaration is consistent with general international law it thereby has direct legal effect.<sup>144</sup> Rather, it is important to look beyond the contents of instruments and to assess what it is that states actually intend to be bound by in order to determine what positive law is.<sup>145</sup> It is clear that neither states nor the Indigenous partakers intended to create or declare hard Indigenous rights through the Declaration.<sup>146</sup> Moreover, the assessment of whether practice is uniform and consistent over most states requires more than looking only at the most “enlightened” states.<sup>147</sup> However, Allen does not view the Declaration as without potential legal implications, but rather that the Declaration was developed as “a model for the legal regulation of indigenous issues at the municipal level”.<sup>148</sup> By endorsing the Declaration, states acknowledged the legitimacy of the rights therein, but left their legal status to be determined by states themselves.<sup>149</sup> In other words, the Declaration should be viewed as a normative source for the development of national laws and only then do the rights become legally enforceable.<sup>150</sup>

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<sup>140</sup> Quane, *supra* note 42, at p. 259.

<sup>141</sup> Karolina Kuprecht, ‘Human Rights Aspects of Indigenous Cultural Property Repatriation’, *Swiss National Centre of Competence in Research, Trade Regulation Working Paper No. 2009/34*, at pp. 22-23 [hereinafter Kuprecht, ‘Human Rights Aspects’].

<sup>142</sup> Allen, ‘The Limits of the International Legal Project’, *supra* note 125, at p. 2; and Stephen Allen, ‘The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project’, in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford and Portland, Oregon: Hart Publishing, 2011, pp. 225-256, at p. 227 [hereinafter Allen, ‘UN Declaration and Limits’].

<sup>143</sup> Allen, ‘The Limits of the International Legal Project’, *supra* note 125, at p. 5. This is contrary to Siegfried Wiessner; Wiessner, ‘Indigenous Sovereignty’, *supra* note 26, at p. 1165.

<sup>144</sup> Allen, ‘Towards Global Legal Order’, *supra* note 124, at p. 7.

<sup>145</sup> Allen, ‘The Limits of the International Legal Project’, *supra* note 125, at p. 6.

<sup>146</sup> Allen, ‘Towards Global Legal Order’, *supra* note 124, at p. 7.

<sup>147</sup> Allen, ‘The Limits of the International Legal Project’, *supra* note 125, at p. 7.

<sup>148</sup> *Ibid.*, at p. 22; and Allen, ‘Towards Global Legal Order’, *supra* note 124, at p. 6.

<sup>149</sup> Allen, ‘The Limits of the International Legal Project’, *supra* note 125, at p. 22.

<sup>150</sup> Allen, ‘Towards Global Legal Order’, *supra* note 124, at p. 9; and Allen, ‘UN Declaration and Limits’, *supra* note 142. See also Voyiakis, *supra* note 126.

### 2.4.3 The Declaration as a Political Tool

#### (a) The Effects on Court Usage and Māori Expectations

Despite how the New Zealand Government has attempted to downplay the significance of supporting the Declaration, the Declaration remains meaningful.<sup>151</sup> This is evidenced by the fact that the support of the Declaration was of great importance to the Māori Party, even though they acknowledged its non-binding nature. Moreover, as explained below, declarations have often been the precursors to hard law and pillars of international law.

As an international document that New Zealand has publically acknowledged support for, it is possible that it will form part of the background to legal decisions and interpretations, including by the Waitangi Tribunal.<sup>152</sup> Because the Government announced its support for the Declaration, judges may interpret existing law to be as consistent with the Declaration as possible and may presume that any newly created laws were so written with the intention to be Declaration compliant. In other words, the Declaration could serve an interpretative function.<sup>153</sup> Such court usage has already occurred in other states.<sup>154</sup> The lack of a definition of “Indigenous peoples” could be a problem for application in other countries,<sup>155</sup> but is not in New Zealand, as it is not conceivable that the State could ever deny it has such a people, regardless of the form of definition, or lack thereof.

Of course, even if decision-making bodies are receptive to the Declaration as an interpretative mechanism,<sup>156</sup> the clear statements by the Government that the Declaration will not affect national law may also impact judicial decisions, as the judiciary often looks at parliamentary debates to find the intended interpretation of ambiguous law. However, a former Waitangi Tribunal chairman and current High Court judge stated that, though the Declaration is only moral in force, the same had been said of the Treaty of Waitangi.<sup>157</sup> Sir Edward Durie stated that “[i]mportant statements of principle established through international negotiation and acclamation filter into the law in time, through both governments and the courts, which look constantly for universal statements of principle in developing policy of deciding

<sup>151</sup> Public Law specialist Mai Chen, quoted in NZPA, *supra* note 105.

<sup>152</sup> Mai Chen, quoted in *ibid.*; and Tracy Watkins, ‘Judge Hails Big Advance for Māori’, *The Dominion Post* (22 April 2010), available online at <http://www.stuff.co.nz/dominion-post/politics/3608371/Judge-hails-big-advance-for-Maori> [hereinafter Watkins, ‘Judge Hails Big Advance for Māori’].

<sup>153</sup> Allen, ‘The Limits of the International Legal Project’, *supra* note 125, at p. 5; and Burger, *supra* note 49, at p. 57.

<sup>154</sup> For example, *Aurelio Cal, et al v Attorney General of Belize* (18 October 2007) Claim 121/2007 Conteh CJ (SC); analysed in Allen, ‘Towards Global Legal Order’, *supra* note 124, at pp. 10-15. For other examples, see Clive Baldwin and Cynthia Morel, ‘Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation’, in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford and Portland, Oregon: Hart Publishing, 2011, pp. 121-143, at pp. 124-126 and 131-132; and Luis Rodríguez-Pinero, ‘The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement’, in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford and Portland, Oregon: Hart Publishing, 2011, pp. 457-483. Anaya is a strong supporter of domestic courts conforming their decisions with the Declaration, as it is “key” to the “operationalizing” of the rights of the if Indigenous peoples; see Anaya, *supra* note 58, at paras 52-54. See also Allen, ‘The Limits of the International Legal Project’, *supra* note 125, at p. 14.

<sup>155</sup> Baldwin and Morel, *supra* note 154, at pp. 132-133.

<sup>156</sup> Allen, ‘The Limits of the International Legal Project’, *supra* note 125, at p. 5.

<sup>157</sup> Watkins, ‘Judge Hails Big Advance for Māori’, *supra* note 152.



cases.”<sup>158</sup> He continued by saying that the support of the Declaration would have important implications for the Office of Treaty Settlements, Crown Forest Rental Trust, Waitangi Tribunal and developers of social policy.<sup>159</sup>

A well-known New Zealand public law specialist, Mai Chen, stated that it would also affect the character of direct negotiations between Māori and the Government, as the Declaration would “shape” Māori expectations.<sup>160</sup> With regard to Article 26 (relating to rights to land, territories and resources), she stated that “[t]his language is not aspirational and may not be understood as such by Māori”.<sup>161</sup> Siegfried Wiessner noted that the general Declaration language “of ‘rights’ and ‘status’ is the language of legal obligation”.<sup>162</sup> Finally, the Chairperson of the UN Permanent Forum on Indigenous Issues stated that the Declaration would serve as “the guide for States, the UN System, Indigenous Peoples and civil society”.<sup>163</sup>

## (b) National Laws and Policymaking

The Declaration will further be important for future policymaking and the general political discourse. It has been said that, though the Declaration is non-binding, “in U.N. practice it is considered a formal and solemn instrument, with which *maximum compliance is expected*.”<sup>164</sup> This is supported by a statement from the Chairperson of the UN Permanent Forum on Indigenous Issues, shortly after the General Assembly adoption, that the Declaration is a “strong” one and sets the “minimum international standards for the protection and promotion of the rights of Indigenous Peoples. Therefore, existing and future laws, policies, and program on indigenous peoples will have to be redesigned and shaped to be consistent with this standard.”<sup>165</sup>

States may feel politically obligated to be in conformity with the Articles within, so as not to be accused of contravening principles endorsed by the General Assembly of the UN. Though not legally binding, it has an important internal role because of the public nature with which it was endorsed.

Allen concluded that the Declaration can be used as a tool in the national political discourse on Indigenous issues.<sup>166</sup> This is because of the political legitimacy that it embodies, rather than that it has the character of positive law.<sup>167</sup> He stated that “[e]ngaging in the national political process required to bring about a change in government policy is a more legitimate way of achieving a cosmopolitan society than attempts to inflate the soft sources of law in the hope they will influence outcomes in municipal legal systems.”<sup>168</sup> Charters also stated that the Declaration may act as a tool, guidelines or a point of reference for claims of Indigenous peoples and the

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

<sup>160</sup> Mai Chen, quoted in NZPA, *supra* note 105.

<sup>161</sup> Mai Chen, quoted in Watkins, ‘Judge Hails Big Advance for Māori’, *supra* note 152.

<sup>162</sup> Wiessner, ‘Indigenous Sovereignty’, *supra* note 26, at p. 1165.

<sup>163</sup> Tauli-Corpuz, ‘GA Adoption’, *supra* note 137 (emphasis added). See also *ibid.*, at p. 1162.

<sup>164</sup> Graham, *supra* note 136 (emphasis added).

<sup>165</sup> Tauli-Corpuz, ‘GA Adoption’, *supra* note 137; and Tauli-Carpuz, ‘Adoption of Declaration’, *supra* note 12. See also Thornberry, *supra* note 45, at p. 375; and Article 43 of the Declaration itself also states that the rights “constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”

<sup>166</sup> Allen, ‘The Limits of the International Legal Project’, *supra* note 125, at p. 22; and Allen, ‘UN Declaration and Limits’, *supra* note 142, at pp. 254-256.

<sup>167</sup> Allen, ‘Towards Global Legal Order’, *supra* note 124, at p. 18.

<sup>168</sup> *Ibid.*, at pp. 18-19.

development of legal norms.<sup>169</sup> It could be used to “reproach and belabour” a state reluctant to follow the rights contained within.<sup>170</sup> Due to its “universal” nature, it would be more widely applicable.<sup>171</sup> Governments will not want to be criticised for massive deviations from the rights held in a UN Declaration.

### (c) Resulting Future International Law?

As aforementioned, many states were only willing to endorse the Declaration due to its non-binding nature. It is considered to be of moral, rather than legal, force.<sup>172</sup> That the Declaration is not binding is not a particularly strong argument for accepting a potentially flawed document, given that the Articles within the Declaration could become binding if they become part of international law.

This political force of the Declaration and the consequential compliancy of states with Articles therein could result in the formation of norms and the creation of international law. Concepts found within UN declarations and General Assembly resolutions have often made their way into international law.<sup>173</sup> This is analogous to the role that the Universal Declaration of Human Rights (1948) (UDHR) has played.<sup>174</sup> The UDHR is not legally binding *per se*, but its provisions constitute general principles of law and it is an “authoritative guide” to interpret the Charter of the United Nations, along with the CCPR and International Covenant on Economic, Social and Cultural Rights (CESCR) (which are binding on UN Members).<sup>175</sup> Ian Brownlie stated that the indirect legal effect is not to be underestimated.<sup>176</sup>

It is also worth noting that the existence of the Declaration may result in Declaration-consistent articles being placed in binding bi- or multilateral agreements between states. For example, so as not to be accused of contravening the principles found within the Declaration, the Declaration will likely play a part in New Zealand’s international negotiations. When partaking in international treaties and agreements, New Zealand already seeks to ensure that Māori interests and the Crown’s obligations under the Treaty of Waitangi are not impinged.<sup>177</sup> In the future, the Crown may similarly also require that certain Declaration-consistent principles are protected. It is possible that a proliferation of these agreements with such articles would result in them becoming new global standards, as has been the case with TRIPS-plus intellectual property rights.<sup>178</sup>

<sup>169</sup> Charters, ‘Declaration Adoption’, *supra* note 3, at p. 123. Erica-Irene Daes also views the instrument as a “normative instrument”, capable of “driving cultural and political transformations”; see Daes, ‘Declaration Background and Appraisal’, *supra* note 2, at p. 38.

<sup>170</sup> Round, *supra* note 19, at p. 392.

<sup>171</sup> Charters, ‘The Rights of Indigenous Peoples’, *supra* note 13, at p. 336.

<sup>172</sup> *Ibid.*, at p. 335.

<sup>173</sup> Brownlie, *supra* note 33, at pp. 691-692.

<sup>174</sup> Universal Declaration of Human Rights (1948) UN GA Res. 217A (III) (UN Doc. A/810) (10 December 1948).

<sup>175</sup> *Ibid.*, at p. 559.

<sup>176</sup> *Ibid.*

<sup>177</sup> For example, Free Trade Agreement Between The Government of New Zealand and The Government of the People’s Republic of China (7 April 2008, entered into force 1 October 2008), Article 205, which states that nothing in the FTA shall “preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement including in fulfilment of its obligations under the Treaty of Waitangi”.

<sup>178</sup> See Denis B. Barbosa, Margaret Chon and Andrés Moncayo von Hase, ‘Slouching Towards Development in International Intellectual Property’ (2007) *Michigan State Law Review*, pp. 71-141, at pp. 85 and 87, citing Peter Drahos, ‘An Alternative Framework for the Global Regulation of Intellectual Property Rights’ (2005) *Journal*

#### 2.4.4 Summary

When assessing whether a principle is part of customary international law, it is important to find both uniform practice and *opinio juris* among states. The rights to self-determination and prior informed consent are unlikely to satisfy these requirements. However, whether principles found within the Declaration are viewed as customary international law or as soft law, they have repercussions at the national level. This is because the Declaration can act as a persuasive political tool. Though the New Zealand Government has attempted to place caveats on its announcement of support and the implications this may prove to have on national law, the Declaration will likely be used as a source of normative standards. Related to this, it is also probable that the New Zealand courts and the Waitangi Tribunal will use the Declaration as part of the backdrop of New Zealand law in deciding cases involving Māori rights. Finally, it is likely that rights encompassed in the Declaration will be raised during direct negotiations between the Māori and Government.

The formation of Declaration-consistent norms at the national level may eventually have an international effect, as states may insist on including such principles in bi- or – multilateral treaties. If done so consistently among states, this could result in the formation of international law. Thus, the more pertinent issue relates to the interpretations that different states give the different Articles. The statements made by states as to their understanding of the interpretations on certain Articles of the Declaration when explaining their votes may be relevant towards this.<sup>179</sup>

In any case, the Articles of the Declaration may impact Māori rights, including those relating to their cultural heritage, despite the non-binding nature of the document.

### 3. THE DECLARATION AND SELF-DETERMINATION OVER CULTURAL HERITAGE

As discussed earlier in this paper, both self-determination and the right to consultation can be viewed as political participation and good governance. A precondition for real political participation of the Māori is a strong identity that is able to be clearly expressed.<sup>180</sup> It has also been stated that “[s]elf-determination is undeniably a process of self-identification.”<sup>181</sup> One can immediately see a “chicken and egg” type paradox, as a strong identity is needed to exercise self-determination, but a strong identity is achieved through the application of self-determination. An external feed into this cycle is required to overcome the paradox. Recognising Māori control

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*für Entwicklungspolitik*, 21 (4), pp. 44-68; and Peter K. Yu, ‘Symposium The First Ten Years of the TRIPs Agreement: Trips and its Discontents’ (2006) *Marquette Intellectual Property Law Review*, 10, pp. 369-410, at p. 409.

<sup>179</sup> Charters, ‘Declaration Adoption’, *supra* note 3, at p. 132.

<sup>180</sup> Foster, ‘Articulating Self-Determination’, *supra* note 30, at p. 154. See also Rebecca Tsosie, ‘Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights’ (2002) *Arizona State Law Journal*, 34, pp. 299-358, at p. 308, who states that “cultural and intellectual sovereignty undergird [Native people’s] continuing efforts to maintain political sovereignty.”

<sup>181</sup> Foster, ‘Articulating Self-Determination’, *supra* note 30, at p. 155. See also O’Sullivan, *supra* note 50, at pp. 12 and 16; and Wiessner, ‘Indigenous Sovereignty’, *supra* note 26, at pp. 1171-1173.

over their own cultural heritage would act as such a feed, as cultural heritage is a major component of identity.<sup>182</sup>

In its simplest form, cultural identity is the means by which groups differentiate themselves from others and is determined by shared practices and the “meaning” attributed to these practices.<sup>183</sup> There is a strong belief in the Māori community that Māori culture and its practice are critical for their well-being.<sup>184</sup> As noted by Xanthaki, the right to maintain, control, protect and develop cultural heritage “is in fact to be conceived under a holistic and spiritual perspective and safeguarded accordingly as an essential element of indigenous peoples’ identity as well as an indispensable prerequisite for the actual realization of their collective and individual rights.” The author has argued elsewhere that the appropriation of Māori cultural heritage dilutes exactly what Māori culture is and what it means to be Māori.<sup>185</sup> The distinguishing features of the Māori identity and their “meanings” are blurred, diminishing the cultural identity of the Māori. This loss of identity has detrimental effects on the socio-economic position of the people, as it has been documented that a strong sense of cultural identity contributes positively to economic growth, through cultural affirmation.<sup>186</sup> Thus, it is vital to allow the Māori to regain, maintain, develop and control the relationship with their cultural heritage, so that they gain a greater sense of identity and social cohesiveness as an ethnic group. The strengthening of identity through the increased self-determination over cultural heritage (or “cultural self-determination”), therefore, would act as both a means to improve the socio-economic position of the Māori and to facilitate their political self-determination.

Along with the references to rights relating to cultural identity/diversity and to TK/TCE, those to land rights are also a large proponent towards furthering Māori retention, control, maintenance and development of their culture and cultural heritage. It has even been stated that the Article 26 protection of land, territories and resources, could be interpreted as including TK and TCE as “resources”.<sup>187</sup> However, the author does not believe that this perspective is worth pursuing, as the context of the Article makes it clear that it was not intended to have such an interpretation. The preceding terms “land” and “territories” qualify the definition of “resources”. The inalienable connection between Indigenous peoples and their land and cultural heritage has been well documented and will not be discussed further in this paper.

In the previous section of this paper, it was concluded that it is possible that the Declaration have an impact on domestic New Zealand law, regardless of the statements

<sup>182</sup> The importance of intangible cultural heritage to the cultural identity of groups was referred to by UNESCO, in The General Conference of the United Nations Educational, Scientific and Cultural Organization, ‘Recommendation on the Safeguarding of Traditional Culture and Folklore’, 26th session (Paris, 1989).

<sup>183</sup> Claire Wright, ‘Reconciling Cultural Diversity and Free Trade in the Digital Age: a Cultural Analysis of the International Trade in Content Items’ (2008) *Akron Law Review*, 41, pp. 399-507, at p. 450-467.

<sup>184</sup> Statistics New Zealand, *Māori Social Survey Discussion Document*, Wellington, New Zealand: Statistics New Zealand, 2009, at p. 6.

<sup>185</sup> Jessica C. Lai, ‘Māori Culture in the Modern World: Its Creation, Appropriation and Trade’, *University of Lucerne, Switzerland*, i-call Working Paper No. 02 (2010), at pp. 13-15.

<sup>186</sup> Ministry of Culture and Heritage, ‘Cultural Indicators for New Zealand’, *Cultural Statistics Programme* (2009), at p. 3; and Margaret Forster, ‘Being Māori in the Context of Poverty, Prosperity and Progress’, *Pōhara, Tōnui, Kōkiri: Poverty, Prosperity, Progress*, Biennial International Development Studies Network (DevNeT) Conference (Victoria University, Wellington, New Zealand, 17 November 2000), at pp. 1-2, available online at [www.devnet.org.nz/conf/Papers/forster.pdf](http://www.devnet.org.nz/conf/Papers/forster.pdf)

<sup>187</sup> Peter-Tobias Stoll and Anja von Hahn, ‘Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law’, in Silke von Lewinski (ed.), *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore*, London: Kluwer Law International, 2008, pp. 7-57, at p. 28.

of intent from the Government. The following parts of the paper assess which particular Articles of the Declaration support Māori cultural self-determination.

### 3.1 RIGHTS TO CULTURE AND CULTURAL DIVERSITY

At the 1982 UNESCO World Conference on Cultural Policies, it was noted:<sup>188</sup>

that in its widest sense, culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs;

that it is culture that gives man the ability to reflect upon himself. It is culture that makes us specifically human, rational beings, endowed with a critical judgement and a sense of moral commitment. It is through culture that we discern values and make choices. It is through culture that man expresses himself, becomes aware of himself, recognizes his incompleteness, questions his own achievements, seeks untiringly for new meanings and creates works through which he transcends his limitations.

“Culture” is, thus, vague and incapable of being fully defined.<sup>189</sup> Likewise, “cultural diversity” is a broad term that generally means the different cultural traditions and values between or in societies.<sup>190</sup> UNESCO has also stated that “[c]ultural identity and cultural diversity are inseparable”.<sup>191</sup>

Neither of the concepts “culture” or “cultural diversity” are defined in the UN Declaration on the Rights of Indigenous Peoples, though both are key notions therein. However, as is clear from reading the Declaration, their meanings within are necessarily broad and general. This is unlike the definition of “cultural diversity” in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which is very “expression” orientated.<sup>192</sup> The rights that pertain to belief systems and to knowledge (as outlined in the following), for instance, evidence the broader nature of “culture” and “cultural diversity” in the Declaration.

The third paragraph of the preamble of the Declaration affirms that “all peoples contribute to the diversity and rich civilizations and cultures, which constitute the common heritage of mankind.” This means that “Indigenous identities are not simply to be tolerated, but celebrated.”<sup>193</sup> Article 15 gives Indigenous peoples “the right to the dignity and diversity of their cultures, traditions, histories and aspirations”. Further, Article 11.1 takes into account that culture is not something purely traditional and frozen in time, declaring that:

<sup>188</sup> UNESCO, ‘Mexico City Declaration on Cultural Policies’, World Conference on Cultural Policies (Mexico City, 26 July - 6 August 1982), preamble [hereinafter, UNESCO, ‘Mexico City Declaration on Cultural Policies’].

<sup>189</sup> The “culture concept” is discussed by Jane E. Anderson, *Law, Knowledge, Culture. The Production of Indigenous Knowledge in Intellectual Property Law*, Cheltenham, UK: Edward Elgar, 2009, at pp. 108-203.

<sup>190</sup> Sabine von Schorlemer, ‘Cultural Diversity’, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, at para. 5, available online at [www.mpepil.com](http://www.mpepil.com), last updated 2009.

<sup>191</sup> UNESCO, ‘Mexico City Declaration on Cultural Policies’, supra note 188, at para. 5.

<sup>192</sup> UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted at the 33rd Session of the General Conference of UNESCO (20 October 2005, entered into force 18 March 2007), Article 4(1). The definition therein was also adopted for the Glossary for the IGC, see WIPO, IGC, Secretariat, ‘Glossary of Key Terms Related to Intellectual Property and Traditional Cultural Expressions’, (WIPO Doc. WIPO/GRTKF/IC/18/INF/7, 2011), at p. 3.

<sup>193</sup> Xanthaki, ‘Indigenous Rights and United Nations Standards’, supra note 4, at p. 115.

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

This recognises that Indigenous cultures evolve and how this occurs should be left in the hands of Indigenous peoples. Many Indigenous peoples consider their right to cultural control, autonomy and recapturing of identity as part of their right to self-determination.<sup>194</sup> Article 3 reinforces this, as it states that by virtue of Indigenous peoples' right to self-determination they may freely pursue their cultural development. It has been pointed out that linking cultural rights to self-determination is risky, given that many states objected to the recognition of Indigenous self-determination in the Declaration.<sup>195</sup> However, this is only an issue if self-determination is perceived as encompassing the right to secede, rather than as a right to political participation.

The reference to the right to develop cultures throughout the Declaration is important, as it acknowledges that Indigenous cultural heritage is not static, but constantly developing, like any other culture. For example, Indigenous peoples have often adapted their handicrafts for Western tastes, such as through simplification of manufacture. These newer products should not be discouraged.<sup>196</sup>

The right embodied in Article 11 is further refined in Articles 12 and 13. Article 12 protects spiritual and religious traditions, customs and ceremonies, religious and cultural sites and includes the right to repatriation of ceremonial objects and human remains. The right to revitalise, use, develop and transmit their histories, languages, oral traditions, philosophies, writing systems and literature, and the right to retain their own names, is safeguarded in Article 13.

Finally, Article 8 states that both "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture". The same Article stipulates that states shall prevent and redress any action that deprives Indigenous peoples of their "integrity as distinct peoples, or of their cultural values or ethnic identities". An earlier draft of the Declaration included a reference to "ethnocide and cultural genocide".<sup>197</sup> "Ethnocide" is the destruction of an ethnic group's identity, whereas "cultural genocide" is mass ethnic murder.<sup>198</sup> States were not willing to accept

<sup>194</sup> Ibid., p. 116, and van Dyke, *supra* note 37, at p. 11.

<sup>195</sup> Xanthaki, 'Indigenous Rights and United Nations Standards', *supra* note 4, p. 116. The linkage of the protection of cultural and intellectual property to land rights and self-determination is common. See, for example, Erica-Irene Daes (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations), 'Discrimination Against Indigenous Peoples. Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples', (UN Doc. E/CN.4/Sub.2/1993/28, 1993), at para. 4 [hereinafter Daes, 'Report on the Cultural and Intellectual Property of Indigenous Peoples']. Michael Brown argues that sovereignty-linked protection of cultural heritage has no limits, either in time or space. Such an approach also does not take into account third-party and global interests. Ultimately, he states that "political sovereignty, even where successfully realized, has profound limitations when it comes to the management of heritage. In many cases, sovereignty-thinking and its conceptual baggage hinder the search for creative, pragmatic solutions to the unwanted circulation of traditional cultural expressions". See Michael F. Brown, 'Culture, Property, and Peoplehood: A Comment on Carpenter, Katyal, and Riley's "In Defense of Property"' (2010) *International Journal of Cultural Property*, 17, pp. 569-579, at pp. 570-573.

<sup>196</sup> Daes, 'Report on the Cultural and Intellectual Property of Indigenous Peoples', *supra* note 195, at para. 66.

<sup>197</sup> UN, 'Draft Declaration on the Rights of Indigenous Peoples', (UN Doc. E/CN.4/SUB.2/1994/2/Add.1, 1994), Article 7 [hereinafter UN, 'Draft DRIP'].

<sup>198</sup> Xanthaki, 'Indigenous Rights and United Nations Standards', *supra* note 4, at pp. 113-114. However, this distinction is not always made, see Thornberry, *supra* note 45, at pp. 387-388.

the prohibition of ethnocide, as they considered it not to be a current international human rights law standard.<sup>199</sup> However, the content of the adopted Article is nevertheless directed towards this end.<sup>200</sup> This Article supports giving Māori more control over their cultural heritage, as appropriation and misuse of such reduces a people's sense of identity. Even without the term "ethnocide", the failure of a state to protect an Indigenous people's identity from being lost, through neglecting to ensure that their cultural heritage is not taken from them, would make a state in breach of the Declaration, as aspects of cultural heritage and the control thereof are large parts of one's identity.

The Articles outlined in this section relate to rights *to* culture and cultural diversity. They are internal in nature and are not *per se* concerned with the rights of third parties (apart from the rights relating to repatriation). In this sense, they are "defensive" or "shield-like" rights, which can be used *against* incursions. Unlike the more "offensive" rights discussed in the following section, the aforementioned Articles are somewhat similar to pre-existing international law. For example, the CCPR and CESCR both also stated that, as a virtue of their right to self-determination, peoples have the right to freely determine their cultural development.<sup>201</sup> Both the CCPR and CESCR are binding on states that are party to them. However, as with self-determination, the Declaration goes beyond the CCPR and CESCR by recognising Indigenous communities as "peoples", rather than as minorities, whereas, under the CCPR and CESCR, this designation is controversial.<sup>202</sup> In other words, the Declaration extends the right found in Article 1 of the CCPR and CESCR specifically to Indigenous communities, pulling it outside the borders of existing international law.

Nevertheless, Article 27 of the CCPR protects ethnic minorities from being "denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".<sup>203</sup> For the purposes of the right to cultural identity outlined in Article 27 of the CCPR, the HRC has defined "culture" broadly, stating:<sup>204</sup>

that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

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<sup>199</sup> Xanthaki, 'Indigenous Rights and United Nations Standards', *supra* note 4, at p. 114. Xanthaki puts forth that this is not true, as protection from "ethnocide" is a logical step from other UN instruments.

<sup>200</sup> Alexandra Xanthaki, 'Draft Interim Report: Rights of Indigenous Peoples', *International Law Association, The Hague Conference* (2010), at p. 17 [hereinafter Xanthaki, 'Draft Interim Report'].

<sup>201</sup> CCPR, Article 1; and CESCR, Article 1.

<sup>202</sup> Graber, 'Aboriginal Self-Determination vs Propertisation', *supra* note 6, at p. 26.

<sup>203</sup> CCPR, Article 27. This has been implanted, almost word-for-word, in the New Zealand Bill of Rights Act 1990, s. 20. The UDHR provides that every person has the right to the "social and cultural rights indispensable for his dignity and the free development of his personality", however the UDHR is not binding on its parties; UDHR, Article 22. See also CESCR, Article 15.1(a), which recognises the right of everyone to take part in "cultural life", discussed in Roger O'Keefe, 'Cultural Life, Right to Participate in, International Protection', in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, available online at [www.mpepil.com](http://www.mpepil.com), last updated 2007.

<sup>204</sup> Human Rights Committee, 'The Rights of Minorities (Article 27)', CCPR General Comment No. 23 (UN HRC Doc. CCPR/C/21/Rev.1/Add.5, 1994), at para. 7 [hereinafter HRC, 'The Right of Minorities'].

Many of the Declaration rights outlined in this section of this paper could be argued to be related to Article 27 of the CCPR, though likely not the rights associated with repatriation. The right held within Article 27 of the CCPR is normally perceived to be limited in that only individuals can invoke it and not groups or collectives.<sup>205</sup> Hence, any Declaration rights which may reflect Article 27 of the CCPR are also an extension of it, as the Declaration's rights for cultural identity are collective in nature. However, these Declaration rights are arguably not so extended from existing law, such that they are no longer tenably still within international law. Christoph B. Graber has stated that Article 27 of the CCPR will have to be interpreted in light of the Declaration, despite the latter's non-binding nature.<sup>206</sup> This is possible through acknowledging that the cultural rights of the CCPR already have a "collective dimension",<sup>207</sup> which is reflected in the Article 27 right being "in community with the other members of their group". Indeed, the HRC has stated that Article 27 is aimed at "ensuring the survival and continued development of cultural, religious and social identity of the minorities concerned", as opposed to individual members of a minority.<sup>208</sup>

In summary, though the more general Declaration rights to cultural diversity and cultural survival outlined in this section are (much like the concepts of "culture" and "cultural diversity" themselves) somewhat vague and more akin to principles than rights, they nevertheless arguably stretch existing international law by being tailored specifically for the purposes of Indigenous peoples and as collective human rights. Even so, it is possible that some of the rights (though not those relating to repatriation) remain within existing international law.

### 3.2 RIGHTS OVER CULTURE AND CULTURAL HERITAGE

The Declaration is progressive in the way in which it offers "offensive" or "sword-like" rights over cultural heritage. These rights are not only related to the protecting of culture to prevent its loss or to prevent assimilation (as with the rights discussed in the previous section), but are rights that can be asserted *over* third parties. Article 11.1 of the Declaration (outlined above) offers "offensive" rights in a limited sense, as practising and revitalising cultural traditions and customs and maintaining, protecting and developing the past, present and future manifestations of their cultures may require either exclusive use of aspects of their cultural heritage or control over others' use.

Furthermore, Article 11.2 requires that states provide redress "through effective mechanisms ... developed in conjunction with indigenous peoples, with respect to their *cultural, intellectual, religious and spiritual property* taken without their free, prior and informed consent or in violation of their laws, traditions and customs".<sup>209</sup> Federico

<sup>205</sup> See Christoph B. Graber, 'Using Human Rights to Tackle Fragmentation in the Field of Traditional Cultural Expressions: An Institutional Approach', in Christoph B. Graber and Mira Burri-Nenova (eds), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, Cheltenham, UK: Edward Elgar, 2008, pp. 96-120, at p. 105.

<sup>206</sup> *Ibid.*, at p. 107.

<sup>207</sup> *Ibid.*, at p. 110; and HRC, 'The Right of Minorities', *supra* note 204, at para. 6.2. See also Brownlie, *supra* note 33, at p. 579, who states that "[i]t is not necessarily the case that there is a divorce between the legal and human rights of groups, on the one hand, and individuals, on the other. Guarantees and standards governing treatment of individuals tend, by their emphasis on equality, to protect groups as well".

<sup>208</sup> HRC, 'The Right of Minorities', *supra* note 204, at para. 9 (emphasis added).

<sup>209</sup> Article 11.2 is complemented by Article 12.2, which states that "States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned."



Lenzerini stated that whether something is an “effective mechanisms” must be from the perspective of the Indigenous peoples concerned.<sup>210</sup> This author would argue that, though this is inarguably important, the mechanism must also be considered to be effective from the point of view of the state overseeing it. Requiring approval from both sides is more consistent with Article 11.2, which requires that the redress be developed in “conjunction with” and not solely by Indigenous peoples. Moreover, it is more in line with the “spirit of partnership”<sup>211</sup> of the Declaration as a whole and between the New Zealand Crown and the Māori. Article 11.2 necessitates a dialogue between Indigenous peoples and their governing states and requires that Indigenous peoples are able to articulate their interests. This process in itself is an expression of self-determination.

The term “property” has been used in Article 11.2 and, presumably, religious and spiritual “property” only refers to tangible artefacts. That the Article also addresses “cultural” and “intellectual” “property” is of particular interest. Though not defined, it is likely that the term “property” limits the Article to concepts understood under Western law. For example, “cultural property” is likely limited to tangible moveable artefacts and “intellectual property” probably only refers to that which fits into the general Western intellectual property system. That this is the case is substantiated by the non-use of the term “cultural and intellectual property”, which was coined by the UN Sub-commission on the Prevention of Discrimination and Protection of Minorities and subsequently used by Erica-Irene Daes, in the early 1990s,<sup>212</sup> to reflect that Indigenous peoples (including the Māori)<sup>213</sup> do not view “cultural property” and “intellectual property” separately, but as interrelated. The non-use of the phrase anywhere in the adopted Declaration indicates that the document does not seek to address the interrelated nature, but to deal with the two individually, under Western property norms. This being true, the application of Article 11.2 is restricted.

However, the term “their” creates further uncertainty, as it has no legal definition and does not necessarily relate to Western private ownership. Kuprecht concluded that it is likely that “their” is a reference to rights that are lesser than (or different to) Western private ownership, but which are sufficient to make a claim of being “mine”.<sup>214</sup> If this is the case, then, though the range of what can be addressed by Article 11.2 may be limited by Western concepts of what can constitute “property”, proof of right to the property could be a different standard to that for Western private ownership.

Article 31 makes further reference to rights over cultural heritage. The Article is considered to be groundbreaking and is worth setting out in full:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual

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<sup>210</sup> Lenzerini, *supra* note 122, at p. 41.

<sup>211</sup> UNDRIP, preamble.

<sup>212</sup> Daes, ‘Report on the Cultural and Intellectual Property of Indigenous Peoples’, *supra* note 195, at para. 9.

<sup>213</sup> Robert Jahnke and Huia T. Jahnke, ‘The Politics of Māori Image and Design’ (2003) *He Pukenga Kōrero*, 7 (1), pp. 5-31, at pp. 6-7. Indeed, Aroha Mead has stated that though whether “culture” and “intellect” are separate or interrelated “might be an academic issue for some – it is an insult to us”; Aroha Mead, ‘Cultural and Intellectual Property Rights of Tangata Whenua’, in Mary Creswell (ed.), *Celebrating Women in Science*, Wellington, New Zealand: NZ Association for Women in Sciences Inc, 1993, pp. 154-157.

<sup>214</sup> Karolina Kuprecht, ‘The Concept of “Cultural Affiliation” in NAGPRA: Potentials and Limits for International Cultural Property Law’, *University of Lucerne, Switzerland*, i-call Working Paper (forthcoming) [hereinafter Kuprecht, ‘Cultural Affiliation in NAGPRA’].

and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Redress for a breach of Article 31 is required under Article 11.2, outlined above.

In an earlier draft of the Declaration, Article 31 entitled Indigenous peoples to “full ownership, control and protection of their cultural and intellectual property”.<sup>215</sup> This original drafting clearly offered a much stronger right with the term “ownership” being used and the interrelated nature of “cultural and intellectual property” being recognised. Article 31 is similar to Article 24, which declares their “right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals”, but also does not confer ownership. What the Declaration does state in Article 31 nevertheless reaches further than any other international instrument ever has.<sup>216</sup> The list of things that Article 31 stipulates that Indigenous peoples have the right to “control, protect and develop” is wide and incorporates the general terms “cultural heritage”, “traditional knowledge” and “traditional cultural expressions”. It includes both tangible and intangible components, consistent with the holistic worldview of most Indigenous peoples.

Because Indigenous cultural heritage, TK and TCE do not usually fit into the narrow confines of classical Western intellectual property mechanisms, it is worth questioning what the Declaration means when it states the right to “maintain, control, protect and develop”, but not “own”, these *per se* or the intellectual property over them. Xanthaki has stated that Article 31.1 implies the creation of a *sui generis* system.<sup>217</sup> The dichotomy between classical Western intellectual property systems and Indigenous cultural heritage, TK and TCE is a strong argument for Xanthaki’s perspective. The term “intellectual property” usually only refers to that recognised by existing intellectual property regimes (for example, patents, copyright and trade marks).<sup>218</sup> If this cannot ensure Indigenous peoples the right to “maintain, control, protect and develop” their cultural heritage, TK and TCE, the right in the first sentence of Article 31.1 requires the creation of a *sui generis* system. In a similar vein, it is questionable what it means to have intellectual property that is not “owned”, as per the second sentence of Article 31.1. It is arguable that, though the concept of “ownership” may have been removed from the Article, it is not possible for Indigenous peoples to “maintain, control, protect and develop their intellectual property” if they do not “own” it, unless a *sui generis* system is created. The use of the phrase “intellectual property over such” cultural heritage, TK or TCE, in the second sentence, supports that the term “intellectual property” is a reference to classical Western IP norms, in the context of the Declaration. Cultural heritage, TK and TCE are clearly not equivalent to “intellectual property”.

<sup>215</sup> UN, ‘Draft DRIP’, supra note 197, Article 29.

<sup>216</sup> Xanthaki, ‘Indigenous Rights and United Nations Standards’, supra note 4, at pp. 117 and 119. For example, the ILO Convention No. 169 is silent on both intellectual and cultural property rights, referring only to general cultural rights (see p. 201).

<sup>217</sup> Xanthaki, ‘Indigenous Rights in International Law’, supra note 33, at p. 31. Examples of *sui generis* systems are the TK and TCE Treaties being negotiated in WIPO. See WIPO, IGC, Secretariat, ‘The Protection of Traditional Cultural Expressions: Draft Articles’, (WIPO Doc. WIPO/GRTKF/IC/19/4, 2011); and WIPO, IGC, Secretariat, ‘The Protection of Traditional Knowledge: Draft Articles’, (WIPO Doc. WIPO/GRTKF/IC/19/5, 2010).

<sup>218</sup> Stoll and von Hahn, supra note 187, at p. 27.

Moreover, Article 11.2 only demands redress for misappropriated cultural “property” and intellectual “property”, seemingly limiting the reach of Article 31 to the norms of Western law, at least with regard to redress. It is unclear why Articles 11.2 and 31.1 do not use the same wording. It could be interpreted that, under the Declaration, Indigenous peoples only have the right to “maintain, control, protect and develop” their cultural heritage, TK and TCE (according to the first part of Article 31.1, perhaps under a *sui generis* system) and to obtain Western IP rights when possible (under the second part of Article 31.1), but redress is only required for its misappropriation if it falls within the confines of classical property and IP laws. Such an interpretation is supported by the last sentence in Article 31.1, which differentiates the right to “maintain, control, protect and develop” cultural heritage *per se* from the intellectual property of this heritage.

In light of these issues that arise from using classical Western property terms, it is arguable that the Special Rapporteur of the Sub-Commission’s suggestion that the term “collective heritage” be used instead of the terms “cultural property” or “intellectual property” should have been heeded.<sup>219</sup> Another alternative is “Indigenous cultural heritage”. The movement away from terms using “property” would be more appropriate for many Indigenous peoples, who do not understand it, but rather relationship, stewardship and guardianship.<sup>220</sup>

In any case, it is clear that the rights in Article 31 are strong and, in a literal sense, the rights to “control” and “protect” should be enough to prevent appropriation and misuse of TK and TCE.<sup>221</sup> That Article 31.1 as adopted removed the term “full ownership” infers that the drafters intended that “control” mean something different than “ownership”.<sup>222</sup> This is not problematic. Most Indigenous people do not seek Western “ownership” over their cultural heritage and “ownership” is not a term they understand in relation to their cultural heritage. Generally, Indigenous peoples desire to have control over use or non-use, by their own people and by others. Furthermore, “ownership” would bestow the right to exclude all other use, as property includes the right of exclusion (with some exceptions). Arguably, “control” is more suited to the needs of the Māori and New Zealand. As has been discussed elsewhere, many aspects of Māori cultural heritage have become integrated into the general New Zealand culture and have become part of every citizen’s identity.<sup>223</sup> Thus, the rights given to Māori over their cultural heritage need to be limited.

However, such control and protection (beyond existing intellectual property rights) have not been generally bestowed to Indigenous peoples around the world. Such rights are not part of written and binding international law and it is unlikely that such rights

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<sup>219</sup> Daes, ‘Report on the Cultural and Intellectual Property of Indigenous Peoples’, *supra* note 195, at para. 23.

<sup>220</sup> Thornberry, *supra* note 45, at p. 392. The concept of “property” has entered a new discourse since the release of Kristen A. Carpenter, Sonia Katyal and Angela Riley, ‘In Defense of Property’ (2009) *Yale Law Journal*, 118, pp. 100-204. In this seminal paper, Carpenter et al. argue that a stewardship model of “property” can be used to justify Indigenous peoples’ rights to their cultural property (tangible and intangible). This widens the understanding of “property” by looking at it from the perspective of peoplehood and stewardship. This paper was critiqued in Brown, *supra* note 195; which was then responded to in Kristen A. Carpenter, Sonia Katyal and Angela Riley, ‘Clarifying Cultural Property’ (2010) *International Journal of Cultural Property*, 17, pp. 581-598.

<sup>221</sup> Stoll and von Hahn, *supra* note 187, at p. 172.

<sup>222</sup> Note though that the Native American Graves Protection and Repatriation Act (NAGRPA) (25 USC 3005(a)(5)) states that, for the purposes of the second prong to determine the allocation of cultural property (sacred objects and objects of cultural patrimony), “control” over an object correlates to ownership. See Kuprecht, ‘Cultural Affiliation in NAGRPA’, *supra* note 214.

<sup>223</sup> Lai, *supra* note 185, at pp. 32-34.

would be considered part of customary international law anytime soon. This means that the general statement of Article 31 is arguably unable to be used on this basis.

Graber has discussed the possibility of applying Article 15.1(c) of the CESCR to TCE.<sup>224</sup> Article 15.1(c) states that everyone has the right “[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”. Article 15(2) states that the “steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.” The UN Committee on Economic, Social and Cultural Rights has commented that groups of individuals or communities can enjoy the right held within the Article, under certain circumstances.<sup>225</sup> The potential application of this Article to both TK and TCE (i.e. technical and non-technical cultural heritage) is clear, particularly because of the broad interpretation that the Committee has given to “any scientific, literary or artistic production”, which:<sup>226</sup>

refers to creations of the human mind, that is to “scientific productions”, such as scientific publications and innovations, *including knowledge, innovations and practices of indigenous and local communities*, and “literary and artistic productions”, such as, *inter alia*, poems, novels, paintings, sculptures, musical compositions, theatrical and cinematographic works, performances and oral traditions.

Technically, the human right embodied in Article 15 is not linked to intellectual property rights and has different bounds, though the right may be (at least in part) ensured through intellectual property mechanisms.<sup>227</sup> However, state practice seldom reflects the application of Article 15.1(c) beyond classical intellectual property. Further still, most forms of intellectual property only protect material interests and only copyright considers moral rights, meaning that “knowledge innovations and practices” do not have recognised moral interests. Indeed, it is probable that states only protect the interests outlined in Article 15.1(c) incidentally and never purposefully. Moreover, the human right is subject to limitations and must be balanced against the other rights encapsulated within the CESCR.<sup>228</sup> States are meant to take into account the overall public interest.<sup>229</sup> As intellectual property regimes theoretically serve a social function and are supposed to be developed by taking into account the balance between the interests of the author/creator and the public, it could be argued that existing intellectual property disciplines already satisfy Article 15.1(c). Thus, though the CESCR is legally binding, the use of Article 15 for the protection of Indigenous TCE and TK is perceivably restricted.

Notably, no commentator ever attempts to push forward that Indigenous cultural and intellectual property rights are part of customary international law. This is not surprising. Given the well-espoused complaint that Indigenous TCEs and TK are not capable of being protected by either classical IP norms or any other existing regimes, it can hardly then be said that the protection thereof is already covered by customary

<sup>224</sup> Graber, *supra* note 205, at pp. 102-103; see also UN, Economic and Social Council, Committee on Economic, Social and Cultural Rights, ‘Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of which He is the Author (Article 15, paragraph 1 (c), of the Covenant)’, CESCR General Comment No. 17 (2005) (UN Doc. E/C.12/GC/17, 2006).

<sup>225</sup> UN, Economic and Social Council, Committee on Economic, Social and Cultural Rights, *supra* note 224, at para. 8.

<sup>226</sup> See *ibid.*, at para. 9 (emphasis added).

<sup>227</sup> *Ibid.*, at paras 2 and 10.

<sup>228</sup> *Ibid.*, at paras 4, 22-24 and 35.

<sup>229</sup> *Ibid.*, at para. 35.

international law. This would be different if the argument were that classical IP norms or other existing regimes theoretically could protect Indigenous TCE/TK, but do not in practice, as then it could be argued that the Declaration is merely reminding states to ensure that the existing norms are applied equally to Indigenous people. However, such is not the case and, as concluded in this section, the Declaration cannot be interpreted as meaning this but as requiring something more than what existing norms can provide for.

Finally, Kuprecht argued that the existence of contradictory concepts in law is a reason for finding that something is not customary international law.<sup>230</sup> She used the example of contradictory private-property concepts to argue that the right to repatriation cannot be customary international law.<sup>231</sup> In the same vein, the contradictory private-property nature of intellectual property means that the protection of Indigenous cultural and intellectual property is also not part of customary international law.

### 3.3 REPRESENTATION AND DIVERSITY OF INDIGENOUS PEOPLES

The Declaration acknowledges that Indigenous peoples within a state, including the Māori, are diverse in culture, stating in the preamble that various situations exist “from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration”. That representatives for decision-making over issues relating to the Māori – including concerns over cultural heritage – should be selected by the Māori themselves, rather than by the State or another agency, is supported by the Declaration in Article 18, which states that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, *through representatives chosen by themselves* in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions”. Furthermore, Article 35 gives Indigenous peoples the right to “determine the responsibilities of individuals to their communities”, and Article 34 “the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs”.

Allowing the Māori to decide their own representatives, consistently with their diversity, is a reflection of political self-determination. These Articles assist in placing control and internal governance in the hands of Indigenous peoples and could be used to forward Māori cultural self-determination.

## 4. HUMAN RIGHTS, FREEDOMS AND THIRD-PARTY INTERESTS

We live in a global world with great cultural diversity, within which Indigenous peoples live. Rights given to Indigenous peoples must consider other global actors and be balanced against their rights and interests. To not do such a balance would only create resentment. As has already been mentioned in this paper, Article 46.2 creates this balance, requiring that the exercise of the rights held within the Declaration respect “human rights and fundamental freedoms *of all*” and articulates that the rights may be subject to limitations “in accordance with international human rights obligations”.

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<sup>230</sup> Kuprecht, ‘Human Rights Aspects’, supra note 141, at pp. 23-24.

<sup>231</sup> Ibid.

Seemingly contradictory, this is followed by a statement that the limitations must be “strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others”, despite that the same paragraph previously states “of all”. Article 46.2 continues that the limitations are “for meeting the just and most compelling requirements of a democratic society”. However, this inconsistency can be overcome through Article 46.3, which states that provisions in the Declaration “shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith” and clearly applies to all.

Despite that the collective nature of the Declaration’s rights is one of the reasons why the document is considered revolutionary, concern has been raised that the Declaration seems to focus too greatly on collective rights, which could impinge on Indigenous individuals’ human rights and freedoms.<sup>232</sup> It has been noted that creating rights that can only be invoked by a collective can result in the denial of the right from the individual and argued that the rights of all people are best assured when individual rights are effectively protected.<sup>233</sup> Furthermore, collective rights could lead to the oppression of individuals by their collectives.<sup>234</sup> However, as discussed in the previous paragraph, Article 46 must be interpreted as protecting the rights and freedoms of individuals of Indigenous communities (as well as non-Indigenous individuals). Further, the rights of Article 34 (outlined in the above section) must be “in accordance with international human rights standards” (Article 34), which Thornberry interprets as a limited means to protect individual human rights.<sup>235</sup> Finally, Article 1 stipulates that “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.” Thus, arguments that individual rights are removed by the Declaration are unfounded. The combined effect of these Articles is that Indigenous communities must respect the individual rights of their members.<sup>236</sup>

It has been stated that favouring collective rights has the potential to allow for discrimination, for example, against Indigenous female individuals.<sup>237</sup> Aside from Articles 1 and 46 that protect individual rights, Article 44 the Declaration specifically states that “[a]ll the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.” Furthermore, Article 22 states that “[p]articuliar attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration” and that “States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and

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<sup>232</sup> For example, see Round, *supra* note 19, at p. 393; Xanthaki, ‘Indigenous Rights and United Nations Standards’, *supra* note 4, at p. 117; and Alexandra Xanthaki, ‘The UN Declaration on the Rights of Indigenous Peoples and Collective Rights: What’s the Future for Indigenous Women?’, in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford and Portland, Oregon: Hart Publishing, 2011, pp. 413-431, at pp. 419-420 [hereinafter Xanthaki, ‘Future for Indigenous Women’].

<sup>233</sup> Xanthaki, ‘Future for Indigenous Women’, *supra* note 232, at p. 419. The balance of individual and collective rights is also discussed in Graber, *supra* note 205, at pp. 114-118.

<sup>234</sup> Xanthaki, ‘Future for Indigenous Women’, *supra* note 232, at p. 420.

<sup>235</sup> Thornberry, *supra* note 45, at p. 381.

<sup>236</sup> Elsa Stamatopoulou, ‘Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples’, in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Oxford and Portland, Oregon: Hart Publishing, 2011, pp. 387-412, at pp. 402-403.

<sup>237</sup> Round, *supra* note 19, at p. 393.

guarantees against all forms of violence and discrimination.” Though the references to general (individual) human rights (such as in Articles 1 and 46) naturally include those in the specifically listed groups, the explicit mention of them in Articles 22 and 44 identifies the unfortunate fact that they are often the victims of breaches of human rights and freedoms.<sup>238</sup>

The requirement of ensuring that *all* individuals’ rights and freedoms are respected, whether Indigenous or not, means that Māori control over their cultural heritage needs to be balanced against the non-Indigenous interests. Exactly how this balance is to be made is outside the purview of this paper. However, it is interesting to note that Xanthaki’s notion of balance includes consideration of the culture of Indigenous peoples, stating that “a balance is to be drawn in light of the specific situation of the instant case, giving particular weight to the fact that culture is an essential feature of the identity of indigenous peoples.”<sup>239</sup> The author here strongly agrees with the concept that culture is an integral part of identity; however, Xanthaki’s approach cannot be correct. It has been argued by many, including Indigenous people, that the Declaration does no more than offer existing human rights to Indigenous peoples, albeit in a specifically tailored form. Moreover, the Declaration was constructed and exists within the UN Human Rights framework. Thus, it is not possible (and one could even say disingenuous) to argue that sometimes the balance may favour collective rights over established individual human rights because of the “particular weight” suggested by Xanthaki.<sup>240</sup>

## 5. CONCLUSION

In April 2010, New Zealand finally adopted the UN Declaration on the Rights of Indigenous Peoples, after refusing to do so with the General Assembly in September 2007. At first glance of the Declaration it could appear that the Government in 2007 was justified in its decision, based on concerns that rights of self-determination could result in secession and rights of consent are tantamount to powers of veto. However, on a deeper inspection it can be seen that the core of both of these rights is political in nature and can operate within a paradigm of participation. During negotiations of the Declaration, Indigenous peoples never sought secession through self-determination or any other concept in the document. Rather self-determination was viewed as political in character. In other words, the right ensures representative government and Indigenous participation in public policymaking and implementation. The requirement that governments, in “good faith”, try to obtain free, prior informed consent before adopting and implementing legislative or administrative measures that may affect Indigenous peoples can equally be viewed as reinforcement of political participation

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<sup>238</sup> Xanthaki, ‘Indigenous Rights and United Nations Standards’, *supra* note 4, at p. 114; and Xanthaki, ‘Future for Indigenous Women’, *supra* note 232.

<sup>239</sup> Xanthaki, ‘Draft Interim Report’, *supra* note 200, at p. 19; and Xanthaki, ‘Future for Indigenous Women’, *supra* note 232, at pp. 428-431.

<sup>240</sup> Human rights treaty bodies have considered permissible limitations of individual cultural rights that conflict with collective rights, when they are “duly justified” and only in force for the time strictly necessary. Such limitations on an individual’s cultural rights can only be imposed “when the survival and welfare of the group are threatened and only for so long as the situation of the threat persists.” Stamatopoulou stated that, at most, there could be some allowance of different means of interpreting rights, so long as this is a reflection of group values and agreed to by all members, after being fully informed about the issue and their choice. See Stamatopoulou, *supra* note 236, at p. 403.

and good governance. Therefore, the initial hesitation to adopt the Declaration was unfounded.

Even so, many states only affirmed the document because declarations are not *prima facie* legally binding. In contrast to this general rule, many statements have been made by other academics that Articles (and even the whole) of the Declaration are customary international law. Through an analytical lens, it can be seen that these assertions are often exaggerated, or – at the very least – tenuous. However, even as soft law, the Declaration has political power as a source for the development of national laws. Towards this, it could act as a starting point and as part of the backdrop for negotiations between Indigenous peoples and their governments. It is also likely to influence court decisions, when interpreting existing and new legislation. Hence, the principles within the Declaration are likely to affect New Zealand law. It is possible that the national use could eventually lead to the propagation of Declaration-consistent articles in bi- or multilateral agreements, which could result in the rights therein becoming new global standards.

This being so, the Declaration could be used as a tool by the Māori to obtain greater control over their cultural heritage and benefit therefrom. This is because it encourages cultural diversity and even confers “offensive” rights over cultural heritage, TK and TCE, though the exact bounds of this are not clear. Moreover, the Declaration encourages ensuring that diversity is taken into consideration and that Indigenous peoples should be able to select their own representatives, supporting internal self-governance and cultural self-determination.

Finally, the Declaration also requires that individual human rights of all people are respected, whether Indigenous or not, meaning that the collective nature of the Declaration rights cannot be used to override existing Individual human rights, and that the rights of non-Indigenous peoples must also be considered.



## Glossary

Ahi kā	The “long burning fire of occupation” (Hirini M. Mead, <i>Landmarks, Bridges and Visions: Aspects of Māori Culture</i> , Wellington: Victoria University Press, 1997, at p. 264). Traditionally it applied only to land, but the contemporary view is that this concept can extend beyond just land, and is about meeting one’s tribal obligations and maintain their connections to the Māori world (T. Kāretu, ‘The Clue to Identity’ (1990) <i>New Zealand Geographic</i> , 5, pp. 112-117, at p. 112).
Atua	Gods.
Haka	Māori posture dance.
Hapū	A sub-division of <i>iwi</i> (clans within an <i>iwi</i> ). Membership is determined by genealogical descent and a hapū is made up of a number of <i>whānau</i> .
Heitiki	Carved greenstone pendant.
Hui	A gathering, assembly or meeting.
Iwi	These are Māori tribes, consisting of several related <i>hapū</i> (clans or descent groups).
Kaitiakitanga	Māori stewardship or guardianship over their lands, villages and treasures. The conservation ethic embodied in the practice of <i>Kaitiakitanga</i> is important for the sustainable management of natural and physical resources. The use, management, and control of these resources are carried out to the mutual benefit of people and resources.
Karakia	Incantations and prayers.
Kawanatanga	Governance.
Koru	A shape based on an unfurling fern frond, common in Māori designs and art work.
Kowhaiwhai	Māori scroll painting.
Mana	This is authority, control, influence, power, prestige, psychic force. There are three forms of <i>mana</i> : <i>mana atua</i> - God given power; <i>mana tūpuna</i> - power from ancestors; <i>mana tangata</i> - authority from personal attributes. (See Margaret Mutu, <i>Te Whanau Moana: Nga kaupapa me nga tikanga/ Customs and Protocols - The Teachings of McCully Matiu</i> , Auckland: Redbooks, 2003, p. 156).
Manākitanga	Nurturing relationships and looking after people.
Māoritanga	A term which conceptualises “Māoriness” and encapsulates elements of traditional Māori expressions considered to be essential to Māori culture.

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Marae	Sacred places, which serve both a religious and social purpose in pre-Christian Polynesian societies.
Mātauranga Māori	Māori knowledge; traditional knowledge of cultural practice; the body of knowledge originating from Māori ancestors, including the Māori world view and perspectives, Māori creativity and cultural practices.
Moko	Māori facial tattoo.
Mokopuna	Grandchild or descendent.
Ngāngara (also ngārara)	insect, creepy-crawly, reptile
Ngā taonga tūturu	Objects that relate to Māori culture, history or society.
Noa	To be free of <i>Tapu</i> . The <i>tapu</i> of <i>taonga</i> sometimes needs to be removed temporarily before people can make use of them. <i>Karakia</i> are important for the removal of <i>tapu</i> from <i>taonga</i> , rendering them <i>noa</i> .
Pākehā	A name used to refer to non-Māori, usually of European decent.
Pitau	See koru.
Rangātiratanga	See Tino rangātiratanga.
Taiaha	Traditional Māori weapon.
Ta moko	The art of Māori tattooing.
Tāngata Whenua	A term sometimes used by the Māori to self-identify. In its broadest sense, it means “people of the land”, so is also used to mean “Indigenous people”.
Tangi	Funeral service.
Taniko	Māori weaving.
Taonga	Treasures or highly prized possessions or holdings; sacred.
Tapu	To be sacred (the opposite of <i>noa</i> ). People, objects or places can be <i>tapu</i> . All <i>taonga</i> are <i>tapu</i> .
Te ao Māori	A Māori world view. Literally “the Māori world”.
Te reo Māori	The Māori language.
Tikanga Māori	“Māori tools of thought and understanding that help organise behaviour” (Hirini M. Mead, <i>Tikanga Māori: Living by Māori Values</i> , Wellington: Huia Publishers, 2003, at p. 12), or a “Māori way of doing things” (New Zealand Law Commission, <i>Māori Custom and Values in New Zealand Law</i> , Wellington: NZLC, 2011 at p. 17). They are subject to interpretation, there are tribal variations and there is fluidity in their application.
Tino	Sovereignty, chieftainship, self-determination.

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rangātiratanga	
Tipuna (also tīpuna, tupuna, tūpuna)	Ancestors
Tohunga	Priests; experts in Māori medicine and spirituality.
Utu	This is about reciprocity in relationships and the balancing of social relationships.
Wahi tapu	Sacred places, “in the traditional, spiritual, religious, ritual, or mythological sense” (Historic Places Act 1993 (NZ)).
Whakairo iwi	Māori bone carving.
Whakairo kohatu	Māori stone carving.
Whakairo rakau	Māori wood carving.
Whānau	This means extended family and includes anyone connected by blood, not matter how distantly connected.
Whakapapa	<i>Whakapapa</i> represents more than lineage and genealogy, but also connects Māori existence to the <i>atua</i> (gods), creation and all life and represents the inheritance Māori receive from descent. It encompasses the view of existence itself and the relationship between this and the natural world.
Whanaungatanga	This is one of the most pervasive Māori values and it stresses the importance of maintaining relationships, or creating meaningful relationships with people. The nature of this kinship relationship determines people's rights, responsibilities, and obligations in relation to the use, management, and control of <i>taonga</i> of the natural world. <i>Whanaungatanga</i> determines rights and use, and responsibility to sustainably manage particular resources.

Note. There is an online Māori to English dictionary, available at <http://www.maoridictionary.co.nz/>