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# Unpacking Indigenous Rights[1]

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## Introduction

The Declaration on the Rights of Indigenous Peoples ("the Declaration") was the initiative of the Working Group on Indigenous Populations ("WGIP"). Established in 1982, the mandate of the WGIP was to develop international standards concerning Indigenous peoples' rights. The Declaration was a manifestation of this mandate and a clear articulation of international standards on the rights of Indigenous peoples. It was not until 25 years later,[2] in September 2007, that the final text was adopted by the General Assembly with a majority of 143 states in favour. Eleven states offered abstentions.[3] Four states opposed adoption; Australia, Canada, the United States of America ("the United States") and New Zealand.

It has now been eight years since the Declaration was adopted, during this time Australia,[4] New Zealand,[5] Canada[6] and the United States[7] have signalled their support of the Declaration and questions have been raised as to whether the Declaration should be binding.[8] Nonetheless, while perceived as a major moral victory the effectiveness of the Declaration is questionable while ongoing violations of indigenous human rights continue.

To measure the efficacy of the Declaration, the background to the genesis of the Declaration will be examined and some of the key provisions, including that of self-determination and participation, highlighted. The perplexing definition of 'indigenous' is intrinsic to this discussion. After considering the legal effect of the Declaration, this paper will revisit the status quo of the Declaration and, some thoughts will be provided moving forward.

1 This article is a revised version of a paper already published: Valmaine Toki (2011): Indigenous Rights - Hollow Rights? In: *Waikato Law Rev*iew, Vol. 19. Issue 2, 29-44.

2 See Sharon H. Venne (2011): The road to the United Nations and the rights of Indigenous peoples. In: 20 *Griffith Law Review,* Vol. 20, Issue 3, 557. and Jackie Hartley, Paul Joffe and Jennifer Preston (eds.) (2010): *Realising the UN Declaration on the rights of Indigenous peoples, Triumph, Hope and Action,* Purich, for a discussion on the protracted nature of the text negotiations.

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

4 See "Statement on the United Nations Declaration on the Rights of Indigenous Peoples" < http://www.jennymacklin.fahcsia.gov.au/statements>.

5 See "New Zealand Statement of Support for the Declaration" <www.converge.org.nz>.

6 See Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples <http://www.ainc-inac.gc.ca>.

7 See Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous People. Available also at <http://www.usun.state.gov>.

8 Megan Davis (2012): To Bind or not to Bind: the United Nations Declaration on the Rights of Indigenous Peoples Five Years On. In: *AILJ,* Vol. 19, 17–48.

## Part One

### *Indigenous Peoples – Indigenous Rights*

The rights of indigenous peoples that have been recognised are essentially those associated with, and intrinsic to, their custom and culture, such as control over their lands and resources.[9] For the Sami peoples (Norway, Sweden, Finland and Russia), it was the watershed *Alta* case that provided the catalyst for the recognition of their indigenous rights to natural resources.[10] In Australia, the Aboriginal peoples have sought recognition of title to their traditional lands in a series of cases illustrated by *Mabo*,[11] and in Canada, recognition was sought through the *Calder* case.[12] In New Zealand, the *Attorney General v Ngati Apa* case,[13] also centred on determining land and resource rights as well as the rights of due process.[14]

Notwithstanding, the Declaration, the seminal international instrument recognising Indigenous rights, provides no definition of indigenous peoples. Sha Zukang offers the following definition:[15]

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

A Background Paper noted that:[16]

> In the thirty-year history of indigenous issues at the United Nations, considerable thinking and debate have been devoted to the question of definition of "indigenous peoples", but no such definition has ever been adopted by any UN-system body.

9 The realisation of these rights is recognised as a form of self-determination.

10 Henry Minde (2003): The Challenge of Indigenism: The Struggle for Sami Land Rights and Self-Government in Norway 1960–1990. In Svein Jentoft, Henry Minde and Ragnar Nilsen (eds.): *Indigenous Peoples, Resource Management and Global Rights*, Eburon, Netherlands, 75.

11 *Mabo v Queensland* (No 2) (1992). In: 175 *CLR*; *Wiks Peoples v Queensland* (1996). In: 121 *ALR,* 129.

12 *Calder v Attorney General of British Columbia* (1973), In: *SCR* 313.

13 *Attorney General v Ngati Apa* (2003). In: *NZCA*, 117.

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

15 Sha Zukang (2009): State of the World's Indigenous Peoples, ST/ESA/328, Department of Economic and Social Affairs, Division for Social Policy and Development, United Nations, New York.

16 See PFII/2004/WS.1/3 - (New York, 19-21 January 2004).

One of the most cited descriptions of the concept of the term indigenous was given by Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his Study on the Problem of Discrimination against Indigenous Populations.

Significant discussions on the subject were held during the drafting of the Declaration. After consideration of the issues involved, the Special Rapporteur offered a working definition of "indigenous communities, peoples and nations". In doing so, he expressed a number of basic ideas to provide the intellectual framework for this effort, which included the rights of indigenous peoples themselves to define what and who is indigenous. The working definition of "indigenous communities, peoples and nations" read:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.
>
> This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:
> a) Occupation of ancestral lands, or at least of part of them;
> b) Common ancestry with the original occupants of these lands;
> c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
> d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
> e) Residence on certain parts of the country, or in certain regions of the world;
> f) Other relevant factors.
>
> On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.

During the period leading up to the formulation of the Declaration, many indigenous organisations rejected the idea of a formal definition of indigenous peoples that would be adopted by States. Similarly, government delegations expressed the

view that it was neither desirable nor necessary to elaborate a universal definition of indigenous peoples.

Finally, at its fifteenth session in 1997, the Working Group concluded that a definition of indigenous peoples at the global level was not possible at that time, and certainly not necessary for the adoption of the Draft Declaration on the Rights of Indigenous Peoples. Article 8 of the Draft Declaration, stated that:

> Indigenous peoples have a collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

International Labour Organisation (ILO) Convention No. 169 - a legally binding instrument that articulates the rights of indigenous and tribal peoples - provides a statement of coverage rather than a definition. Article 1 states that the Convention applies to:[17]

> a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
>
> b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Article 1 also indicates that self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of the Convention apply. The terms "indigenous peoples" and "tribal peoples" are used by the ILO as there are tribal peoples who are not "indigenous" in the literal sense, but who nevertheless live in a similar situation. An example would be Afro-descended Saramaka Peoples (Suriname); or tribal peoples in Africa such as the San (Botswana) or Maasai (Kenya and Tanzania) who may not have occupied the region they currently inhabit longer than other population groups. Cultural difference is a criteria required by the ILO Convention to determine an indigenous or tribal people as opposed to a group of people who have occupied an area since time immemorial.

Nevertheless, many of these peoples refer to themselves as "indigenous" in order to fall under discussions taking place at the United Nations.[18]

17 International Labour Organization Indigenous and Tribunal Peoples Convention No. 169 (opened for signature 27 June 1989, entered into force 5 September 1991), art 1.

18 Andrew Erueti (2006): The Demarcation Of Indigenous Peoples' Traditional Lands: Comparing Domestic Principles Of Demarcation With Emerging Principles Of International Law. In: *Arizona Journal of International and Comparative Law,* Vol. 23, Number 3, 543.

For practical purposes, the terms "indigenous" and "tribal" are used as synonyms in the UN system when the peoples concerned identify themselves as indigenous. The lack of formal definition of "peoples" or "minorities" has not been crucial to the organisation's successes or failures in those domains, nor to the promotion, protection or monitoring of the rights recognised for these groups. With regards to the concept of "indigenous peoples", the prevailing view today is that no formal universal definition is necessary. For practical purposes, the common understanding of the term is the one provided in the Martinez Cobo study mentioned above.

## Declaration on the Rights of Indigenous Rights

Perceived as a major triumph, the Declaration[19] is the only international instrument that views indigenous rights through an indigenous lens.[20] As a Declaration, the orthodox view is that it will not be legally binding upon the States.[21] However, it provides a benchmark as an international standard, against which indigenous peoples can measure State action, and a means of appeal in the international arena.[22] Parts of the Declaration may also represent binding international law. According to Professor James Anaya:[23]

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

The rights articulated in the Declaration are broadly grouped into seven themes; right to self-determination; second: life, integrity and security; third: cultural, religious, spiritual and linguistic identity; fourth: education and public information; fifth: participatory rights; sixth: lands and resources and seventh: the exercise of self-determination.[24] The Declaration opens with general statements. Articles 4 and 5 then provide fundamental additions from the perspective of indigenous people's rights:

19 "United Nations Declaration on the Rights of Indigenous Peoples: Adopted by the General Assembly 13 September 2007" (2007) <www.un.org>.

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

21 Ian Brownlie (2008): *Principles of Public International Law*. Oxford, Oxford University Press, 4.

22 See generally Megan Davis (2012): To Bind or not to Bind: the United Nations Declaration on the Rights of Indigenous Peoples Five Years On. In: *AILJ,* Vol. 19, 12.

23 S. James Anaya (2009*): International Human Rights and Indigenous Peoples*. New York, Aspen Publishers, 80; Kiri Toki (2010): What a Difference a Drip Makes: The Implications of Officially Endorsing the United Nations Declaration on the Rights of Indigenous Peoples. In: *Auckland UL Rev*, Vol. 16, 243; Claire Charters (2005): Developments in Indigenous Peoples' Rights under International Law and Their Implications. In: *NZULR*, Vol. 21, 519.

24 Davis supra note 22.

> Article 4
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
>
> Article 5
> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Other articles build upon these basic provisions, including, the rights against assimilation or destruction of indigenous culture and effective redress for past breaches of this right (Art 8); the right to practice and revitalise the cultural traditions and customs of indigenous peoples is also accompanied by redress for past removal of cultural property (Art 11);[25] and the right to establish their own media (Art 16). It is clear that cultural rights are central to the Declaration. In relation to other economic, social and cultural rights, Art 21 provides that:

> 1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
> 2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

This is supplemented by other specific rights, including rights to presently occupied lands as well as rights to lands that were traditionally, but no longer occupied by the indigenous peoples concerned (see Arts 26–28).

The Declaration clarifies and places indigenous peoples within a human rights framework.[26] In doing so, it recognises the indigenous peoples, as a collective, not just as individuals.

The Declaration contains more than twenty provisions affirming indigenous peoples' collective right to participate in decision making. It emphasises indigenous peoples' right to participate as a core principle of international human rights law. In particular, Article 18 provides:

25 See also art 13, relating to the protection of the histories, languages, philosophies, and art 14, relating to educational systems; art 31 provides for the protection of traditional knowledge, including sciences and technologies.

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

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

Further provisions supporting indigenous peoples' right to participation include Articles 19 and 20 of the Declaration. Article 19 states:

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

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

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

The lynchpin of the Declaration, however, is contained in Article 3, which provides:

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

The principle of participation in decision-making has a clear relationship with indigenous peoples' right to self-determination, which includes, the right to autonomy or self-government (Arts 4 and 5), and the State's obligation to consult indigenous peoples in matters that may affect them based on the principle of free, prior, and informed consent (Art 19). These legal concepts are integral to the right of indigenous peoples to participate in decision-making.

It is acknowledged that the Declaration provides no explicit text to establish, for example, a judicial system for criminal or civil matters beyond or outside the existing respective judicial or legal system. Nonetheless, Article 5 (right for indigenous peoples to maintain their own distinct legal institutions), when read together with Article 20 (right to develop this legal institution) and Article 3 (right to freely pursue their

culture), provides support for the implementation of an indigenous legal system or court within our current legal system.[27]

## Legal effect of the Declaration

The orthodox view is that the Declaration is soft law,[28] and will not be legally binding upon the State unless it is incorporated into domestic legislation.[29] The doctrine of state sovereignty provides a restriction on international instruments, such as the Declaration, to regulate matters within the realm of the state.[30]

## Incorporation

In Bolivia, the recently promulgated Constitution has fully incorporated the collective rights of indigenous peoples, including those rights contained in the Declaration.[31] Bolivia's Electoral Transition Law created seven special indigenous electoral districts. For the first time, the indigenous peoples of Bolivia have direct representation in the Legislative Assembly. Nonetheless, indigenous leaders believe that the current number of electoral districts does not give indigenous peoples enough voice in the Assembly. The intention is that the new electoral law will propose a fairer representation system.[32] Ecuador has also incorporated the Declaration into its Constitution, the Constitution of the Republic of Ecuador 2008.

27 It is acknowledged that the right of indigenous peoples to use their own systems of law is also recognized by the International Labour Organization Convention No. 169. Articles 8 and 9 of ILO C169 outline the right of indigenous peoples to preserve and apply their legal system. However, this right is not absolute, as its exercise must not be incompatible with fundamental national and international human rights. Art. 8(1): "In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws." Art. 8(2): "These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights".

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

29 Ian Brownlie, supra note 21, p. 4. It is acknowledged that in June 2006 the International Law Association Executive Council approved the establishment of a Committee on the Rights of Indigenous Peoples. At the first meeting of the Committee (Pretoria, 2007), it was decided that the Committee would focus on the actual legal meaning of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the UN General Assembly in September 2007. This work is currently in progress focusing on relevant cases that may be reviewed and evaluated against the UNDRIP.

30 S. James Anaya (2009): The Rights of Indigenous People to Self-determination in the Post-Declaration Era. In Claire Charters and Rodolfo Stavenhagen (eds.): *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, Copenhagen, International Working Group for Indigenous Affairs, 194. See also International Law Association "The Hague Conference (2010): Rights of Indigenous Peoples" Interim report (2010) <*www.ila-hq.org*>.

31 United Nations High Commissioner for Human Rights "Report of the United Nations High Commissioner for Human Rights on the Activities of Her office in the Plurinational State of Bolivia" (2010) United Nations Human Rights Council A/HRC/13/26/Add.2 18 at [4] <http://daccess-dds-ny.un.org>.

32 At [16].

If states, like New Zealand, followed this approach and incorporated the Declaration into domestic legislation, the onus would be on the New Zealand government to provide Māori, the indigenous peoples of Aotearoa New Zealand, the ability to fully participate in decision-making in matters that may affect them socially, politically and economically. This could be achieved through the meaningful application of culture. As in Bolivia, discrete legislation could be enacted to ensure meaningful indigenous representation in government.[33]

## Legal reception[34]

How the Declaration is received depends, in part, on the respective jurisdictions of the area.[35] For instance, notwithstanding the current status of the Declaration as soft law, Chief Justice Conteh in the Supreme Court of Belize found that:[36]

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

Belize is a common law jurisdiction. Should reliance be placed on the Declaration, this decision could provide persuasive authority for extending the ability for indigenous peoples to fully participate in decision-making affairs, as one example.[37]

33 Also see discussion by Naomi Kupuri (2009): The UN Declaration on the Rights of Indigenous Peoples in the African context. In Claire Charters and Rodolfo Stavenhagen (eds.): *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, Copenhagen, International Working Group for Indigenous Affairs, 255, on the Ilchamus (indigenous) community who successfully claimed that their rights to political representation had been violated. The presiding judge took into consideration the then draft Declaration to determine this case in favour of the Ilchamus community.

34 It is acknowledged that a growing body of case law from all jurisdictions is currently being collated in the form of a database. See UNDRIP Online Public Database http://www.ilc.unsw.edu.au/research/undrip-online-public-database.

35 See *Indigenous Peoples' Human Rights in Domestic Courts* where it is noted that "in Latin America, although variable between regions, there is a body of developing jurisprudence on the recognition of indigenous peoples' rights and those incorporated in UNDRIP. For instance, under the guidance of its Constitutional Court, in Colombia reference to the UNDRIP and to the Inter American jurisprudence is common. In the recent Tres Islas case in Peru, the Constitutional Court interprets the provisions of the Constitution in the light of the Inter American jurisprudence, but also on Articles 3 and 4 of UNDRIP. Undoubtedly, the progressive interpretation of the Inter American human rights system has been instrumental for these developments, as well as the constitutional and legal recognition in the countries of the region. Nevertheless, reference to the UNDRIP, in domestic courts reasoning is non-existent in many of the countries in the region". See also Megan Davis (2012): To Bind or not to Bind: the United Nations Declaration on the Rights of Indigenous Peoples Five Years On. In: *AILJ,* Vol. 19, 31.

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

37 This situation would only apply to indigenous peoples within common law or similar jurisdictions.

Furthermore, Bolivia and Ecuador have incorporated the Declaration into domestic law,[38] with Ecuador also incorporating the Declaration into its legislative framework.[39] In 2010, Professor James Anaya, the Special Rapporteur, visited New Zealand and commented that:[40]

> It should be noted that certain initiatives underway in New Zealand represent important steps towards advancing the purpose and objectives of the United Nations Declaration on the Rights of Indigenous Peoples. This Declaration, far from affirming rights that place indigenous peoples in a privileged position, aims at repairing the ongoing consequences of the historical denial of the right to self-determination and other basic human rights. I am, of course, very pleased to note that New Zealand recently declared its endorsement of the Declaration, thus joining the overwhelming majority of States that have expressed their support for this historic instrument.

In New Zealand, the utilisation of the Declaration in a judicial forum is not novel.[41] The Waitangi Tribunal has positively referred to the, then, Draft Declaration in respect to claims relating to tino rangatiratanga.[42] The High Court decision of *Ngai Tahu Māori Trust Board v Director General of Conservation* also referred to the Draft Declaration.[43] More recently the Supreme Court, in referring to the Declaration, noted that:[44]

> …whether Ms. Clarke's decision as executor as to the burial of Mr. Takamore was one to which she was entitled to come, in application of common law principles as developed in conformity with human rights norms, the Treaty of Waitangi, and the Declaration of the Rights of Indigenous Peoples (which recognises the interest of many indigenous peoples in the repatriation of human remains and which emphasises the collective nature of the rights of indigenous peoples).

If Māori engaged in a judicial challenge to realise their right to participate fully in the decision-making process, reliance could be placed on Conteh CJ's comments in *Cal & Ors v the Attorney General of Belize & Anor*.[45] Māori could argue that, as New

38 New Political Constitution of the State Act 2009 (Bol), s 1(1), art 2.

39 Anaya, supra note 23.

40 Statement of the United Nations Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples, Professor James Anaya, upon conclusion of his visit to New Zealand 22 July 2010 at [4]. <www.ohchr.org>.

41 See also reference to the Declaration in *Takamore v Clarke* SC 131/2011 [2012] NZSC 116, [2012] 2 NZLR 733 at [12] and [35].

42 "The Taranaki Report: Kaupapa Tuatahi" (Waitangi Tribunal, Wellington, 1996) Wai 143 www.waitangi-tribunal.govt.nz.

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

44 *Takamore v Clarke* [2012] NZSC 116 at [35] per Wild J and Glazebrook J.

45 *Cal & Ors v the Attorney General of Belize & Anor* (2007) Claim Nos 171 and 172 of 2007, Conteh CJ (Belize Sup Ct) at [132]. New Zealand has a common law jurisdiction and this case can offer persuasive value before the Court.

Zealand has endorsed the Declaration, the government should not disregard the general principles contained therein.

In the absence of direct incorporation by statute, there are different methods of recognising international human rights instruments, including recourse through administrative law. First, the (outdated) concept of legitimate expectation in Australia,[46] and mandatory relevant consideration in New Zealand,[47] have been utilised to treat unincorporated international obligations as considerations for the decision maker. Also the presumption of consistency, a common law principle of statutory interpretation, recognises that Parliament is presumed not to legislate intentionally in breach of its obligations.[48] In *Zaoui v Attorney-General,* the Supreme Court applied this presumption using New Zealand's international law obligations.[49]

Notwithstanding the successful application of administrative law to recognise international obligations in *Zaoui*, Gieringer expresses some concern with the application of the principle of mandatory relevant considerations.[50] Based on this analysis, recourse to the principle of mandatory relevant consideration to recognise the Declaration's provisions could provide a useful option for Māori. Through this, the New Zealand Courts could uphold Māori rights to full participation in decision-making, consistent with Article 20 of the Declaration.

Notwithstanding, heed should be paid to the constitutional norm of Parliamentary sovereignty,[51] which provides little status to 'Māori self-determination'. New Zealand Deputy Solicitor-General Matthew Palmer summarises the position at the constitutional level:

> Because of the political nature of the New Zealand constitution … representative democracy and parliamentary sovereignty [are] … fundamental norms of New Zealand's constitution. Māori political representation relies on representative democracy to access influence over the exercise of parliamentary sovereignty.[52]

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

47 *Tavita v Minister of Immigration* (1994). In: 2 *NZLR* 257; (1993) 11 FRNZ 508; (1993) 1 HRNZ 30 (CA).

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

49 *Zaoui v Attorney-General* (2004). In: 2 *NZLR* 339. See also Claudia Gieringer (2006): International Law through the Lens of Zaoui: Where is New Zealand At? In: *PLR*, Vol. 17, 318.

50 Claudia Gieringer (2006): International Law through the Lens of Zaoui: Where is New Zealand At? In: *PLR,* Vol. 17, 318. Although Gieringer still considers *Tavita* to be good law above n 452.

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

52 Matthew S. R. Palmer (2008): *The Treaty of Waitangi in New Zealand's Law and Constitution. Wellington*,Victoria University Press, 291.

Palmer does, however, sound a note of caution:

> However loudly Māori voices are heard within Parliament, that institution is ultimately ruled by the majority and Māori do not now constitute a majority in New Zealand. A group of people that consistently forms the majority [i.e Pakeha] has few incentives not to exploit, or ignore a group of people that consistently forms a minority.[53]

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

> … any other treaty [should] be a mandatory consideration when it is relevant to decision-making, including adjudication … it is an expression of the rule of law: a statement that Western norms do not exhaust the values of society: that even in the absence of entrenched rights we cannot tolerate any tyranny of the majority.[54]

Further, Professor James Anaya, United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People recently noted:[55]

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

During a recent United States Senate Committee meeting Professor James Anaya noted:[56]

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

**Status Quo**

The Declaration does not create any new rights[57] but it is the only international instrument that views Indigenous rights through an Indigenous lens.

53 Ibid. 292.

54 Hon Justice David Baragwanath (2007): The Evolution of Treaty Jurisprudence. In: *Waikato Law Review* Vol. 15, 1-11.

55 Statement of the United Nations Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous People, Professor James Anaya, upon conclusion of his visit to New Zealand 22 July 2010 at para 9, at <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10229&LangID=E>.

56 See "US Senate Committee holds controversial hearing on UN Indigenous Declaration" 10 June 2011 <http://bsnorrell.blogspot.com/2011/06/us-senate-committee-holds-controversial.html> last accessed 14 June 2011.

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

> "The Declaration… will go a long way in consolidating gains made by indigenous peoples in the international arena toward rolling back inequities and oppression. It builds upon numerous decisions and other standard setting measures over recent decades by a wide range of international institutions that are favourable to indigenous peoples' demands…
>
> There should not have been a Declaration on the Rights of Indigenous Peoples, because it should not be needed. But it is needed. The history of oppression cannot be erased, but the dark shadow that history has continued to cast can and should be lightened."[58]

The Declaration simply affirms rights derived from human rights principles such as equality and self-determination. The Declaration seeks to recognize Indigenous peoples rights and contextualizes those rights in light of their particular characteristics and circumstances and promotes measures to remedy the rights' historical and systemic violation.[59]

The significance of the Declaration lies in its effect. The Declaration provides a benchmark, as an international standard, against which Indigenous peoples may measure state action. State breach of this standard provides Indigenous peoples with a means of appeal in the international arena. Anaya notes that:[60]

> [t]he Declaration does not attempt to bestow Indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of Indigenous peoples.

Recognised and supported by UN member states,[61] the Declaration contains norms that are already binding in international law. So, the Declaration provides an additional international instrument for Indigenous peoples when their rights, such as the right to participate fully in decision-making, have been breached. Indigenous peoples can now argue that not only have International treaties been broken, but a breach of a right in the Declaration has occurred.

The available remedy is uncertain; nonetheless, it would be reasonable to conclude that this would provide an avenue to engender effective dialogue between the state and Indigenous peoples. It does, however, provide Indigenous peoples with an international arena to shame or embarrass a government as happened 11 March 2005 when the United Nations Committee on Elimination of Racial Discrimination con-

58 S. James Anaya (2009): *International Human Rights and Indigenous Peoples.* New York, Aspen Publishers, 63.

59 Ibid, 63.

60 S. James Anaya Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples UN Doc A/HRC/9/9 (11 August 2008) 24 [86].

61 148 member states have adopted/supported the Declaration. Columbia and Samoa have reversed their abstention leaving nine states still abstaining. See <http://www.un.org>.

cluded in its Sixty-Sixth session that New Zealand's Foreshore and Seabed Act 2004 contained discriminatory aspects against Māori.[62]

Eight years after the adoption of the Declaration by the General Assembly violations of Indigenous human rights still prevail. This raises the question as to whether the Declaration should be binding on States or whether implementing alternative methodologies, such as principles of administrative law, is more in keeping with the fundamental nature of the rights.

## Conclusion

As a Declaration the orthodox position is that the Declaration will not be legally binding upon the State[63] unless it is incorporated into domestic legislation. Notwithstanding this position, principles of administrative law provide a window to import these rights.

Irrespective of the concerns on the wording of support given to the Declaration and the legal effect of the Declaration, the Declaration is without doubt the most significant document that recognizes and acknowledges the rights of indigenous peoples. The current perspective of States and UN Agencies[64] are one of support and willingness to engage and implement these rights. The challenge ahead will be the practical manifestation of these rights for indigenous peoples.

62 See Report by the Committee on the Elimination of Racial Discrimination Decision on Foreshore and Seabed Act 2004. Sixty Sixth session, Decision 1 (66): New Zealand CERD/C/DEC/NZL/1. Available also < http://www.converge.org.nz>.

63 Ian Brownlie (2008): *Principles of Public International Law*. Oxford, Oxford University Press, 4.

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