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Use it or Lose it: The Value of Using the Declaration on the Rights of Indigenous Peoples in Maori Legal and Political Claims

I Introduction

One of the most effective ways to increase the legal and political impact of the Declaration on the Rights of Indigenous Peoples (the Declaration) is for indigenous peoples to use it in their legal and political advocacy. In doing so, indigenous advocates can compel states to interact with the Declaration in ways that may lead, in the longer term, to better cognizance and conformity with it, even in cases where the state rejects or qualifies those norms and the norms are strictly speaking non-binding. The legal and political value of the Declaration is thus increased through “using it”.

Part II of this chapter outlines relevant legal and political theory explaining how advocacy can enhance state interaction and, ultimately, compliance with international norms. Part III then focuses on a case study - the Waitangi Tribunal hearing and decision in its report, *Whaia Te Mana Motuhake, In Pursuit of Mana Motuhake: Report on the Maori Community Development Act Claim* (Wai 2417) relating to Maori rights to self-determination – as a concrete example of the Declaration being used in a legal forum to promote state interaction with the Declaration’s norms.¹ I summarise the claim and detail the way I sought to prove the relevance of the Declaration in my expert evidence. Part IV then details how the Declaration was used by the Waitangi Tribunal in its reasoning.

I argue that use of the Declaration in arguments before the Waitangi Tribunal in the Wai 2417 hearing and the Tribunal’s reliance on it in its report, will compel the New Zealand government – from politicians, to the Ministry of Maori Development/Te Puni Kokiri to Crown Law – to engage with the Declaration. Together with the many other references to the Declaration in the Waitangi Tribunal and the courts, especially New Zealand’s Supreme Court,² such activity can over time lead to greater state conformity with the Declaration. To that end, I hope that advocates for Maori claims will continue to use the Declaration in their arguments for Maori claimants in various fora and that they can use my expert evidence as a form of precedent for such arguments.

II The value of “using it”

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

¹ Waitangi Tribunal *Whaia Te Mana Motuhake, In Pursuit of Mana Motuhake: Report on the Maori Community Development Act Claim* (Wai 2417, 2015) [*Whaia Te Mana Motuhake*].

² See, *Takamore v Clarke* [2012] NZSC 116; *New Zealand Maori Council v Attorney General* [2013] NZSC 6; and *Paki v Attorney General* [2014] NZSC 118.

Constructivist theories maintain that states' interests can be socially influenced – or constructed – by exogenous factors in such a way that norm conformity comes to be considered consistent with state interests. It is a process of socialization.³

Under transnational legal process theory states' interaction with norms leads states to engage with them and then internalize them.⁴ Koh writes:⁵

One or more transnational actors provokes an *interaction* (or series of interactions) with another, which forces an *interpretation* or enunciation of the global norm applicable to the situation. By doing so, the moving party seeks not simply to coerce the other party, but to *internalize* the new interpretation of the international norm into the other party's internal normative system ... The transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalise the norms, and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process.

As noted by Abram and Antonia Chayes, even where states enunciate arguments against norms, or seek to explain their non-compliance, they are still, not always voluntarily, engaging with the norms, interpreting and interacting with them: ⁶

States are under the practical necessity to give reasons and justifications for suspect conduct. These are reviewed and critiqued not only in formal dispute settlement processes but also in a variety of other venues, public and private, formal and informal, where they are addressed and evaluated. In the process, the circumstances advanced in mitigation or excuse of non-performance are systematically addressed. Those that seem to have substance are dealt with; those that do not are exposed. Often the upshot is agreement on a narrower and more concrete definition of the required performance, adapted to the circumstances of the case. At all stages, the putative offender is given every opportunity to conform. Persuasion and argument are the principal engines of this process, but if a party persistently fails to respond, the possibility of diffuse manifestations of disapproval or pressures from other actors in the regime is present in the background.

A state's perception of reputational costs associated with non-compliance with international norms can also be a factor in a state's internalization of norms.⁷

According to Harold Koh, internalisation of norms occurs not only in legal but also social and political fora:⁸

³ Ryan Goodman and Derek Jenks "How to Influence States: Socialization and International Human Rights Law" (2005) 54(3) Duke L J 621 and Martha Finnemore *National Interests in International Society* (Cornell University Press, Ithaca, 1996).

⁴ Harold H Koh "Bringing International Law Home" (1998) 35 Houston L Rev 623; Harold H Koh "Internalization Through Socialization" (2005) 52 Duke L J 975; and Harold H Koh "Why Do Nations Obey International Law?" (1997) 106 Yale L J 2599.

⁵ Koh "Why Do Nations Obey International Law?" above n 4, at 2646

⁶ Abram Chayes and Antonia Handler Chayes *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge, 1995) 26.

⁷ Andrew T Guzman "Reputation and International Law" (2005–2006) 34 Ga J Int'l & Comp L 379 at 387.

⁸ Koh "Why Do Nations Obey International Law?" above n 4, at 2656–2657.

Social internalization occurs when a norm acquires so much public legitimacy that there is widespread general obedience to it. Political internalization occurs when political elites accept an international norm, and adopt it as a matter of government policy. Legal internalization occurs when an international norm is incorporated into the domestic legal system through executive action, judicial interpretation, legislative action, or some combination of the three.

Social movement theory focuses especially on the role played by social movements in stimulating changes in state behavior including, for example, by raising norms in litigation against the state.⁹

As is evident from the above descriptions, these theories share similar views on the methods that promote states' internalization of norms, being social, political and legal actions that compel states to interact with norms. Such actions might include: law making processes, such as parliamentary select committees in the New Zealand context; politically influential protest; indigenous-state engagements, including Treaty settlement negotiations; shadow reports to, or statements in, international human rights bodies; and, of most relevance here, claims in domestic courts or tribunals, such as the Waitangi Tribunal.

There are four important points to note here about the processes that lead to potential state internalization of norms. First, non-state actors, including NGOs, can initiate such processes. Second, these processes can be legal in nature, such as legal argument reliant on the Declaration in courts, but need not be. Protest and argumentation in political contexts can also be functionally important. Third, non-state actors might best initiate a number of political and legal strategies simultaneously to facilitate state engagement with norms. While some activities might be more effective than others to stimulate state responses, multiple approaches can deepen a state's interaction with norms. Fourth, as noted above, a state's rejection of a norm in political and legal fora does not halt a state's internalization of a norm. Indeed, some scholars claim that norm rejection is a relatively standard "step" in a state's internalization of norms. Risse and Sikkink write:¹⁰

[w]e count the denial phase as part of the socialization process because the fact that the state feels compelled to deny the charges demonstrates that a process of international socialization is already under way. If socialization were not yet underway, the state would feel no need to deny the accusations that are made.

There is some evidence to suggest that New Zealand is already en route to internalizing some of the norms in the Declaration, albeit perhaps only those norms that do not seriously, or are not perceived to, threaten New Zealand's sovereignty or private property regime.¹¹ In 2010, for example, it reversed its earlier rejection of the Declaration, with official records of the time noting that endorsement would enhance New Zealand's reputation and meet recommendations made by the UN Human Rights Council (HRC) during its universal periodic review of New Zealand.¹²

⁹ Margaret E Keck and Kathryn Sikkink *Activists Beyond Borders* (Cornell University Press, Ithaca, 1998).

¹⁰ Thomas Risse and Kathryn Sikkink "The Socialization of International Human Rights Norms into Domestic Practices: Introduction" in Thomas Risse, Stephen C Ropp and Kathryn Sikkink *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, Cambridge, 1999) 1, at 23.

¹¹ Sheryl Lightfoot, "Emerging International Indigenous Rights Norms and 'Over-Compliance' in New Zealand and Canada." *Political Science*, Vol. 62, No. 1, June 2010, pp. 84-104.

¹² Pita Sharples, "UNPFII Opening Ceremony New Zealand Statement" (Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, 19 April 2010)

Maori and other non-state actors' activities continue to persistently compel New Zealand to engage with the Declaration in multiple ways, for example, in shadow reports and statements before international human rights bodies,¹³ in claims to the courts¹⁴ and Waitangi Tribunal,¹⁵ in select committees,¹⁶ and through the establishment of bodies to monitor New Zealand's compliance with the Declaration.¹⁷

III *Background to Whaia te Mana Motuhake Report*

The Whaia te Mana Motuhake inquiry concerned a claim by the New Zealand Maori Council (the Council) that the Crown had breached the principles of the Treaty of Waitangi by unilaterally initiating and undertaking a review of the legislation that established the Council, the Maori Community Development Act 1962 (the Development Act). The Development Act established 'districts' throughout New Zealand and processes for appointing representatives of these districts that together comprised the Council as a national body with a mandate to give advice to government on a range of policy matters affecting Maori.

The Council sought to have the Waitangi Tribunal take into account the Declaration when determining whether the Crown had breached the principles of the Treaty of Waitangi. The Council particularly relied on the Declaration with respect to its claim that the Crown had interfered with Maori self-government and mana motuhake rights by initiating the review of the Development Act. The Council claimed that the principles of the Treaty, the Act itself and the Declaration required that any review of Maori organisations, including statutory bodies such as the Council, should be led by Maori. An important element of the claim was that the Council had been established pursuant to a 'historic self-government pact' between Maori and the Crown. The Council argued Māori should decide what changes they want to their self-government institutions even where those institutions are provided for in legislation.

The Crown conceded during the hearing that any review of the Council and relevant sections of the Development Act should be led by Maori. However, given changes in representation of Maori, especially the establishment of many new iwi representative groups, the Crown argued that a broader range of Maori should be included in decision making on the Council's reform.

¹³ For example, see the shadow reports submitted by Peace Movement Aotearoa and Aotearoa Indigenous Rights Trust to the UN Human Rights Committee in February 2016 for the March 2016 review of New Zealand's compliance with the International Covenant on Civil and Political Rights available here:http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=124 (last accessed 10 March 2016).

¹⁴ For example in *Takamore v Clarke* [2012] NZSC 116; *New Zealand Maori Council v Attorney General* [2013] NZSC 6; and *Paki v Attorney General* [2014] NZSC 118.

¹⁵ See, *Whaia Te Mana Motuhake*, above n 1.

¹⁶ See for example Dr. Carwyn Jones, Associate Professor Claire Charters, Andrew Erueti, Professor Jane Kelsey MĀORI RIGHTS, TE TIRITI O WAITANGI AND THE TRANS-PACIFIC PARTNERSHIP AGREEMENT (2016) submission to Foreign Affairs, Defence and Trade Select Committee on International treaty examination of the Trans-Pacific Partnership Agreement (TPPA); available at https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/51SCFDT_EVI_00DBSCH_ITR_68247_1_A496119/andrew-erueti.

¹⁷ Such as the Iwi Chairs Forum's establishment of an independent mechanism to monitor the government's implementation of the UN Declaration on the Rights of Indigenous Peoples in 2015. See Report of the Monitoring Mechanism regarding the implementation of the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand (2016) A/HRC/EMRIP/2016/CRP.4

The Council successfully requested the Waitangi Tribunal to authorize the preparation of expert evidence on the relevance of the Declaration to the claim, which I prepared and then presented during the hearing. I focused on the Maori right to autonomy to lead a review of the Council free from Crown interference or control.

IV Case Study: Using the Declaration in Waitangi Tribunal Hearings

(a) the Declaration and human rights

My evidence first sought to establish the authority of the Declaration. The objective was to persuade the Waitangi Tribunal that, despite not being ‘binding’ on New Zealand, there are sound legal reasons for the Waitangi Tribunal to rely on it. To do this, I focused on the legitimacy of the Declaration, namely the reasons why it is legally authoritative rather than legally binding. I pointed out that it is the most supported and comprehensive of legal instruments describing the rights of indigenous peoples and that declarations are recognized within the United Nations as “solemn instrument[s] resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected.”¹⁸ This point is reflected in the status of another declaration, the Universal Declaration of Human Rights.¹⁹ I outlined some of the key justifications for the normative weight of the Declaration, including:

- The UN General Assembly’s authority to adopt declarations is sourced in Article 13(1)(b) of the Charter of the United Nations (UN Charter), to assist with the realisation of human rights and freedoms. The UN Charter constitutes the United Nations.
- Under the UN Charter all states are required to respect and promote human rights. The Declaration informs these duties.
- The Declaration reflects a global consensus on the rights of Indigenous peoples with 143 states voting for it in the UN General Assembly. Only four states voted against the Declaration and all (including New Zealand) changed their position to one of support within 3 years of the General Assembly’s adoption of it.
- Many of the rights expressed in the Declaration reflect rights and freedoms included in widely ratified human rights treaties, including those ratified by New Zealand. For example, rights to non-discrimination, culture, property and, importantly for this inquiry, the right to self-determination contained in Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).
- World-renowned international lawyers that comprise the International Law Association concluded that the Declaration “includes several key provisions which correspond to existing State obligations under customary international law”.
- With respect to New Zealand specifically, the close relationship between the substance of the Declaration and the Treaty of Waitangi, acknowledged by government in its statement in support of the Declaration and by the Supreme Court.
- Human rights institutions the world over have cited the importance of the Declaration including New Zealand institutions such as the Human Rights

¹⁸ Economic and Social Council *Report of the Commission on Human Rights* (18th Sess, March-April 1962) UN Doc E/3616/Rev 1, para 105.

¹⁹ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

Commission and previous Waitangi Tribunal reports.²⁰

(b) Process legitimacy

Next I highlighted the legitimacy that attaches to the Declaration as a result of the processes that gave rise to it. In terms of procedure, I stressed that the Declaration text was negotiated over two decades and included states, indigenous peoples, international institutions, non-governmental organisations and academics amongst others. In addition, the point was made that the Declaration has been considered by many UN bodies.²¹

Over the two decades from the mid-1980s until 2007, the Declaration was considered or approved in its various forms by a multitude of bodies – all comprised of states or their appointees and, in one case, Indigenous peoples’ representatives – before its final adoption by the UN General Assembly. These bodies included the UN Working Group on Indigenous Populations (comprised of state-appointed experts on human rights), the UN Sub-Commission on the Protection and Promotion of Human Rights (comprised of state-appointed experts on human rights), the (former) UN Commission on Human Rights (comprised of states), the UN Open-Ended Inter-sessional Commission on Human Rights Working Group on the draft Declaration on the Rights of Indigenous Peoples (comprised of states with Indigenous peoples’ participation), the UN Human Rights Council (the UN’s principal multi-lateral state human rights institution), the UN General Assembly’s Third Committee on Social, Humanitarian and Cultural Issues, which focuses on human rights (multi-lateral state institution) and then, finally, the UN General Assembly itself on 13 September 2007 (the highest-level and most inclusive state body of the UN).

(c) Substance legitimacy: the normative weight of the Declaration

I then highlighted that the Declaration responds to historical discrimination against indigenous peoples under colonial regimes and international law and that, as many authors have noted, international law historically and discriminatorily excluded Indigenous peoples from recognition as sovereigns and ‘peoples’.²² In its acknowledgment of an Indigenous peoples’ right to self-determination, the Declaration goes some way to remedying that historical injustice.

(d) The Declaration’s influence internationally and domestically

Next I focused on the influence of the Declaration internationally and domestically highlighting that it has become *the* standard against which state activities are assessed at the domestic and international levels.

(i) International Law

At the international level, I highlighted how the Declaration has been used as an authoritative guide on the content of the rights of indigenous peoples by institutions such as the UN General Assembly, the UN Human Rights Council, the UN Economic and Social Council, the World

²⁰ See for example, Waitangi Tribunal *Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) at 233.

²¹ At para 24.

²² See Antony Anghie *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2004) and Patrick Macklem “Indigenous Recognition in International Law: Theoretical Observations” (2009) 30 *Mich J Int'l Law* 177. See also Patrick Macklem *The Sovereignty of Human Rights* (OUP, 2015).

Intellectual Property Office, UN human rights treaty bodies, the International Labour Organisation, by UN special procedures, the UN Food and Agricultural Organisation, the World Health Organisation, the World Bank, the UN Development Programme, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, institutions associated with the Convention on Biodiversity, environmental institutions, regional courts such as the Inter-American Court of Human Rights and, of course, Indigenous specific bodies such as the UN Expert Mechanism on the Rights of Indigenous Peoples, the Special Rapporteur on the rights of indigenous peoples and the UN Permanent Forum on Indigenous Issues.

Given international human rights treaties ratified by states are binding, I cited specific examples of human rights treaty bodies endorsing and applying the Declaration in their observations, responses to communications from individuals and general recommendations or comments. Equally, I stressed comments made to New Zealand by other states to implement the Declaration in the Human Rights Council's Universal Periodic Review process.²³

While the jurisprudence of regional human rights bodies such as the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights is not binding on New Zealand, it illustrates that Indigenous peoples' rights are being applied in concrete ways. Both regional bodies have recognized, for example, states' duties to demarcate and title indigenous peoples' rights to their lands, territories and resources under their own indigenous legal systems. Similarly, I thought it relevant to mention the World Bank's policies on indigenous peoples' rights, which draw on the Declaration, not least because the World Bank has significant power to compel states to comply with its policies when they seek loans.

I also considered that the Waitangi Tribunal might be influenced by case law from other jurisdictions that cite positively and rely on the Declaration, including cases from other common law jurisdictions such as Belize.²⁴

I provided detail of criticisms of New Zealand's failures to respect indigenous peoples' rights by international human rights treaty bodies, the UN Human Rights Council and the UN Special Rapporteur on the Rights of Indigenous Peoples to drive home the point that New Zealand cannot avoid international oversight of its approach to Maori rights. It also served to highlight that if the Waitangi Tribunal failed to recognize and apply indigenous peoples' rights under international law it might well be subject to similar criticism when New Zealand is reviewed by international human rights bodies.

(ii) Domestic Law

To illustrate that international law can be relevant to the interpretation and application of the common law, I first cited extracts from the Court of Appeal to the effect that 'so far as its wording allows, legislation should be read in a way which is consistent with New Zealand's international obligations',²⁵ and that international instruments can be taken into account by

²³ See Natalie Baird's chapter in this book.

²⁴ *Cal v Attorney General* Claims Nos 171/2007, 172/2007, 18 October 2007 (Supreme Court of Belize). Since the finalization of my expert evidence, the Caribbean Court of Appeal affirmed the lower court's decision to recognize Mayan land rights. See Press Release, University of Arizona Indigenous Peoples Law and Policy Programme, 22 April 2015, "Maya Indigenous Peoples of Belize Win".

²⁵ Citing *New Zealand Airline Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269, 289 (CA), per Keith J. In the immigration context, refer *Puli'uvea v Removal Review Authority* (1996) 2 HRNZ 510 (CA);

courts when developing the common law.²⁶ I also noted that the Court of Appeal has observed that ‘[l]egitimate criticism could extend to the New Zealand courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms, or obligations, the Executive is necessarily free to ignore them.’²⁷ The latter point was also made to, once again, make the point that the Waitangi Tribunal’s decisions might be reviewed by international human rights bodies.

To stress the influence of the Declaration domestically, I cited a number of cases that refer to the Declaration including the Supreme Court decisions of *New Zealand Maori Council v the Attorney General*²⁸ and *Takamore v Clarke*.²⁹

The *New Zealand Maori Council v Attorney General* concerned the Council’s objection to the Crown’s establishment of a mixed-ownership model of formerly state owned enterprises engaged in energy generation and, especially, the potential for Maori rights to freshwater to be compromised as a result. The Supreme Court in its single unanimous decision doubted whether the Declaration adds to the principles of the Treaty when it is statutorily recognised in legislation.³⁰ I argued that this suggested that the Supreme Court is of the view that the principles of the Treaty are co-extensive with the rights and freedoms expressed in the Declaration. Moreover the Supreme Court also accepted that ‘the Declaration provides some support for the view that those principles should be construed broadly.’³¹

The other notable decision was *Takamore v Clarke* which concerned a dispute between Mr Takamore’s wife, Denise Clarke, and Mr Takamore’s Tuhoë whanau as to where Mr Takamore should be buried given Takamore died intestate and left no clear indication as to where he wanted to be buried. The whanau argued that he should be buried, in accordance with tikanga Maori. A principal legal issue was the extent to which the common law could accommodate tikanga Maori. The decision was ultimately decided by the Supreme Court in Denise Clarke’s favour.

Noting that both the Court of Appeal and the Supreme Court had cited the Declaration positively, I explained, that Elias CJ, in the Supreme Court, cited the Declaration as evidence of ‘the importance placed on the repatriation of the dead by Indigenous peoples.’³² In relation to the Court of Appeal decision, I noted that the majority also cited the Declaration as ‘recognising the need to safeguard both the individual and the collective rights of Indigenous peoples.’ cite I argued that this indicated the common law relating to burial needs to give greater consideration to the collective nature of Indigenous peoples’ rights. Finally, on the status of the Declaration in New Zealand law, the Court of Appeal noted that while it is non-binding, ‘New Zealand announced its support of the Declaration in 2010’ and that New Zealand ‘is a party to the international human rights covenants on which the Declaration is based’ and that an authority on the Declaration, Professor Elsa Stamatopoulou, observes that ‘the Declaration does not in fact contain any new cultural human rights, but restates, in one systematic text, human rights contained in previously adopted international instruments and confirmed through the case law of

Tavita v Minister of Immigration [1994] 2 NZLR 257 (CA) and *Zaoui v Attorney-General* [2006] 1 NZLR 289 (SC).

²⁶ *Hosking v Runting* [2005] 1 NZLR 1 (CA) and *Lange v Atkinson* [1998] 3 NZLR 424.

²⁷ *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA).

²⁸ above n

²⁹ above n

³⁰ above n at [92].

³¹ at para 63.1.

³² a paras 63.2 and

international bodies.³³

I then cited a number of positive references to the Declaration by the Waitangi Tribunal that ‘to the extent that rights declared in the [Declaration] may be recognised consistent with the jurisdiction and procedures of the Tribunal, then this Tribunal should do so.’³⁴ In a similar vein, I noted obligations on Parliament to take into account international legal obligations when making laws and the numerous times that the Declaration has been referenced in Parliament.³⁵

The Waitangi Tribunal’s statutory mandate is to assess Crown actions against the principles of the Treaty of Waitangi.³⁶ It was important to make the case that the principles of the Treaty can and should be read consistently with the Declaration, a point that in fact the Waitangi Tribunal had accepted in previous reports. cite. Many high-level governmental persons had also noted the synergies between the instruments, which I mentioned in the evidence. Of especial note the Hon Pita Sharples (then Minister of Maori Affairs) during his expression of support for the Declaration at the UN, on behalf of New Zealand, had stated that, ‘[t]he Declaration contains principles that are consistent with the duties and principles inherent in the Treaty, such as operating in the spirit of partnership and mutual respect.’³⁷ I also highlighted the similarities between Treaty principles and the Declaration, albeit noting that the Declaration with its 46 articles is more explicit, specific and express in outlining Indigenous peoples’ rights than the Treaty principles.³⁸

I devoted considerable attention to the relevance of s 20 of the New Zealand Bill of Rights Act (BORA), which includes the right to culture, to the interpretation of the Treaty and, in turn, the role of the Declaration in New Zealand law. Section 20 of the BORA, which mirrors article 27 of the International Covenant on Civil and Political Rights, states that:³⁹

A person who belongs to an ethnic, religious or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, profess and practice the religion, or to use the language, of that community.

While there is little jurisprudence on section 20 in New Zealand case law, albeit with notable exceptions such as in *Takamore*, its potential relevance to cases involving Maori culture is significant.⁴⁰ As Paul Rishworth comments: ‘[o]nce it is accepted that culture may involve matters ranging from commercial exploitation of natural resources by minorities to mechanisms of social control and conflict resolution, the reach of s 20 is broad indeed.’⁴¹ This is especially true given that BORA imposes legally enforceable obligations on the Executive whereas the Treaty of

³³ at para 253.

³⁴ Judge Caren Fox, Presiding Officer, *Memorandum of Directions (No 7)* in relation to Wai 2200 (3 December 2010).

³⁵ At paras 72 and 79, citing the New Zealand Cabinet Manual (Wellington, 2008), 1 and the Guidelines provided by the Legislation Advisory Committee *Guidelines on Process and Content of Legislation* 2001 with subsequent amendments (Wellington), 135. For an example of references to the Declaration in Parliament, see the debate on the Marine and Coastal Area (Takutai Moana) Act: http://www.parliament.nz/ennz/pb/debates/debates/49HansD_20110308_00000716/marine-and-coastal-area-takutai-moana-bill---second-reading (last accessed 15 January 2014).

³⁶ Tow Act 1975.

³⁷ Rt Hon Pita Sharples, New York (19 April 2010).

³⁸ Para 84.

³⁹ Iccpr, art 27.

⁴⁰ Fleur Adcock “Maori and the Bill of Rights Act: A Case of Missed Opportunities” (2013) 11 NZJPIL 183.

⁴¹ Rishworth, “Minority Rights”, 401.

Waitangi ordinarily requires statutory recognition to be enforceable. Elias CJ states in *Takamore* that:⁴²

It would however be paying lipservice to the importance of culture recognised by the New Zealand Bill of Rights Act and in particular the importance of Māori society and culture in New Zealand (derived from the Treaty of Waitangi and recognised in modern New Zealand legislation) to conclude that the wishes of the spouse will always prevail over other interests.

Section 20 BORA could function as an important vehicle to incorporate Declaration rights into New Zealand jurisprudence if New Zealand courts and tribunals interpret the right to culture in a way that is consistent with the Declaration, which is exactly what international human rights treaty bodies have done. As stated in my evidence,⁴³

Most articles in the Declaration are closely related to Indigenous individuals' and peoples' rights not to be denied the right to enjoy their culture, from rights to lands, territories and resources, to self-determination and to determination of their own representative institutions. Accordingly, s 20 BORA can easily be interpreted to "cover" or even to "incorporate" many of the rights expressed in the Declaration into New Zealand law.

I then illustrated ways in which the UN Human Rights Committee has interpreted the right to culture consistently with indigenous peoples' rights under the Declaration such as to protect indigenous peoples' rights to their lands, territories and resources, to consultation and free, prior and informed consent and to self-determination.⁴⁴

(d) The right to self-determination and the Waitangi Tribunal hearing

The remainder of my evidence focused on the specific issue before the Waitangi Tribunal, namely showing that the Declaration, especially the right to self-determination and related articles, supported the Council's claim that Maori should determine the constitution of their institutions. I relied on articles that support indigenous autonomy and, especially article 33, which states, "Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures." I also referred to the articles on free, prior and informed consent and related international jurisprudence given the Council's concern that government might proceed and unilaterally impose its reforms under the Development Act.

✓ *The Waitangi Tribunal report and findings on the Declaration*

The Waitangi Tribunal found for the Council especially with respect to the need for Maori to determine their own processes with respect to the constitution of their own Maori institutions. In doing so, the Waitangi Tribunal relied on the Declaration in many places in its report to 'assist in the interpretation of and application of [...] Treaty principles.'⁴⁵ As this quote suggests, the

⁴² Para 101.

⁴³ Para 91.

⁴⁴ See paras 92 – 97. Relevant material cited includes UN Doc HRI/GEN/1/Rev.1 at 38 (1994); CCPR/C/AUS/CO/5, 2 April 2009, para 13; CCPR/C/MEX/CO/5, 17 May 2010, para 22; CCPR/C/95/D/1457/2006, 24 April 2009; CCPR/C/NZL/CO/5, 7 April 2010, para 19; *Apirana Mahuika et al v New Zealand* Comm No 547/1993 UN Doc CCPR/C/70/D/547/1993 (2000).

⁴⁵ P 47.

Declaration was not authoritative in and of itself, which the Waitangi Tribunal addressed explicitly. It clarified:⁴⁶

our jurisdiction is to assess Crown actions against the principles of the Treaty. It is not our role to make findings on whether the Crown has acted inconsistently with [the Declaration]. However, both the claimants and the Crown accept that [the Declaration] articles are relevant to the interpretation of the principles of the Treaty of Waitangi. Because the New Zealand Government has now affirmed [the Declaration], the obligations described in its articles are a circumstance we can take into account in assessing the Crown's actions. [The Declaration] is therefore relevant to the manner in which the principles of the Treaty of Waitangi should be observed by Crown officials. This is particularly the case where [the Declaration] articles provide specific guidance as to how the Crown should be interacting with Māori or recognising their interests.

In considering various arguments made about the relevance of the Declaration, the Waitangi Tribunal noted: the importance of UN declarations generally; that the Declaration 'merely restates for the most part, human rights contained in other international instruments';⁴⁷ that it is 'routinely referred to by international institutions';⁴⁸ and there is extensive New Zealand case law referencing the Declaration. Citing New Zealand's statement of support for the Declaration in 2010, the Waitangi Tribunal notes that it envisages that the government will respect the Treaty, 'as further elucidated by any relevant articles of [the Declaration], subject to any lawful limitations.' cite It also cited earlier comments by the Waitangi Tribunal, including that it is "perhaps the most important international instrument ever for Maori people",⁴⁹ and references to the Declaration in judgments of New Zealand Court of Appeal and Supreme Court.⁵⁰

The Waitangi Tribunal went on to group many of the Declaration's articles under various Treaty principles, including kawanatanga, rangatiratanga, partnership, active protection, equity and equality and right to development. Clearly this schema could be of use in subsequent claims to the Waitangi Tribunal.

The Waitangi Tribunal referred multiple times to the Declaration. In a key passage where the Declaration was especially important to the Waitangi Tribunal's approach, it states that:⁵¹

in our view, reading the Treaty principles as informed by the Declaration, we think it is correct that Māori should decide what changes they want to their self-government institutions, even where those institutions are provided for in legislation. Having decided what is wanted or needed, Māori must then discuss implementation with the Crown, because the Crown would need to arrange the necessary funding or legislation. Collaboration occurs because the Crown has a duty to satisfy itself that the requested funding or legislation is reasonable and can be met by Parliament and/or the public purse. Also, in Dr Charters' evidence, the Crown would need to satisfy itself that legislative changes are supported by the Māori groups who will be affected by them, before it promotes legislation to give effect to them.

⁴⁶ At p 55.

⁴⁷ P 51.

⁴⁸ P 51.

⁴⁹ At 54.

⁵⁰ At 54-55.

⁵¹ At 364-365.

The Waitangi Tribunal decided that “the Crown’s decision in 2013 to proceed with a Crown-led review, leading to unilateral Crown decisions about Maori self-government institutions, was not consistent with the rights affirmed in the Declaration.”⁵² In its recommendations the Tribunal also recommended that reform should be Council-led and negotiated with the Crown.

VI Conclusion

In conclusion, I have argued that by using the Declaration in a variety of legal and political fora, advocates can contribute to state internalisation of its norms. By explaining how the Declaration can be used in Maori legal claims in the Waitangi Tribunal, based on my evidence in Wai 2417, I hope to encourage other advocates to promote state internalisation by articulating arguments based on it.

⁵² At 510.