

**OBSERVATIONS RELATING TO THE U.N. SPECIAL RAPPORTEUR'S
REPORT ON MĀORI PEOPLE IN NEW ZEALAND – 2011: INTRODUCING
A HUMAN RIGHTS DISCOURSE TO TREATY JURISPRUDENCE**

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I. INTRODUCTION

Recent developments in international law—especially the United Nations Declaration on the Rights of Indigenous Peoples (Declaration)—are important to New Zealand’s indigenous peoples, Māori. So too are international institutions, including the indigenous-specific international mechanisms aimed at implementing indigenous rights such as the office of the U.N. Special Rapporteur on the Rights of Indigenous Peoples. Professor James Anaya, during his tenure as U.N. Special Rapporteur, was extremely productive. By my count he produced twenty country reports and eleven thematic reports. He attended dozens of symposia and issued dozens of press statements and press releases. And as we all know, his reports—despite the word limit imposed by the U.N.—set out legal and historical context succinctly and got quickly to the nub of the most salient issues. The New Zealand Report is an excellent example.

In terms of Professor Anaya’s work as U.N. Special Rapporteur, I focus on a project that he started long before he took up the position but that was a central platform of his advocacy work as U.N. Special Rapporteur. Professor Anaya brought to this position a robust normative theory for international indigenous rights. This innovation—set out in his book *Indigenous Peoples in International Law*¹—contends that indigenous rights in the Declaration are best seen as an elaboration of human rights.

This “human rights model” (as I will call it) of international indigenous rights has been extremely useful in New Zealand, and it has great potential to spark further reforms. I expect, however, that advocates using the Declaration in New Zealand will advance the human rights discourse alongside more treaty-based, historical sovereignty-type arguments. And indeed, to some extent, this approach can be seen in Professor Anaya’s 2011 New Zealand report, which to me shows a subtle recalibration of the human rights discourse to suit local conditions. This can be compared with Professor Anaya’s reports in Latin America, Asia, and Africa which focus more directly on indigenous rights as human rights.

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¹ S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1996).

II. INDIGENOUS RIGHTS IN NEW ZEALAND

New Zealand has a solid reputation for indigenous rights. It is particularly proud of its “unparalleled system for redress.”² And, to be fair, the system is exemplary. It represents one of the few efforts to address historical grievances.³ New Zealand also played a large role in Declaration negotiations. It attended most of the Working Group meetings over the course of twenty plus years, making written and oral submissions. Though a small country with modest international political and economic clout, New Zealand was taken seriously by other states and indigenous advocates because of three main factors: the fact that it is an established democracy committed to human rights with long-standing laws and policies relating to indigenous rights; reforms undertaken from the 1970s (in particular the Treaty of Waitangi settlement process); and its large indigenous population which has played a prominent role in domestic and international indigenous rights politics.

However, New Zealand is extremely wary of international indigenous rights. The reason, in my view, is that New Zealand is far from perfect and does not like international attention. New Zealand, as is well known, voted against the Declaration in the U.N. General Assembly.⁴ The reasons it gave then are worth noting now because I think they remain key. They are also the typical issues raised by CANZUS states (Canada, Australia, New Zealand, and the United States) as a whole. In the main they relate to self-determination, historical redress, and free, prior, and informed consent (FPIC)—what I call the self-determination framework. All of the CANZUS states, at various times throughout negotiations, would note the connection between self-determination in the Declaration and the U.N.-sponsored decolonization project. Recognizing the right to self-determination, they argued, could lead to indigenous peoples claiming the right to secession. They also expressed concern about the generality of the redress and land rights measures, suggesting they required the return of essentially the entire land mass.⁵ FPIC was

² See U.N. GAOR, 61st Sess., 107th plen. mtg., at 13, U.N. Doc. A/61/PV.107 (Sept. 13, 2007) [hereinafter GA Plenary Meeting], available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/61/PV.107&Lang=E (statement of New Zealand, delivered by Ms. Banks, explaining that “New Zealand has an unparalleled system for redress, accepted by indigenous and non-indigenous citizens alike”).

³ In the other three common law states, governments have, for the most part, avoided these historical claims. Modern treaty making in Canada and Australia, for example, is directed at addressing current native title claims rather than historical injustices. See Andrew Erueti, *Historical Rectification and International Law on Indigenous Rights*, in HANDBOOK OF INDIGENOUS PEOPLES’ RIGHTS (Damien Short & Corinne Lennox eds., 2014). For background information on treaty settlements, see Richard S. Hill, *Ngā Whakataunga Tiriti – Treaty of Waitangi Settlement Process*, TE ARA, <http://www.teara.govt.nz/en/nga-whakataunga-tiriti-treaty-of-waitangi-settlement-process> (last updated Sept. 19, 2013).

⁴ See GA Plenary Meeting, *supra* note 2, at 14.

⁵ *Id.* at 14 (“The entire country would appear to fall within the scope of [Article 28 relating to redress]. The text generally takes no account of the fact that land may now be occupied or owned legitimately by others or subject to numerous different, or overlapping,

characterized as a “right of veto over the State.”⁶ When the current New Zealand government decided to endorse the Declaration, these rights in the self-determination framework were downplayed as “aspirational,” non-justiciable rights—much like the rights in the International Covenant of Economic, Social and Cultural Rights (ICESCR)—to be progressively realized within the political realm.⁷ In fact this was the overall CANZUS position when endorsing the Declaration.

I think the overriding concern for the CANZUS states is the power of the Declaration. In particular, the threat posed by the Declaration for CANZUS states is that domestic legal practice falls well short of the self-determination framework in the Declaration. It is the prospect of meaningful autonomy and territorial rights that is of most concern to CANZUS states and the use of international law to advance these rights.

There are several outstanding issues in New Zealand. Primarily they concern the ability of Māori, whānau (extended family), hapū (sub-tribes), and iwi (tribes) to exercise more say over the things that mean the most to them: particularly Māori autonomy and territory.

There have been steps toward promoting greater Māori autonomy. Professor Anaya outlines them (and their gaps) in his New Zealand report. In Parliament, Māori members of Parliament make up about twenty percent of the 120 seats—although they are spread across different political parties with divergent approaches to Māori rights. This representation is due to New Zealand’s adoption of a proportional voting system and its separate Māori voting roll.⁸ Māori representatives can yield significant leverage when they bind together in the political system. However, the conflicts between members of the Māori Party

indigenous claims.”).

⁶ See, e.g., *id.* at 11 (statement of Australia, delivered by Mr. Hill, explaining that “Australia cannot accept a right that allows a particular subgroup of the population to be able to veto legitimate decisions of a democratic and representative Government”).

⁷ *National Govt to Support UN Rights Declaration*, JOHN KEY (Apr. 20, 2010), <http://www.johnkey.co.nz/archives/932-National-Govt-to-support-UN-rights-declaration.html> (“Successive Governments have considered certain elements of the Declaration, particularly principles advocating prior and informed consent of indigenous peoples in decision-making and full reparation or restitution for wrongfully taken land and resources, to be inconsistent with New Zealand’s domestic arrangements and democratic processes. This Government has reviewed New Zealand’s position on the Declaration. The statement of support acknowledges these areas are difficult and challenging but notes the aspirational spirit of the Declaration and affirms to continually progress these, alongside Māori, within the current legal and constitutional frameworks of New Zealand.”).

⁸ There are seven Māori electorates in the New Zealand Parliament. See *Māori Representation*, ELECTORAL COMM’N, <http://www.elections.org.nz/voting-system/maori-representation> (last updated Oct. 20, 2014). As Professor Anaya notes, the law relating to Māori seats is “not entrenched, meaning that they may be revoked by a simple act of Parliament.” Special Rapporteur on the Rights of Indigenous People, *The Situation of Maori People in New Zealand*, U.N. Doc. A/HRC/18/35/Add.4, ¶ 14 (May 31, 2011) (by S. James Anaya).

demonstrates how difficult it can be to reach a common position on policy, particularly between “pragmatists” and more “radical” Māori politicians. In terms of local government, Māori and iwi are generally poorly represented, although it is possible to establish Māori wards—several local governments have established them.⁹

As noted above, New Zealand is unique in that it is one of the few countries to establish a process for addressing historical injustices suffered by Māori. Under this treaty-settlement process (as it is called), the government has settled iwi claims across the country relating to deep-sea commercial and traditional fisheries,¹⁰ unjust land acquisitions,¹¹ and Māori interests in forestry,¹² and aquaculture.¹³ As a result iwi are increasingly gaining economic clout. These settlements also contain mechanisms aimed at promoting iwi effective participation in decisions that may affect them. However, no private land can form part of a settlement.¹⁴ Given that much of New Zealand is in private ownership,¹⁵ most treaty settlements are comprised of monetary compensation. Nor are iwi able to claim any interest in

⁹ Local and regional councils may make provisions for Māori wards and Māori constituencies (although representation is not guaranteed). Local Electoral Act 2001, §§ 19Z-19ZH (N.Z.), *available at* <http://www.legislation.govt.nz/act/public/2001/0035/latest/DLM93914.html>. Several regional councils have established Māori seats. The Waikato Regional Council has established two Māori seats for the 2013 elections. *Iwi Relationships*, WAIKATO REG'L COUNCIL, <http://www.waikatoregion.govt.nz/Services/Regional-services/Iwi-relationships/> (last visited Mar. 23, 2015); *see also Representation Arrangements*, WAIKATO REG'L COUNCIL, <http://www.waikatoregion.govt.nz/Council/About-us/Our-council/representation/> (last visited Mar. 23, 2015). The Bay of Plenty regional Council has three Māori constituencies. *Maori Seats*, BAY OF PLENTY REG'L COUNCIL, <http://www.boprc.govt.nz/council/kaupapa-maori/maori-seats/> (last visited Mar. 24, 2015) (citing Bay of Plenty Regional Council (Maori Constituency Empowering) Act 2001). Nelson also has provision for a Māori ward. *Nelson Praised for Māori Council Ward*, N.Z. LAW SOC'Y, <http://my.lawsociety.org.nz/branches/nelson/news/nelson-praised-for-mori-council-ward> (last visited Mar. 24, 2015).

¹⁰ Waitangi Tribunal, REPORT OF THE WAITANGI TRIBUNAL ON THE MURIWHENUA FISHING CLAIM (1988); Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

¹¹ *See* Ngāi Tahu Claims Settlement Act 1998, pmbl.

¹² *See* Central North Island Forests Land Collective Settlement Act 2008.

¹³ *See* Waitangi Tribunal, AHU MOANA: THE AQUACULTURE AND MARINE FARMING REPORT (2002); Maori Aquaculture Claims Settlement Act 2004.

¹⁴ *But see* TUHOE DEED OF SETTLEMENT §§ 4.18-19 (2013), *available at* <http://nz01.terabyte.co.nz/ots/DocumentLibrary/TuhoeDOS.pdf> (explaining that the Te Urewera National Park will become a legal entity to be administered by representatives of Tuhoe and the government).

¹⁵ The government has revised its former policy of excluding conservation estate from treaty settlements. However, only small areas of lands are returned with most remedies being directed at joint-management, greater effective participation of tribes in decisions concerning conservation estate. *But see id.* § 4.18 (giving the Urewera Park legal personality).

precious minerals such as petroleum beneath their lands.¹⁶ Also, in New Zealand, these settlements do not allow for tribes to exercise any form of jurisdiction. A “practical” challenge raised by New Zealand is that tribal self-government is “normally associated with indigenous people living on reservations and not integrated into the wider community,”¹⁷ whereas Māori are said to be “fully-integrated.”¹⁸ However this is a rather formalistic approach to self-government. Jurisdiction can be exercised over an area irrespective of whether the land is owned by the self-governing authority. And indeed there are areas of New Zealand with a particularly high concentration of Māori.

What about the legal status of the Treaty of Waitangi? The Treaty is said by the government to be one of New Zealand’s founding instruments. But as former Prime Minister Sir Geoffrey Palmer puts it, the Treaty exists “half in and half out of the [New Zealand] legal system.”¹⁹ The Treaty of Waitangi itself may be taken into account in public decision-making but is only *required* to be considered if referred to in legislation.²⁰ Thus there are “treaty clauses” in about thirty Acts of Parliament that require decision makers to “take into account” or “have regard to” the principles of the Treaty of Waitangi.²¹ The Treaty of Waitangi thus is not enforceable unless parliament (in which Māori are a minority) has made it so.

Parliament is supreme; if Parliament wishes to enact a law and it has the numbers to do so (a simple majority) there is nothing to stop it, even if it is relatively clear that the law discriminates unjustifiably.²² Māori rights need to be more secure than they are at present. But the government’s basic view has been that Māori grievances can be redressed without limiting Parliamentary sovereignty through the provision of economic resources and the right to “self-management.”

¹⁶ The Office of Treaty Settlements notes “the Crown owns and manages nationalised minerals (including petroleum, uranium, gold and silver) under the Crown Minerals Act 1991, in the national interest. It considers that it should continue to do so. These resources are therefore not available for use in Treaty settlement.” OFFICE OF TREATY SETTLEMENTS, *HEALING THE PAST, BUILDING A FUTURE: A GUIDE TO TREATY OF WAITANGI CLAIMS AND NEGOTIATIONS WITH THE CROWN* 94 (2d ed. 2003).

¹⁷ Douglas Graham, *The New Zealand Government’s Policy*, in *RECOGNISING THE RIGHTS OF INDIGENOUS PEOPLES* 9 (Alison Quentin-Baxter ed., 1999).

¹⁸ *Id.* at 10.

¹⁹ Geoffrey Palmer, *The Treaty of Waitangi—Where to from Here?*, 11 OTAGO L. REV. 381, 383 (2007).

²⁰ As a treaty of cession, it must be incorporated into local law to be enforceable. See *Hoani Te Heuheu Tukino v Aotea District Maori Land Board*, [1941] AC 308 (P.C.).

²¹ For example, section 8 of the Resource Management Act 1991 provides “[i]n achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).”

²² See, e.g., Comm. on the Elimination of Racial Discrimination, New Zealand Foreshore and Seabed Act 2004, Decision 1(66), ¶ 6, U.N. Doc. CERD/C/66/NZL/Dec.1 (Mar. 11, 2005) [hereinafter Decision on the N.Z. Foreshore & Seabed Act], available at <http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.66.NZL.Dec.1.pdf> (noting the “discriminatory aspects” in the Foreshore and Seabed Act 2004).

In New Zealand, we have not started to seriously address issues related to jurisdiction or constitutional recognition of indigenous rights because there is a lack of political will to effect further change. Economic resources are being returned to iwi, but Māori continue to be over-represented in statistics relating to prison incarceration,²³ ill-health,²⁴ and poverty.²⁵ The recognition of political rights relating to self-government offers hope of addressing these social ills and promoting economic prosperity.²⁶ However, Māori advocates are running out of options in terms of strategic means to advance their arguments for reform. I think the Declaration can be put to work in efforts to seek reforms in New Zealand law.

As mentioned before, one of Professor Anaya's most significant contributions has been to conceive of indigenous rights in international law as an elaboration of human rights, in particular the right to self-determination. The human rights model was a departure from the view advanced by many advocates during the early years of Declaration negotiations. These advocates focused on decolonization—where over seventy colonies and dependent territories acquired independence—rather than human rights. Their argument was that as first peoples, indigenous peoples had the right, like the colonized peoples of Africa, for example, to independence.²⁷ Professor Anaya refers to this as the “continuity with historical sovereignty” model:

Indigenous groups are referred to as “nations” and identified as having attributes of sovereignty that predate and, at least to some

²³ Although Māori comprise fifteen percent of the total population, as of June 30, 2012, Māori made up fifty-one percent (4,391) of the total prison population. *New Zealand's Prison Population*, STATISTICS N.Z., http://www.stats.govt.nz/browse_for_stats/snapshots-of-nz/yearbook/society/crime/corrections.aspx (last visited Apr. 20, 2015).

²⁴ Based on death rates from 2010-12, Māori life expectancy at birth is 72.8 years for males and 76.5 years for females, compared with “80.2 years for non-Māori males and 83.7 years for non-Māori females.” *Narrowing Gap Between Māori and Non-Māori Life Expectancy*, STATISTICS N.Z. (Apr. 16, 2013), http://www.stats.govt.nz/browse_for_stats/health/life_expectancy/NZLifeTables_MR10-12.aspx.

²⁵ For example, in relation to child poverty, from 2011–2013, on average, around thirty-four percent of Māori children lived in poor households, compared to an average of sixteen percent of European children. CHILD POVERTY MONITOR, CHILD POVERTY AND LIVING STANDARDS 10 (2012), available at http://www.nzchildren.co.nz/document_downloads/B.%202014%20CPM%20Child%20Poverty%20and%20Living%20Standards.pdf.

²⁶ See Stephen Cornell & Joseph P. Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 AM. INDIAN CULTURE & RES. J., no. 3, 1998, at 187.

²⁷ Under the decolonization program, dozens of colonies acquired independence, leading to the creation of new states. Inspired by the decolonization program, indigenous advocates in the U.N. Declaration on the Rights of Indigenous Peoples negotiations argued that indigenous peoples as “peoples” were entitled to the right to self-determination and the option of independence. See, e.g., WORLD COUNCIL OF INDIGENOUS PEOPLES, INTERNATIONAL COVENANT ON THE RIGHTS OF INDIGENOUS PEOPLES (1983) (on file with author).

extent, trump the sovereignty of the states that now assert power over them. The rhetoric of nationhood is used to posit indigenous peoples as states, or something like states, within a perceived post-Westphalian world of separate, mutually exclusive political communities. Within this frame of argument, advocates for indigenous peoples point to a history in which the “original” sovereignty of indigenous communities over defined territories has been illegitimately wrested from them or suppressed. The rules of international law relating to the acquisition and transfer of territory by and among states are invoked to demonstrate the illegitimacy of the assault on indigenous sovereignty and derivative rights over lands and natural resources. Under this argument, claims to land, group equality, culture, and development assistance stem from the claim for reparations for the historical injustices against entities that, a priori, should be regarded as independent political communities with full status as such on the international plane.²⁸

This eloquently encapsulates the basis of what I will call the historical sovereignty model. And it was used by indigenous advocates to support their claim to a right to self-determination as set out in common Article One of the International Covenants. Of course, states disliked the historical argument just as they opposed sovereignty-based claims domestically. When the Declaration negotiations first commenced, most states sought a restatement of human rights or minority rights, but specifically applied to indigenous peoples. And of course, indigenous advocates disliked this.

Given these two extremes, Professor Anaya proposed a human rights approach to self-determination. Whereas traditionally self-determination was connected with the decolonization project, it did not have to be limited to that end-state remedy. In fact, self-determination could be seen as advancing the human rights of other peoples, including indigenous peoples.²⁹ In the indigenous context it was essentially remedial in nature—restoring indigenous peoples’ autonomy and their territories. Self-determination and other indigenous rights in the Declaration are about addressing international law’s denial of basic human rights to indigenous peoples.

²⁸ S. James Anaya, *Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend*, 16 *COLO. J. INT’L ENVTL. L. & POL’Y* 237, 241 (2005).

²⁹ ANAYA, *supra* note 1, at 77-78.

This human rights model was adopted by many indigenous advocates in the Declaration negotiations.³⁰ It is now the conventional wisdom in the international movement.³¹

And this concept has been put to work to deliver real outcomes for indigenous peoples. As an advocate, Professor Anaya has advanced the human rights model in the context of indigenous peoples' claims to traditional lands.³² In *Awas Tingni* (2001), the Inter-American Court of Human Rights recognized that the human right to property in Article 21 of the American Convention on Human

³⁰ The human rights discourse and especially discrimination resonated with indigenous peoples' treatment under international law. See, e.g., Moana Jackson, *The Face Behind the Law: The UN and the Rights of Indigenous Peoples*, in 8(2) YEARBOOK OF NEW ZEALAND JURISPRUDENCE SPECIAL ISSUE: TE PURENGA 10, 22 (Ani Mikaere ed., 2005) ("[I]f the right [to self-determination] is a human right that inheres in peoples because of their humanity, then the attempts that States make to deny or limit the application of Article Three is to impose the same assumptions of human worthlessness that colonisation has always done.").

³¹ After the U.N. General Assembly adoption of the Declaration, Australian aboriginal activist, Les Malezer, addressed the General Assembly and spoke of the Declaration in these human rights terms:

We emphasise once again that the Declaration on the Rights of Indigenous Peoples contains no new provisions of human rights. It affirms many rights already contained in international human rights treaties, but rights which have been denied to the Indigenous Peoples. As Indigenous Peoples we now see a guarantee that our rights to self determination, to our lands and territories, to our cultural identities, to our own representation and to our values and beliefs will be respected at the international level.

....

The Declaration carries a message for all States that have links and association with Indigenous Peoples. That message is not about secession, as some States may fear, but about co-operation and partnership to ensure that all individuals, regardless of race or beliefs, are truly equal and that all peoples are respected and allowed to develop.

Les Malezer, Chairman, Global Indigenous Caucus, Statement to the U.N. General Assembly (Sept. 13, 2007). See also Les Malezer, Co-Chair, National Congress of Australia's First Peoples, Keynote Speech to the Annual Human Rights Dinner of the Human Rights Law Centre, (June 15, 2012), available at http://webcache.googleusercontent.com/search?q=cache:oSTTd_oVM94J:www.hrlc.org.au/files/HRLC_Human_Rights_Dinner_2012_Keynote_-address.docx+&cd=3&hl=en&ct=clnk&gl=nz&client=safari.

³² See S. James Anaya & S. Todd Crider, *Indigenous Peoples, the Environment, and Commercial Forestry in Developing Countries: The Case of Awas Tingni, Nicaragua*, 18 HUM. RTS. Q. 345 (1996); see also INTER-AM. COMM'N ON HUMAN RIGHTS, INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES: NORMS AND JURISPRUDENCE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM 7 (2010).

Rights³³ includes the collective right of indigenous peoples to their lands and resources on the basis of traditional tenure and indigenous customary law.³⁴ Indigenous tenure is deserving of the same equal protection as non-indigenous tenures.³⁵ This reasoning has since been adopted and applied in other Inter-American Court decisions³⁶ and in other jurisdictions.³⁷

In New Zealand, the human rights model has proven critical in the context of iwi claims to customary property. For example, Māori appealed to human rights and especially the right to equality and non-discrimination to obtain a decision from the U.N. Committee on the Elimination of Racial Discrimination criticizing the New Zealand government's approach to iwi claims to customary property in the New Zealand's coastal area.³⁸ Iwi submissions to the Committee adopted the human rights discourse used by Anaya in the *Awas Tingni* decision. In particular, iwi argued that Māori customary property had to be respected on the same basis as other forms of property in New Zealand.³⁹

In New Zealand, the adoption of the Declaration has sparked greater interest in the Declaration and in international indigenous rights. Several judicial decisions have referred to it.⁴⁰ And I think the human rights model has great

³³ American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

³⁴ *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

³⁵ The court ruled that to not recognize indigenous peoples forms of tenure as “property”—and therefore protected as a human right under Inter-American human rights law—would be discriminatory.

³⁶ *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

³⁷ The African Commission on Human and Peoples Rights decision in *Endorois* recognized the Endorois indigenous people's right to land and informed consent. See *Centre for Minority Rights Dev. (Kenya) & Minority Rights Grp. Int'l (on behalf of Endorois Welfare Council) v. Kenya*, Comm. No. 276/2003, Afr. Comm'n on Human & Peoples' Rights (2010).

³⁸ See Decision on the N.Z. Foreshore & Seabed Act, *supra* note 22. For comment on the decision, see Claire Charters & Andrew Erueti, *Report from the Inside: The CERD Committee's Review of the Foreshore and Seabed Act 2004*, 36 VICTORIA U. WELLINGTON L. REV. 257 (2005).

³⁹ Decision on the N.Z. Foreshore & Seabed Act, *supra* note 22.

⁴⁰ See *Takamore v Clarke* [2012] NZSC 116; *N.Z. Māori Council v Attorney-Gen.* [2013] NZSC 6, [2013] 3 NZLR 31, at paras [91]–[92], [118]; *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733, at para [12]; *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573, at paras [16], [107], [250]–[54], [309]; *Greenpeace of N.Z., Inc. v Minister of Energy and Res.* [2012] NZHC 1422, at paras [58], [83], [141]; *Otimi v R* [2012] NZCA 216, at para [48]; *Taueki v Horowhenua Dist. Council* (2012) 294 Aotea MB 236 (294 AOT 236) New Zealand Māori Land Court, A20090001234, 18 December 2012, at para [29]. Cases that mention the Declaration in reported submissions but not in the final judgments include *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305, at 313–14, and *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179, 7–8, 18 (HC).

potential. So far, the focus has been on treaty rights and environmental law. The Declaration brings a new element to the mix.

To cast indigenous peoples' claims as human rights issues has several advantages. As Professor Anaya has noted, the international community is amenable or hospitable to claims couched as human rights.⁴¹ The human rights model is less confrontational than the historical sovereignty model. Yet it is also able to address the historical elements that underpin much of the indigenous movement.⁴² If indigenous rights are human rights, indigenous peoples are able to utilize the human rights institutions within the U.N. regional human rights systems including U.N. agencies, domestic human rights commissions, human rights non-governmental organizations, and human rights scholars. The international human rights movement is the new utopia or the *lingua francas* of the moment.⁴³ The human rights model is universal in that it can be applied to and adopted by indigenous peoples from regions outside the settler-states of Australasia and the Americas. The human rights model also indicates that indigenous rights possess "binding qualities" as elaborations of human rights enshrined in international treaties, including the International Human Rights Covenants.⁴⁴ This is important given that the Declaration is technically not binding and the CANZUS states, as noted above, argue that many of the rights in the Declaration—specifically self-determination—are aspirational.

However, some scholars object to the human rights model. Patrick Macklem, for example, argues indigenous rights are not intended to "transcend the contingencies of history and protect universal features of humanity. Their significance lies in the contingencies of history itself, namely, in the ways in which international law has organized international political reality."⁴⁵ History then, specifically European colonization, is determinative of the moral basis of indigenous rights.⁴⁶ For Macklem, indigenous rights are directed at the wrongs

⁴¹ See Anaya, *supra* note 28, at 257 ("Within its human rights frame, international law is hospitable to indigenous peoples' claims of rights over lands and natural resources, at least to a point.")

⁴² *Id.* at 241. ("Historical narrative enters into this strain of argument to identify past acts of oppression against indigenous peoples, but the backward-looking narrative is mainly used to identify the origins and historical continuity of present day oppression and inequities that affect today's indigenous human beings and their communities.")

⁴³ See SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 88 (2010) (noting human rights has surpassed decolonization as the new utopia).

⁴⁴ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

⁴⁵ Patrick Macklem, *Indigenous Recognition in International Law: Theoretical Observations*, 30 MICH. J. INT'L L. 177, 208 (2008).

⁴⁶ Several prominent liberal theorists use a corrective or rectificatory justice argument to support indigenous peoples' rights in international law to "historical self-determination." See, e.g., Margaret Moore, *An Historical Argument for Indigenous Self-Determination, in SECESSION AND SELF-DETERMINATION* 89 (Stephen Macedo & Allen E. Buchanan eds., 2003);

established by international law, in particular indigenous peoples' "historic exclusion from the distribution of *sovereignty* initiated by colonization that lies at the heart of the international legal order."⁴⁷

There is a risk with the human rights discourse that the historical underpinnings of indigenous claims are relegated to the background. This can be witnessed in litigation over indigenous land rights. The Australian High Court decision of *Mabo* overturned as discriminatory the common law rule that Australia was *terra nullius* when sovereignty was asserted over the country.⁴⁸ As noted by Justice Brennan, who delivered the majority opinion, "[w]hatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted."⁴⁹ The decision was breakthrough; critical to the court's reasoning was human rights. Indigenous forms of property, should they be proven to exist, ought to be accorded the protection of the law like other forms of property.

Interestingly, the historical and ongoing injustices brought about by British organized settlement provided only a distant backdrop to the decision. For the Meriam islanders who brought the claim, there could be no doubt that underlying the native title claim was a broader issue relating to political autonomy—although these were filtered out of the *Mabo* decision.

The decision of *Awas Tingni* provides another example.⁵⁰ The Inter-American Court recognized that the Awas Tingni community had a human right to property under the Convention and ordered that Nicaragua demarcate and title the community's lands.⁵¹ However, the primary justification for recognition of the right was human rights to equality, property, and culture. As the Court put it:

The close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to

ALLEN E. BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW (2007).

⁴⁷ Macklem, *supra* note 45, at 209. Macklem gleans the purpose of indigenous rights in international law from his review of the legal history of international indigenous rights during the twentieth century, that is, the protection of indigenous workers in colonies by the ILO in the 1920s, to the promulgation of ILO Conventions 107 and 169, up to its most contemporary expression in the U.N. Declaration on the Rights of Indigenous Peoples.

⁴⁸ *Mabo v Queensland (No. 2)* (1992) 175 CLR. 1 (Austl.).

⁴⁹ *Id.* para 42.

⁵⁰ *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).*

⁵¹ *Id.*

preserve their cultural legacy and transmit it to future generations.⁵²

Absent from the Court's reasons justifying demarcation is the community's historical experience of being first peoples and their colonization, exploitation, and marginalization by colonizing powers. These form the background to the decision, but they do not form part of the primary normative bases for recognition of the community's land rights. Instead, human rights are front and center, and while that delivered a result for the *Awes Tingni* community, having human rights as the sole animating basis for indigenous rights—especially the right to culture—can potentially constrain the scope and nature of indigenous rights.⁵³ A greater emphasis on the historical sovereignty model would seem to counter this and also highlight the political dimensions of claims making.

III. CONCLUSION

What is going on behind many of these cases is a struggle for greater autonomy. Many land rights cases, or indeed most claims made by iwi, are in fact proxy battles for greater control over their lives and their resources. And to be fair, the courts are not really the place to resolve these issues—it requires a political commitment, which has been lacking to date. What I hope for is the Declaration to be wielded in support of further reforms in New Zealand, especially jurisdiction and constitutional recognition of the Treaty of Waitangi. Pressure is mounting for the government to ensure Māori rights receive greater recognition and protection as evidenced by the recent Government-sponsored inquiry into constitutional reform.

But what I expect to see in New Zealand is a multi-pronged or bifurcated approach in relation to implementation of the Declaration, involving human rights and the historical sovereignty model; perhaps we might see a similar approach across the CANZUS states. Human rights will be a critical form of the ongoing discourse, but it will develop alongside the established traditional treaty-based discourse. Many New Zealanders are aware of the Treaty of Waitangi and the effects of colonization and settlement on Māori, including its continuing effects on Māori communities. The human rights model accommodates this history by using it to determine the nature and extent of the human rights remedy, whether self-

⁵² *Id.* para 149.

⁵³ The constraining effect of the human rights model is clear from the Inter-American Court's treatment of the Saramaka claim to natural resources and gold within its territory. A right to timber was permitted because it was seen as "essential for the survival of their way of life," but such was not the case for gold, as this was not traditionally used by the Saramaka people. See *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 155 (Nov. 28, 2007). On critiques of indigenous claims making based on culture, see COURTNEY JUNG, *THE MORAL FORCE OF INDIGENOUS POLITICS: CRITICAL LIBERALISM AND THE ZAPATISTAS* (2008) & KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY* (2010).

determination or restoration of land rights. However, the historical sovereignty argument leans more toward a reading of self-determination in the Declaration that steps outside of the typical discourse about citizenship and equality within the modern state and into the area of equality between states. And this normatively is a powerful argument in the call for fundamental constitutional change.



