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Maori and the right to self-determination: Exercising their right to self-determination through treaty settlements

JACLYN WILLIAMS

**MAORI AND THE RIGHT TO SELF-
DETERMINATION: EXERCISING THEIR RIGHT
TO SELF-DETERMINATION THROUGH TREATY
SETTLEMENTS**

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Abstract

Indigenous peoples have been victims of oppression, discrimination for many years. Policies of assimilation and integration have contributed to the socio-economic position Maori are in today. Maori have lost large areas of land and autonomy over their resources. The adoption of the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) finally affirms indigenous peoples right to self-determination. The Declaration outlines a range of individual and collective rights of indigenous peoples that are essential for their political, economic, social and cultural development.

This paper analyses whether the redress provided in the Treaty settlement framework allowed Maori to exercise self-determination as specified under the Declaration. It will argue that the Treaty settlement framework enables Maori to exercise sufficient levels of economic and cultural self-determination. However it currently fails to provide Maori sufficient level of political and social autonomy.

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Indigenous Peoples-Human Rights-International Law

I INTRODUCTION

Maori have been fighting to reclaim their autonomy since the 1840s. Maori and other indigenous peoples around the world are considered to be among the most disadvantaged and vulnerable groups of people on the planet. Each indigenous group, including Maori, have their own unique story to tell but all stories share the same themes of oppression, land loss, marginalisation and discrimination. Indigenous peoples are fighting to assert and affirm their right to self-determination, trying to reclaim their lost lands and natural resources, develop their people and strengthen their cultures.¹ Indigenous groups have not found adequate recourse within their own domestic legal system and have ventured further abroad to the international stage. There are a myriad of international organisations and instruments which indigenous peoples are 'plugging' into to find justice.²

The topic of self-determination is considered one of the paramount issues affecting indigenous peoples' rights and can be considered the foundation of their rights³. It is also one of the most contentious issues relating to indigenous peoples rights. States find it contentious as they tend to equate self-determination as a unilateral right to secede while most indigenous peoples have no desire to secede and focus instead of the other aspects of the right. I will discuss this further in my paper.

James Anaya describes self-determination as a "universe of human rights precepts concerned broadly with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies."⁴ The right to self-determination is considered to be essential to the survival of indigenous peoples.⁵ The

¹ Warren Allmand "The International Recognition of Indigenous Rights" (2005) 5 McGill International Review 34.

² Claire Charters *Indigenous peoples and international law and policy* (2007) 18 PLR 22.

³ See Alexandra Xanthaki *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press, Cambridge, 2007), 131.

⁴ S.J. Anaya, *Indigenous peoples in international law* (Oxford University Press, Oxford, New York, 2004) 98.

⁵ UN Commission on Human Rights "Report of the WG on draft declaration on indigenous peoples" (6 December 1999) E/CN.4/2000/84, para 46.

key themes of self-determination are the ideas of freedom and equality, non discrimination and the will of the people.

The question that arises is do indigenous peoples have the right to self-determination? Indigenous people argue that the recognition of their right comes from the human right violations they have suffered due to States 'policies of destruction and assimilation'.⁶

On 13 September 2007 the United Nations Declaration on the Rights of Indigenous Peoples (the **Declaration**) was adopted after over twenty years of negotiations⁷. The Declaration, a non binding document, finally affirms indigenous peoples' right to self-determination.

The Declaration has 23 preambular paragraphs and 46 substantive articles which deals with the individual and collective rights of indigenous peoples in particular rights concerning self determination⁸, autonomy and self-government⁹, redress¹⁰, land and resource rights¹¹ and the right of indigenous peoples to maintain and strengthen their distinct political, legal, economic, social and cultural institutions¹².

This paper analyses whether the redress provided in the Treaty settlement framework allowed Maori to exercise self-determination as specified under the Declaration.

Section II of the paper analyses the evolution of self-determination since the creation of the United Nations regime in the 1940s. It looks at how self-determination evolved from a principle to a legal right under international law. It also looks at the

⁶ Xanthaki, above n 3, 132.

⁷ UNGA "The United Nations Declaration on the Rights of Indigenous Peoples" (13 September 2007) UN Doc A/61/L.67 [The Declaration].

⁸ Ibid, article 3.

⁹ Ibid art 4.

¹⁰ Ibid, art 8(2).

¹¹ Ibid, arts 25 and 26.

¹² Ibid, art 5.

scope and different beneficiaries and how it transformed through decolonisation, apartheid and the democracy phases. The paper also examines what each phase meant for indigenous peoples' right to self-determination.

In Part III there is an analysis of the self-determination provisions contained in the Declaration. I put forward an interpretation of self-determination under the Declaration based on contextual reading and historical interpretations and use this to measure examples of self-determination in New Zealand and whether or not they meet the Declaration standards.

Part IV measures the interpretation of self-determination, set out in Part III, against different examples of self-determination in New Zealand. I analyse whether the examples given afford Maori the level of self determination as contained in the Declaration. I focus on four key areas as set out in the Article 3 of the Declaration; political, economic, social and cultural aspects.

This paper will illustrate that the self-determination models permitted by the Crown in New Zealand falls short of the right to self-determination contained in the Declaration in certain areas. In general the Crown fails to provide Maori the right to determine their own political status. Though there are different models to choose from Maori usually do not have a choice of which model to use i.e. can not freely choose their political status. Political self-determination underpins the other three aspects of self-determination as the ability to pursue development involves policy decisions which occur in a political system. However developments are possible in this area through the Treaty settlement framework as a result of recent negotiations between Ngai Tahu and the Crown where a change to the current constitutional arrangements is being negotiated.

I argue that redress provided to Maori through the Treaty settlement process enables Maori to pursue their economic development and ultimately enable economic self-determination. Substantial amounts of money are being provided to Maori for the purposes of settling breaches of the Treaty of Waitangi by the Crown and to provide

Maori an economic basis for future development. Ten years after settling their historical Treaty claims, Ngai Tahu and Waikato-Tainui have been able to build their assets up to \$1 billion. This has made both iwi's major commercial players and greatly positioned to support their people instead of the government.

In regards to social self-determination the devolution policies by the Crown required Maori organisations to provide service delivery to their people on behalf of the Crown. This gives Maori greater responsibility than they previously had but it falls short of autonomy as Maori organisations are accountable to Ministers and not to their people. Treaty settlements generally do not provide redress to address this aspect other than providing economic redress which will enable Maori to pursue their social development. The Ngai Tahu and Waikato-Tainui settlements enable these iwi to fund their own social services. Recent Treaty settlements have provided instruments which address this aspect of self-determination.

In regards to cultural self-determination Treaty Settlements provide many different instruments which allow Maori to exercise their right as stated under the Declaration. Negotiations between Maori and the Crown on cultural redress are interest based and various instruments have been created to meet the different needs of Maori.

¹¹ A. Cassin, *Self-Determination of Peoples: A Legal Study* (Cambridge University Press, New York, 1975) 11.

¹² *Ibid.*, 12.

¹³ *Ibid.*, 12.

¹⁴ Hans Kelsen, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Toronto Press, Toronto, 1968) 22.

II EVOLUTION OF SELF DETERMINATION SINCE CREATION OF UNITED NATIONS

We can not discuss self-determination as contained in the Declaration without examining what self-determination means under international law and how it has evolved over time. It also indicates how the self-determination provisions in the Declaration should be interpreted. For the purposes of this paper I will primarily focus on the developments since the adoption of the United Nations Charter.

A Political principle

The principle of self-determination can be linked to both western school of thought and non-western theories. The origin of self-determination can be traced all the way back to the American Declaration of Independence in 1776 and the French Revolution in 1789 and possibly even further back in time.¹³ In regards to the French Revolution the concept of self-determination came about mainly to stop territorial changes which went against the will of the people and to a lesser extent a principle of democratic legitimisation of governments.¹⁴

The principle of self-determination resurfaced again in the twentieth century. President Woodrow Wilson linked self-determination to western democratic theory and the right of the people to freely choose their government.¹⁵ V. I. Lenin, the leader of the Russian Revolution, linked self-determination to the liberation of oppressed peoples and the socialist political philosophy. Lenin was a strong advocate of the principle of national self-determination but only so far as to promote the movement against oppressor nations and colonisation.¹⁶ The former believed self-determination to be a standard of

¹³ A Cassese *Self-Determination of Peoples: A Legal Reprisal* (Cambridge University Press, New York 1995) 11.

¹⁴ *Ibid*, 32.

¹⁵ *Ibid*, 32.

¹⁶ Hurst Hannum *Autonomy, Sovereignty, and Self-determination: the accommodation of conflicting rights* (University of Pennsylvania Press, Philadelphia, 1990) 32.

democracy where the latter understood it to be more in the context of anti-colonialist postulate.¹⁷ These differences in interpretation continue to exist today.

Wilson's interpretation would allow groups within whole populations to be entitled to the principle of self-determination such as indigenous peoples but only when they are unable to freely choose their government. However under the interpretation given by Lenin the concept is targeted to whole populations which would exclude indigenous groups who are usually minority groups within a population.

Before the creation of the United Nations regime self-determination was understood to be used in the following: (a) during territorial changes of sovereign states once people have made that decision; (b) democratic principle legitimising the governments of modern States, where the people decide their rulers; (c) an anti-colonial postulate; (d) a principle of freedom for 'nations' or ethnic groups constituting minorities in sovereign States.¹⁸ Under this criteria indigenous peoples fit under category (d) and are therefore 'peoples' entitled to the exercise self-determination. However as will be seen in the next section the scope of the principle decreased as it became a right under international law.

B United Nations Charter (1940)

Self-determination was affirmed in the human rights framework where it went from a political postulate to part of international law.¹⁹ Article 1(2) of the United Nations Charter²⁰ (**the Charter**) mentions the principle of self-determination twice and provides, as one of the purposes of the United Nations (UN), "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."

¹⁷ Cassese, above 13, 32.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, 65.

²⁰ The Universal Declaration of Human Rights (10 December 1948).

The principle is further mentioned under Article 55 of the Charter. Article 55 states:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (a) higher standards of living, full employment and conditions of economic and social progress and development; (b) solutions of international economic, social, health and related problems; and international cultural and educational cooperation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

In the Wilsonian era self-determination was only a political principle and asserted as the peoples' entitlement to democracy.²¹ Wilson backed away from his assertions after realising that his ideals had no parameters and were causing consternation around the world from the threat of civil unrest and disruption to territorial sovereignty.²² It was during the UN era that the scope of the principle was minimised and restricted to colonial peoples.

From the creation of the UN regime the principle of international law branched out and became a legal right. Self-determination is now widely known to be a principle of customary international law and arguable even *jus cogens*, a peremptory norm.²³

As a principle, self-determination does not set out the legal consequences if States are not in compliance and is more general and abstract than a right. It is only one important factor to consider along with other principles of international law such as territorial integrity, national sovereignty and respect for the rights of others.²⁴

²¹ Cassese, above n 13, 33.

²² Castellino and Gilbert "Self-Determination, Indigenous Peoples and Minorities" *Macquarie Law Journal* (2003) Vol 3, 173.

²³ See generally Anaya above n 4, Hannum, above n 16; and Xanthaki above n 3.

²⁴ Xanthaki, above n 3, 157.

Alternatively the right to self-determination does specify the legal consequences of non-compliance and is more specific and definitive.²⁵

Following on from the discussion above it was no surprise that the principle in the Charter was characterised as being in a 'rather loose and weak form'.²⁶ The self-determination provisions encapsulated in the Charter was only taken to mean a principle or goal of the UN and only framed to mean self-government and not sovereignty.²⁷ The Charter also did not impose any legal obligations on States or state what would happen if States did not abide by the Charter.²⁸ These provisions reinforce the fundamental importance and respect for the principles of equal rights and self-determination of peoples with the main emphasis being on peaceful relations.

The principle of self-determination is still in existence and has not been eclipsed by the legal right. After looking at the difference between a principle and a right you can appreciate the reasons why the scope of the principle decreased when it was became a human right. Once the concept of self-determination became a right it had to become more detailed. With States having major concerns about the potential threat to the principle of territorial sovereignty it was easy to see why they would lobby for the scope to be as narrow as possible and to ensure that territorial integrity remained the paramount consideration.

So even though it was now part of international law, it had lost some of the scope that it had as a political postulate.

1 Indigenous peoples rights under the United Nations Charter

The Charter mentions the principle of equal rights and self-determination of peoples. The Charter does not specify who the beneficiaries of the principle to self-

²⁵ Ibid.

²⁶ Cassese, above n 13, 43.

²⁷ Ibid.

²⁸ Ibid.

determination are even though it mentions the principle twice and establishes a system to implement the right for non-self-governing territories.²⁹

The Charter also does not specify what the principle encapsulates. Again this goes back to principles being more general in nature. During the debate on the Article 1(2) it was noted that self-determination did not mean the right of a minority, ethnic or national group to secede from a sovereign country.³⁰ This would then exclude indigenous populations from being entitled to secession unless they constituted the majority of the population. This distinction is not important because under the Charter no peoples were entitled to secede as it only allowed self-government. One of the purposes of the Charter is to promote friendly relations among nations. It can be argued that this leans more towards whole populations as it does not specify relations within nations. This argument would then exclude indigenous peoples from being considered peoples.

C Decolonisation

After World War II the situation of colonisation was a major issue around the world. Colonial countries, backed by socialist states, began to rely on the self-determination provision in the UN Charter as a legal entitlement to decolonisation.³¹

1 Declaration against Colonialism

Over time detailed international rules were created to help solve the problem of colonisation. Two important resolutions adopted by the UN General Assembly were Resolution 1514(XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples (**Declaration against Colonialism**)³² and Resolution 1541(XV)³³. Resolution 1514 (XV) helped transform the principle of self-determination into a legal

²⁹ Xanthaki, above n 3, 137.

³⁰ Cassese, above n 13, 42.

³¹ Ibid, 65.

³² UNGA Resolution 1514 (XV) (14 December 1960).

³³ UNGA Resolution 1541(XV) (15 December 1960).

right.³⁴ In the 1970s the Declaration of Friendly Relation was adopted³⁵. This Declaration built on the former resolutions and extended the scope of the right to some extent as will be outlined below.

In the 1960s the Declaration against Colonialism was adopted.³⁶ The Declaration "[s]olemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all forms and manifestations."³⁷ It also recognised for the first time that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."³⁸

This Declaration provides colonial peoples with the right to self-determination. However colonial peoples are only entitled to exercise external self-determination and may only exercise the right once.

Article 1 of the Declaration against Colonialism describes the beneficiaries of the right of self-determination under the Declaration as peoples subject to alien subjugation, domination and exploitation.³⁹ While the Declaration is considered a soft law instrument it is still an authoritative interpretation of the Charter.⁴⁰

2 *Indigenous peoples' rights under the Declaration against Colonialism*

I agree with Alexandra's argument that indigenous peoples have been victims of subjugation, domination and exploitation from the dominant populations of the state.⁴¹ The applicability of the Declaration against Colonialism to indigenous peoples turns on the meaning of the word 'alien'. Alexandra argues that if 'alien' is interpreted to mean

³⁴ Cassese, above n 3, 70.

³⁵ UNGA Resolution 2625(XXV) (24 October 1970).

³⁶ UNGA Resolution 1514 (XV) (14 December 1960).

³⁷ Xanthaki, above n 3, 136.

³⁸ UNGA Resolution 1514 (XV) (14 December 1960), Preamble, para 2.

³⁹ UNGA Resolution 1514 (XV) (14 December 1960), Article 1 and see Xanthaki, above n 3, 137.

⁴⁰ Xanthaki, above n 3, 137.

⁴¹ *Ibid.*

cultural and not 'territorial' then indigenous people will satisfy the criteria.⁴² This is because indigenous peoples have suffered oppression by nations of different cultures.⁴³

The principle of territorial integrity is considered the main obstacle to indigenous peoples' right to self-determination. Article 6 states that "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations" with Article 7 reaffirming the principle of territorial integrity.

Another barrier is that the Declaration against Colonialism recognises peoples as being whole populations of a State.⁴⁴ Indigenous peoples very rarely constitute the whole population of a territory. In fact most indigenous people represent minorities within a territory. If indigenous peoples were to be considered 'peoples' then the way in which they exercise their right to self-determination would not be permitted to disrupt the sovereignty or territorial integrity of the State they lived in.⁴⁵ Therefore it would be limited to an internal right to self-determination.

Colonies have the following three characteristics: foreign domination; the presence of a political/territorial entity in the colony; and geographical separation from the colonising power.⁴⁶ Indigenous peoples would easily be able to prove the first two criteria how the last category would be a barrier for most indigenous peoples including Maori. For Maori, the colonising State came and settled in the New Zealand. In the post war era Maori began to steadily move from their traditional lands to urban centres and have become integrated into society. There are pockets around New Zealand where a high concentration of Maori reside such as the Far North or the East Coast of the North Island. However this does not satisfy the criteria of geographical separation. This view

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Xanthaki, above n 3, 137.

⁴⁶ Glenn T. Morris "International Law and Politics: Towards a Right to Self-Determination for Indigenous Peoples" in Jaimes, M Annette *The State of Native America: Genocide, Colonization and Resistance* (South End Press, Boston, Massachusetts, 1992)74.

is known as the “Blue-Water” or “Salt-Water” thesis of decolonisation where the colony is separated from the coloniser by a substantial amount of water.

3 *Resolution 1541 (XV)*

Soon after the adoption on the Declaration against Colonialism, Resolution 1541 (XV) was also adopted.⁴⁷ The Resolution gave recognition of self-determination to non-self-governing territories which were territories geographically separate and ethnically and/or culturally distinct from the country administering it.⁴⁸ Tokelau and New Caledonia are examples of indigenous territories recognised by the United Nations as non-self-governing territories.⁴⁹ Under the resolution non-self-governing territories can achieve “a full measure of self-government” by establishing a sovereign independent state or free association with an independent state or integration with an independent state.⁵⁰

4 *Indigenous peoples’ rights under Resolution 1541*

Alexandra believes that indigenous peoples satisfy the criteria under this Resolution as they suffer “from arbitrary discrimination in their everyday life and are ethnically distinct from the rest of the population of the territory.”⁵¹ She notes that the main barrier to this argument is the interpretation of ‘geographically separate’. If you were to interpret it as not meaning international borders then indigenous peoples would satisfy the criteria. As mentioned before indigenous peoples very rarely constitute the whole population of the State therefore if international boundaries were used then indigenous peoples would not be considered ‘peoples’ entitled to the right of self-determination.

⁴⁷ UNGA Resolution 1541(XV) (15 December 1960).

⁴⁸ UNGA Resolution 1541(XV) (15 December 1960), Principle IV.

⁴⁹ See Xanthaki, above n 3, 139.

⁵⁰ Hannum, above 16, 39.

⁵¹ Xanthaki, above n 3, 138.

To summarise, as a result of the Resolutions noted above colonial peoples were entitled to the right to self-determination and as a result should be *freely determine their political status and freely pursue their economic, social and cultural development*.⁵² Only whole populations were entitled to self-determination⁵³ and their right only extended to the external aspect of the right. Therefore sub groups within a population were excluded. The methods for exercising external self-determination, as captured in international instruments, were sovereignty or association with a sovereign state or integration with a sovereign state.⁵⁴ Also colonial peoples could only exercise this right once as it was not considered a continuing right.⁵⁵

Both Resolutions helped identify some of the beneficiaries of self-determination and listed the applications of the right. There are arguments to support indigenous peoples being considered peoples under the Resolutions but these arguments are weak. I think the main barrier for indigenous peoples is that they are not whole populations of a State and also they do not satisfy the 'blue-water' thesis. States are concerned that any categorisation of indigenous peoples as peoples will conflict with the principle of territorial integrity.

D 1966 International Covenants on Human Rights

Article 1 of both the UN Covenant on Economic, Social and Cultural Rights and UN Covenant on Civil and Political Rights (**International Covenants**) provides that:⁵⁶

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

⁵² UNGA Resolution 1514 (XV) (14 December 1960), Operative paragraph 2.

⁵³ UNGA Resolution 1514 (XV) (14 December 1960), Operative paragraph 6.

⁵⁴ UNGA Resolution 1541(XV) (15 December 1960), Principle VI.

⁵⁵ UNGA Resolution 2625(XXV) (24 October 1970), Para VI; Cassese, above n 13, 72.

⁵⁶ International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3. and International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.

Both International Covenants extended the scope of external self-determination from only statehood to contracting states to refrain from interfering with other States.⁵⁷ The International Covenants also revitalised the UN provisions relating to dependent peoples, and include self-determination over peoples' natural resources.⁵⁸

After analysing other provisions of the International Covenants we can assume that internal self-determination encompasses those rights and freedoms, contained in the International Covenants that allow peoples to express their popular will.⁵⁹ These include the right to freedom of expression,⁶⁰ the right of peaceful assembly,⁶¹ the right to freedom of association,⁶² the right to vote,⁶³ and the right to take part in public affairs, directly or through a representative.⁶⁴

The beneficiaries of Article 1 are entire populations living in independent and sovereign States or have yet to attain independence (colonial peoples) and populations living under foreign military occupation.⁶⁵

1 Indigenous peoples' rights under the International Covenants

Under the criteria set out by Antonio above indigenous peoples would not fall under the category of peoples as they rarely constitute whole populations. However if indigenous peoples are able to prove that they are living under foreign occupation then they may satisfy the test.

⁵⁷ Cassese, above n 13, 66.

⁵⁸ Before self-determination was focused on political considerations with the International Covenants now opening the right to include economic considerations. Cassese, above n 13, 66.

⁵⁹ Cassese, above n 13, 53.

⁶⁰ International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3, and International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, Article 19.

⁶¹ *Ibid.*, Art 21.

⁶² *Ibid.*, Art 22.

⁶³ *Ibid.*, Art 25 b.

⁶⁴ *Ibid.*, Art, 25 a.

⁶⁵ Cassese, above n 13, 59.

During the drafting process of the International Covenants it was articulated that 'minorities' were not considered 'peoples' under the covenants and that minorities were dealt with in Article 27 of the ICCPR. It is now widely accepted that indigenous groups do not follow under the category of minorities.⁶⁶ However an analysis of the debates regarding the drafting of this provision illustrates that it was not the intention of the States that peoples should include sub-groups within a State. Therefore it is clear that indigenous peoples can not considered peoples under the International Covenants.

E Democracy and Participation

1 Declaration on Friendly Relations

In 1970 the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (**Declaration on Friendly Relations**) was adopted.⁶⁷

The Declaration of Friendly Relations protects the territorial integrity of States and also widens the beneficiaries of the right of self-determination. This Declaration expands the modes of implementing the external aspect of self-determination set out in Resolution 1541 (XV) by including the option of *emerging into any other political status freely determined by the people*.⁶⁸ The apartheid system in South African was a primary concern for the international community at that time so the scope of self-determination was moulded to reflect this problem.⁶⁹

Antonio argues that these modes apply mainly to the situations of colonial peoples.⁷⁰ I would like to argue that the right to secession or sovereignty is considered by Anaya as a remedial right where peoples will only be entitled to it if there are serious violations of the right to self-determination. I think that the other three methods can also

⁶⁶ Xanthaki, above n 3, 133.

⁶⁷ UNGA Resolution 2625(XXV) (24 October 1970).

⁶⁸ Xanthaki, above n 3, 159.

⁶⁹ Xanthaki, above n 3, 147.

⁷⁰ Cassese, above n 13, 147.

be considered a remedial right which can only be utilised in certain circumstances. In this respect any category of peoples will be entitled to the remedial rights and different modes of external self-determination if they have suffered serious violations to their right to self-determination.

The Declaration of Friendly Relations also increased the scope of the right as it extended the beneficiaries of the right to self-determination to mean 'peoples under colonial or *racist regimes* or other forms of alien domination' (emphasis added).⁷¹ The Declaration on Friendly Relations provides that:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

As a result of this Declaration it can be inferred that the right to self-determination entitles peoples the right to democratic governance and the right to participation in the public affairs of the State.⁷² However this is qualified as the internal right to self-determination as specified in the Declaration is limited to racial and religious groups. Therefore the whole populations of a state are not entitled to internal aspect of the right.⁷³ States must allow racial and religious groups equal access to government institutions. Under this Declaration racial and religious groups are not afforded any other rights.

2 *Indigenous peoples' rights under the Declaration on Friendly Relations*

It can be argued that indigenous peoples have been subjected to racist policies inflicted upon them by the State, where the State structures and policies have

⁷¹ Xanthaki, above n 3, 139.

⁷² Xanthaki, above n 3, 159.

⁷³ Cassese, above n 13, 114.

discriminated against them on the basis of race.⁷⁴ However this right is limited as it only allows indigenous groups equal access to government institutions. In New Zealand Maori are given equal opportunity to access and participate in government. There is a Maori Electoral Roll which will be discussed later on. Special provisions are already in place in New Zealand to ensure that Maori are represented in Parliament. This is only a small aspect of what internal self-determination is considered as it does not even allow autonomy or self-government. However if the State is seen to not be representing the all people belonging to the State then it can be inferred from the language of the provision that a remedial right to secession may still be permitted.⁷⁵

3 *Helsinki Declaration*

In 1975 the Final Act of the Conference on Security and Cooperation in Europe (**Helsinki Declaration**) was adopted by 35 States.⁷⁶ UN Documents considered peoples under colonial or foreign occupation entitled to external self-determination. By the 1970s these situations were mainly resolved in Europe and in Western countries.⁷⁷ Before this stage self-determination was predominantly thought of in term of decolonisation however with the principle of external self-determination largely realised in Europe and other western countries it was time to broaden the scope of self-determination.

The Declaration states that:⁷⁸

All peoples always have the right, in full freedom to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, social and cultural development.

⁷⁴ Xanthaki, above n 3, 138.

⁷⁵ Xanthaki, above n 3, 139.

⁷⁶ Conference on Security and Cooperation, Final Act (1 August 1975), 14 ILM 1292.

⁷⁷ Cassese, above n 13, 278.

⁷⁸ Conference on Security and Cooperation, above n 76, Principle VIII.

4 *Indigenous peoples' rights under the Helsinki Declaration*

The Helsinki Final Act stated that the process was ongoing and that peoples should be free from both external and internal interference. It also expanded the beneficiaries of self-determination to include peoples living in independent states as it referred to 'all' peoples and therefore extend the meaning of peoples outside of the colonial context.⁷⁹ The Resolutions noted in the previous section only refers to peoples as whole populations of a territory. The inclusion of the word 'all' leads to a broader meaning and we can infer that sub-groups with a nation (i.e. minorities, ethnic groups etc) are all considered peoples to which this document refers too.

Antonio argues that the meaning of *all* must be put in the context of the countries that signed up to the Declaration. The 35 countries interpreted the Declaration to mean peoples of sovereign states and not people under colonial rule, foreign domination or racist regimes.⁸⁰ This view can also be backed up by the inclusion of Principle IV which discusses territorial integrity. This principle is ranked higher in the framework of the Declaration than the provisions relating to self-determination (Principle VIII). Also the self-determination provision itself notes that participating States will respect the principles of the UN Charter and international norms including the principle of territorial integrity.

I note that the inclusion of 'all' broadens the scope of the term 'peoples' from the conventional meaning of peoples under colonial rule or foreign occupation. I would like to argue that indigenous peoples therefore should be considered in the widened scope however it is clear from debates preceding the adoption of the Declaration that Principle VIII was meant to exclude national minorities.⁸¹ The increase in scope was to allow sovereign states who were not under colonial rule, foreign occupation or racist regime the entitlement to self-determination. Also national minorities are dealt with in Principle VII.

⁷⁹ Xanthaki, above n 3, 139.

⁸⁰ Cassese, above 13, 286.

⁸¹ Xanthaki, above n 3, 289.

It should then be considered that the external right to self-determination in the Declaration does not allow a right to secede but allows a right to associate or integrate with another sovereign state.⁸² Also this right can not be exercised if it is contrary to the will of the people.

Another extension that the Helsinki Declaration achieves is to allow all peoples the ability to exercise internal self-determination as the qualifier that is present in the Declaration of Friendly Relations is not present here. Therefore the Declaration has increased the democratic aspect of self-determination.⁸³

The principle of self-determination earlier encapsulated democratic elements during the Wilsonian era. However decolonisation and territorial integrity became paramount concerns.⁸⁴ The extension of internal self-determination is not surprising given the climate during this time. This was during the time of the Cold War, also western States were interested in emphasising the principles of democracy, free elections and participation.⁸⁵

There was a resurgence in claims for independence in the 1990s with the collapse of the former Soviet Union and Yugoslavia and creation of new States. However this time it was clear that self-determination was more than the right to independence.⁸⁶ Subsequently numerous other documents were adopted that focussed on participation, democracy, elections and autonomous regimes.⁸⁷ The (CERD) General Recommendation XXI (48)⁸⁸ issued in 1993 focused on secession but also recognised that minorities have the right to internal self-determination.

⁸² Cassese, above 13 287.

⁸³ Cassese, above 13 287.

⁸⁴ Cassese, above 13 287.

⁸⁵ Xanthaki, above n 3, 148.

⁸⁶ Xanthaki, above n 3, 148.

⁸⁷ For example, UNGA Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities UN Doc.A/47/49 (1993) and United Nations General Assembly Res. 47/135, Annex, 47 UNGAOR Supp.(No49) p. 210; see Xanthaki, above n 3, 148

⁸⁸ CERD/C/CRP.2/Add.7, General Recommendation, adopted by the committee at the 1147th meeting, March 1996.

F Summary of Evolution of Self-determination

We can see when looking at the last 60 years that the concept of self-determination moulded to fit the situation at that time such as decolonisation, apartheid in South African and the movement of democracy. Under the decolonisation Resolutions indigenous peoples would not have been considered peoples and therefore be entitled to self-determination. Under the Declaration on Friendly Relations indigenous peoples could be considered as a racial group and as such entitled to equal access to government institutions. This is a poor substitute for the full scope of internal self-determination. However there is a possibility that if the state violates this principle then indigenous people would have the right to secede. Under the Helsinki Declaration indigenous peoples would not fall under the widened scope of peoples as they are usually minorities within a State.

Indigenous peoples' right to self-determination has been hampered in part by States concerns regarding the violation of the principle of territorial integrity and as such have not been able to benefit from the right to self-determination. In the following section we will look at the Declaration on the Rights of Indigenous Peoples, where the right to self-determination is affirmed for indigenous peoples.

¹ Sub-Committee on Prevention of Discrimination and Protection of Minorities Resolution 1503 (2) August 1990, E/CN.4/Sub.2.1990/14, para. 10.

² UN Commission on Human Rights, Resolution 1993/27 (3 March 1993) E/CN.4/Sub.2/1993/27, 1.

³ Martin, "Negotiating the Declaration on the Rights of Indigenous Peoples" Section 2.

⁴ UN Commission on Human Rights, "Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1989/2 of 3 March 1989 on its Eleventh Session" (22 March 1990) E/CN.4/Sub.2/1990/11, para. 27.

⁵ UN Commission on Human Rights, "Resolution 2007" (20 June 2006) A/HRC/RES/11/18, 37.

III DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

A Introduction

In this section I will analyse the self-determination provisions contained in the United Nations Declaration on the Rights of Indigenous Peoples (the **Declaration**). I will put forward an interpretation of self-determination under the Declaration based on contextual reading and historical interpretations and use this to measure examples of self-determination in New Zealand and whether or not they meet the Declaration standards.

B History of the United Nations Declaration on the Rights of Indigenous

The drafting process for the Declaration began in 1982 when the Working Group on Indigenous Populations (**WGIP**) was created. The WGIP finished drafting the Declaration in 1993. It was later adopted by the Sub-Commission on the Promotion and Protection of Human Rights (**Sub-Commission**)⁸⁹ and submitted again to its parent body, the UN Commission on Human Rights (**UNCHR**).

A Working Group (**WGDD**) was established by the UNCHR to consider the text submitted by the WGIP.⁹⁰ It was during this phase that fierce debate on the text of the Declaration was had between States and indigenous organizations. This was the first time where beneficiaries of a UN instrument participated in negotiations on the drafting of the instrument.⁹¹ Ten years later, the Declaration was finally adopted by WGDD⁹² and submitted to the newly established United Nations Human Rights Council (**UNHRC**).⁹³

⁸⁹ Sub-Commission on Prevention of Discrimination and Protection of Minorities Resolution 1994/45 (26 August 1994) E/CN.4/SUB.2/RES/1994/45, para 4(a).

⁹⁰ UN Commission on Human Rights "Resolution 1995/32" (3 March 1995) E/CN.4/RES/1995/32/, 1.

⁹¹ Mattias, "Negotiation the Declaration on the Rights of Indigenous Peoples" Section 2.

⁹² UN Commission on Human Rights "Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Eleventh Session" (22 March 2006) E/CN.4/2006/79, para 27.

⁹³ UN Commission on Human Rights "Resolution 2006/2" (30 June 2006) A/HRC/1/L.10, 57.

Many thought it would be a relatively easy ride to the final adoption of the Declaration. However a group of African States (**GAS**) noted their opposition to certain provisions of the Declaration when it hit the General Assembly. GAS had been relatively silent during earlier negotiations.⁹⁴

In November 2006 the Third Committee of the General Assembly agreed to defer action on the Declaration as requested by GAS.⁹⁵ Agreement was eventually resulting in minor amendments to the Declaration. The main amendments made were the inclusion of a reference to territorial integrity in the new Article 46 and preambular provision relating to the fact that the Declaration did not specify a definition of 'indigenous peoples'.⁹⁶

Finally, on 13 September 2007 the Declaration was adopted 143 votes for, 4 against, 11 abstentions and the rest of the States absent.

The Declaration is a non-binding and aspirational document.⁹⁷ However despite the Declaration having moral rather than legal force it is still considered a significant document. In New Zealand the Declaration has shown its persuasiveness in the domestic Courts⁹⁸ and during the Treaty Settlement process.⁹⁹

C The Declaration and the Self-Determination Provisions

In the following section I will note and analyse the primary self-determination provisions contained in the Declaration. The Declaration acknowledges:¹⁰⁰

⁹⁴ The provisions were: arts 3, (self-determination) 5, 9, 19 (Free, prior and informed consent), 26 (Land, Territories and Resources), 37 (Treaties).

⁹⁵ UNGA Resolution 61/178 (20 December 2006) A/Res/61/178, para 1.

⁹⁶ UNGA "Concluding Considerations of the Third Committee's Reports, General Assembly" (20 December 2006) GA/10563.

⁹⁷ UNGA "General Assembly Adopts Declaration on the Rights of Indigenous Peoples" (13 September 2007) GA/10612.

⁹⁸ *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA).

⁹⁹ Claire Charters "The Rights of Indigenous Peoples" (2006) NZLJ 335, 336.

¹⁰⁰ The United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007) A/61/L.67 [The Declaration], preambular paragraph 16.

[T]hat the United Nations Charter, the International Covenants on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, and by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.

I will use the interpretation of these listed instruments and those mentioned in the previous section to help inform the interpretation of the self-determination provisions in the Declaration.

1 Self-determination – Article 3

The primary self-determination provision in the Declaration is Article 3. Throughout the two decades of tumultuous negotiations on the drafting of the Declaration the wording of Article 3 remained intact. Article 3 states:¹⁰¹

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

This provision mirrors wording from Common Articles 1(1) of the International Covenants.¹⁰² However as noted in the previous section indigenous peoples were not considered peoples as peoples were either entire populations living in independent and sovereign States or have yet to attain independence (colonial peoples) and populations living under foreign military occupation.¹⁰³ The majority of indigenous peoples are minorities within a whole population.

It can be argued that the Declaration extends the category of peoples to include indigenous groups whether or not they are a whole population giving indigenous peoples the same rights as other peoples. However during debates on the drafting of the

¹⁰¹ Ibid, Art 3.

¹⁰² International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3 and International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.

¹⁰³ Cassese, above n 13, 59.

Declaration some States interpreted the right to self-determination contained in the Declaration not as the general right normally afforded to peoples but rather a *sui generis* right. In other words some States believe that the Declaration created new law in this area and as a result indigenous peoples should not be considered 'peoples' under international law and are not entitled to the same rights as all other peoples.

This discriminatory interpretation is not in harmony with preambular paragraph 22 of the Declaration as it denies indigenous peoples the right to exercise certain human rights recognized in international law i.e. the right to self-determination as specified in the UN Charter and other international documents specified in the previous section.

Also the Chairperson of the Working Group rejected a proposal from Australia, New Zealand and the United States to introduce a new or *sui generis* internal right to self-determination as it did not conform with international law. The Chairperson made it clear to all that the right he proposed under the Declaration was the right to self-determination generally held by peoples.¹⁰⁴ As a result the proposal was largely ignored by the working party.

(a) Territorial integrity

Another issue which has dominated the scope of the right to self-determination is the principle of territorial integrity. During negotiations on the Declaration many States voiced their concerns about the wording of Article 3 in particular the fact that no reference was made to the principle of territorial integrity. At the last minute, as a result of the securing agreement from the GAS groups, Article 46 was amended to reflect that the Declaration upholds the principle of territorial integrity. Article 46 states that nothing in the Declaration may be interpreted to mean any activity or action which is contrary to the United Nations Charter or that would "dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States."¹⁰⁵ This last

¹⁰⁴ Mattias, above n 91, 3.4.

¹⁰⁵ The Declaration, above n 100, Article 46.

minute inclusion brought many States on side and as a result many voted for the adoption of the Declaration.¹⁰⁶

New Zealand was one of the countries that voted against the Declaration. One of its objections were that the right to self-determination entitled peoples, including indigenous peoples, the unqualified right to secede and sought to use the term self-management.¹⁰⁷

As an explanation as to why it voted against the Declaration Australia stated that it could not support it as it might encourage action that would impair its own territorial and political integrity.¹⁰⁸ Japan noted that the Declaration could not be understood to support a right to secession. These concerns are unreasonably and incorrectly held as will be explained below.

During negotiations on the Declaration, the Working Group and its Chair repeatedly voiced their opinion that the principle of territorial integrity would apply to the Declaration regardless of whether a provision was included.¹⁰⁹

Under international law the right to secede is only allowed in a limited number of circumstances namely where:¹¹⁰

A colonial government governs a nation from outside the nation's territory; a people is subject to "alien subjugation, domination and exploitation"; and where "peoples separate from their parent state with its acquiescence or because the parent state disintegrates".

International law does not authorize or prohibit secession. It allows secession to occur in the most extreme cases and only if secession will actually remedy the situation.¹¹¹ The

¹⁰⁶ See the Interpretative Statements of the following countries: Argentina, Japan, Jordan, Mexico, Sweden, Brazil, India, Paraguay, Turkey and the Philippines.

¹⁰⁷ The Rights of Indigenous Peoples, above n 99,336.

¹⁰⁸ General Assembly GA/10612 "General Assembly Adopts Declaration on Right of Indigenous Peoples" 13 September 2007 <http://www.un.org> (last accessed 10 January 2009).

¹⁰⁹ Mattias, above 91, 3.2

¹¹⁰ The Rights of Indigenous Peoples, above n 99, 336.

fact that secession was used during the decolonisation era does not restrict the right to that remedy alone or to be granted in only that situation.

The Declaration does not change the international law position.¹¹² However for States to be protected by international law they must adhere to international and human rights laws and has a government that represents the whole people belonging to the territory “without distinction as to race, creed or colour”.¹¹³

The problem behind many of the States’ positions during negotiations is that they were of the view that secession was the only interpretation of self-determination and that peoples were entitled to a unilateral right to secede. This position is incorrect and fueled States’ fears that the right would lead to territorial and political disruption.

James Anaya argues that self-determination should not be thought of solely in terms of the decolonisation regime and the right to secession. Instead the right to secession for peoples should only be used as a remedial measure and only where serious injustices have occurred.¹¹⁴ James divides the principle of self-determination into substantive and remedial aspects where secession is a remedial measure to fix the violations of the principle.¹¹⁵

Most scholarship in this area divides self-determination into external and internal aspects. I agree with the James’ framework as it illustrates that that the substantive aspect of the right is the primary aspect which all peoples are entitled to. And it is this aspect that States should have been focus on during the drafting of the Declaration.

James’ framework shows that if the substantive aspect of the right is breached then there are methods which can be used to remedy that breach including secession.

¹¹¹ Mattias, above n 91, 3.2.

¹¹² The Declaration, above n 4, preambular paragraph 17.

¹¹³ See The Rights of Indigenous Peoples, above n 99, 336; and 1970 UN Declaration on Friendly Relations, above n 67; and UN Commission on Human Rights “Report of the WG on draft declaration on indigenous peoples” (6 December 1999) E/CN.4/2000/84UN Document, para 48.

¹¹⁴ Anaya, above n 4.

¹¹⁵ Anaya, above n 4, 104.

However this aspect of self-determination is narrow in scope and is not a unilateral right that all peoples are entitled to. James notes that only those that have suffered violations of their substantive self-determination can benefit from the remedies.¹¹⁶

Since the Declaration does not change the international law position it can be concluded that indigenous peoples have the same rights as other 'peoples' and will only have the right to secede if they meet the same criteria as other peoples. The majority of indigenous peoples will not meet this standard and therefore will not be entitled to the right to secede. However indigenous peoples made it clear throughout the negotiations process of that they were not pursuing that remedial right.

Discussion, during the different working groups, on the right to self-determination and Article 3 were pitched from different ends of the spectrum. We also saw during the process that some States changed their position dramatically. Canada and Russia both initially accepted the inclusion of the right to self-determination in the Declaration subject to the international principle of territorial integrity.¹¹⁷ It was surprising to all when both countries later voted against the Declaration. Canada, once a supporter of the Declaration became an opponent where Canadian representatives lobbied against the adoption of the Declaration.

Regardless of States objections international bodies, such as the Human Rights Committee, have already acknowledged that indigenous peoples are considered peoples and as such have the general right to self-determination.¹¹⁸

Despite these two examples other states such as Colombia¹¹⁹, Bolivia,¹²⁰ Fiji,¹²¹ Switzerland,¹²² Pakistan,¹²³ Finland,¹²⁴ Norway,¹²⁵ Cuba,¹²⁶ Guatemala¹²⁷ and Mexico¹²⁸ all agree to the inclusion of Article 3 in the Declaration.

¹¹⁶ Anaya, above n 4, 104.

¹¹⁷ Report of the Commission Working Group, UN Doc.E/CN.4/2000/84 (1999) para. 50 and 61.

¹¹⁸ See *The Rights of Indigenous Peoples*, above n 99, 336.

¹¹⁹ Report of the Commission Working Group, UN Doc.E/CN.4/1997/102 (1996) para. 332.

¹²⁰ *Ibid*, para. 317.

¹²¹ *Ibid*, para.330.

In summary, the Declaration affirms that indigenous populations are peoples under international law and as such are entitled to same rights to self-determination as other peoples. The right to self-determination does not lead to a unilateral right to secede. The right to secede is only a remedial right afforded to peoples who suffer serious violations to their right and where secession is the solution to the problem. Indigenous populations, just like all other peoples, must satisfy strict criteria set out in international law to be able to secede.

The external aspect of self-determination has been set out in Resolution 1541¹²⁹ and the Declaration of Friendly Relations.¹³⁰ The options for external self-determination are: establishing a sovereign independent state; free association with an independent state; integration with an independent state; or emerging into any other political status freely determined by the people. Since independence is not permitted under the Declaration and indigenous peoples are not whole populations, none of these options can be exercised.

Therefore the main thrust of the right to self-determination in New Zealand will focus on indigenous peoples' right to autonomy or self-government in matters relating to their internal and local affairs.¹³¹

2 *Self-Government/Autonomy – Article 4*

Article 4 goes on further to highlight one form of the right to self determination by stating that by:¹³²

¹²² Report of the Commission Working Group, UN Doc.E/CN.4/2000/84 (1999) para.64.

¹²³ Ibid, para.67.

¹²⁴ Ibid, para.70.

¹²⁵ Report of the Commission Working Group, UN Doc.E/CN.4/2001/85 (2001) para.82.

¹²⁶ Ibid, para 70.

¹²⁷ Report of the Commission Working Group, UN Doc. E/CN.4/2004/85 (2004) para.16.

¹²⁸ Ibid, para.17.

¹²⁹ UNGA Resolution 1541(XV) (15 December 1960).

¹³⁰ UNGA Resolution 2625 (XXV) (24 October 1970) A/RES/2625, 124.

¹³¹ The Declaration, above n 100, art 4.

¹³² The Declaration, art 4.

exercising their right to self-determination, [indigenous peoples] 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.

The idea of autonomy and self-government within the state can be equated to internal self determination, whereas external self-determination can include secession.¹³³ There is no generally accepted definition of autonomy though it has to do with having authority to make final decisions on matters relating to a particular set of peoples.¹³⁴ I agree with Alexandra that internal self-determination includes the right of democratic governance and the right to participate in the public affairs of the state.¹³⁵

There are various different expressions of self-determination used by different peoples all around the world. The Declaration recognises that the situation of indigenous peoples varies from region to region and country to country.¹³⁶ So how one indigenous group expresses their right to self-determination may not be how another indigenous group may want to express their right. The way each group of indigenous peoples may want to express their right may depend on its population, size of land base, and resources among other factors.¹³⁷

This may be broken down further in New Zealand where one iwi may want to exercise their right differently from another iwi. Some iwi may want to go further and have the level of autonomy running from iwi level all the way down to the marae level. Whatever mechanism is chosen must address the needs of the people concerned and be based on the will of the people. It must also be based on a power-sharing relation and not

¹³³ Catherine Iorns Magallanes "A New Zealand Case Study: Child Welfare" in Alison Quentin-Baxter (ed) *Recognising the Rights of Indigenous Peoples* (Victoria University of Wellington, Wellington, 1998) 135, 135.

¹³⁴ Valerie Epps "Evolving Concepts of Self-Determination and Autonomy in International Law: The Legal Status of Tibet" (Legal Studies Research Paper Series, Research Paper 08-33 Suffolk University Law School, 2008)23.

¹³⁵ Xanthaki, above n 3, 159.

¹³⁶ The Declaration, above n 100, preambular para 23.

¹³⁷ Valerie Epps "Evolving Concepts of Self-Determination and Autonomy in International Law: The Legal Status of Tibet" (Legal Studies Research Paper Series, Research Paper 08-33 Suffolk University Law School, 2008)25.

just an allocation of funds where groups are answerable to Ministers. They must be answerable to their people.

Internal self-determination has been described as “a peoples’ pursuit of its political, economic, social and cultural development within the framework of an existing state.”¹³⁸ These four aspects are said to be interdependent, and can only be fully realised through the recognition and implementation of each.¹³⁹ James divides substantive self-determination into the categories of constitutive and ongoing. The constitutive process refers to peoples’ political status while the ‘ongoing’ aspect relates to the economic, social and cultural aspects.¹⁴⁰ I will discuss these two categories of self-determination below.

(a) Constitutive (Political) self-determination

Under constitutive self-determination indigenous peoples must be able to freely determine their political status and create their own governing institutions.¹⁴¹ Therefore the institutions or models of governance for Maori must reflect the “collective will of the people, or peoples involved”.¹⁴² It must also allow participation and consent from the peoples involved.¹⁴³

Maori must decide which models of governance they wish to use. The various models to choose from include sovereignty, autonomy, federation, confederation, autonomous regions, self management, co-management, or even full integration within the State. However under the Declaration Maori would not be able to claim sovereignty unless they fulfilled strict criteria set out above. The constitutive aspect also covers the institutions that Maori wish to use to give effect to their constitutive decision. In New Zealand that may cover entities such as Maori Trust Boards, Runangas or Tribal Councils.

¹³⁸ *Reference re Secession of Quebec*, (1998) 2 Can. S.C.R. 217, 126.

¹³⁹ Hector Gros Espiell *Study on the Right to Self-Determination: Implementation of United Nations Resolutions E/CN.4/Sub.2/405/Rev.1* (United Nations, New York, 1980) para 113.

¹⁴⁰ Anaya, above n 4, 105.

¹⁴¹ The Declaration, above n 100, Art 3

¹⁴² Anaya, above n 4, 105.

¹⁴³ Anaya, above n 4x, 105.

This also links in with Article 5 where recognition is given to indigenous peoples' distinct political, legal, economic, social and cultural institutions and their right to maintain and strengthen those institutions as well as participate in the institutions of the State.¹⁴⁴

As noted in the previous section we can assume that internal self-determination includes those Civil and political rights and freedoms, contained in the 1966 International Covenants that allow peoples to express their popular will.¹⁴⁵ In New Zealand these democratic and civil rights are protected in the Bill of Rights Act 1990. However what internal self-determination means in New Zealand will need to be worked through between Maori and the government. The principles of "justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith" must underpin any dialogue between the two parties.¹⁴⁶

It is argued that the core of the right to self-determination is political in nature and that self-determination is political control of the peoples' destinies.¹⁴⁷ Even though the Declaration and other international document refers to pursuing economic, social and culturally development, to pursue development involves establishing policies and prioritisation.¹⁴⁸ These decisions are made through a political process.

(b) Ongoing self-determination

Once the political status has been established peoples can then use that as the foundation to allow them to make meaningful decision about all other aspects of their lives. In other words allow peoples to "freely pursue their economic, social, and cultural

¹⁴⁴ The Declaration, art 5.

¹⁴⁵ Cassese, above n 13, 53. These include the right to freedom of expression, the right of peaceful assembly, the right to freedom of association, the right to vote, and the right to take part in public affairs, directly or through a representative.

¹⁴⁶ The Declaration, above n 100, art 46(3).

¹⁴⁷ Xanthaki, above n 3, 158.

¹⁴⁸ Xanthaki, above n 3, 158.

development".¹⁴⁹ This will include development of tribal assets and resources, education programmes, health and other social services etc.

In 1999 Sir Douglas Graham restricted Maori right to autonomy or self-government to delivering educational and health services and control over issues of specific cultural or socially concern. He also believed that the wording of Article 4 in the Declaration went too far than the New Zealand Government was prepared to go.¹⁵⁰

Sir Douglas Graham's interpretation of autonomy ignores peoples' right to freely pursue their economic development. Also the delivery of services is still ultimately controlled by the government and not by the peoples themselves. Autonomy is guided by the will of the people and not the will of the government. It also involves participation and consent from the peoples. However whatever framework is created must be exercised within the existing legal framework.

¹⁴⁹ The Declaration, art 3 and other international instruments listed above.

¹⁵⁰ Douglas Graham "The New Zealand Government's Policy" in Paul Haveman (ed) *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Oxford University press, Auckland, 1999) 9.

IV EXAMPLES OF SELF-DETERMINATION IN NEW ZEALAND

In this section I will look at different models of self-determination present in New Zealand and compare each with the interpretation of the right to self-determination contained in the Declaration as specified in the previous section.

It is affirmed that peoples are entitled to the right to self-determination and since the adoption of the Declaration it is clear that indigenous peoples fall under that category. However what is unclear is how to implement this right. The implementation of the right to self determination under international law has been unbalanced due mainly to political reasons.¹⁵¹

During an international workshop on the draft Declaration in Mexico academic, indigenous and governmental experts believed the right to self-determination should be seen in a positive light and was a basis to promote partnership and dialogue between the State and Indigenous peoples. It was also seen to help crystallise greater indigenous participation in state processes.¹⁵²

A New Zealand commentator has said:¹⁵³

Maori aspiration for greater control over their own destinies and resources is variously described as a search for sovereignty, autonomy, independence, self-governance, self-determination, tino rangatiratanga and mana motuhake. These are important distinctions between those terms, though they all capture an underlying commitment to the advancement of Maori peoples as Maori, and the protection of the environment for future generations. And all reject any notion of an assimilated future.

¹⁵¹ International Workshop on the Draft United Nations Declaration on the Rights of Indigenous Peoples Patzcuaro, Michoacan, Mexico (30 September 2005), E/CN.4/2005/WG.15/CRP.1, pg 3.

¹⁵² Ibid.

¹⁵³ Shin Imai "Indigenous Self-Determination and the State" CLPE Research Paper 25/2008 Vol 04 No.05 (2008) (<http://ssrn.com/abstract=1262780>) (last accessed on 17 November 2008), 11.

Self-determination for Maori in New Zealand has also been described as “Maori aspiration for greater control over their own destinies and resources”¹⁵⁴ and “the right to greater Maori freedom and control within the political, legal, social and economic decision-making structures of this country from parliament right down to the local body or tribal levels”.¹⁵⁵ In New Zealand the concept of self-determination is in the context of the Treaty of Waitangi and is most commonly referred to by Maori as ‘tino rangatiratanga’.

A Background to the Treaty Settlement process

The right to self-determination has four key aspects: political, economic, social and cultural.¹⁵⁶ In this section I will look at each of the four aspects to the right to self-determination and illustrate examples of redress provided to iwi through the Treaty of Waitangi Settlement process and where none exist I would look further a field for examples. I will discuss how the redress provided stacks up against the provisions of the Declaration in relation to interpretation of self-determination noted earlier in this paper.

Maori have been seeking resolution of their historical Treaty of Waitangi claims for well over 150 years. There were previous settlements between the Crown and iwi before the current Treaty settlement process was established. In the 1920s a Royal Commission was established to investigate the land confiscations. The commission known as the Sim Commission found that the invasion of the Crown into Tainui area and subsequent confiscation of Maori land was excessive.¹⁵⁷ In 1946, after much negotiation, the Crown agreed to make an annual for the first fifty year for £6000 and £5000 thereafter in perpetuity. The Crown believed that the settlement was full and final. However in the 1980s the Crown agreed with iwi that the settlement should be revisited

¹⁵⁴ Mason Durie, “Te Mana, Te Kawanatanga: The Politics of Maori Self-Determination” (OUP, Auckland, 1998) 218.

¹⁵⁵ Maui Solomon “The Context for Maori” in Alison Quentin-Baxter (ed) *Recognising the Rights of Indigenous Peoples* (Victoria University of Wellington, Wellington, 1998) 60.

¹⁵⁶ See Anaya, above n 4, 104.

¹⁵⁷ New Zealand History Online <http://www.nzhistory.net.nz> (last accessed 24 January 2009).

and fresh negotiations between the Crown and Tainui began with a Deed of Settlement being signed in 1995 with a redress amount of \$170 million.¹⁵⁸

The Treaty Settlement framework allows a process of dialogue and negotiation between the Crown and Maori claimants to settle all of their historical Treaty claims against the Crown. There are two types of Treaty of Waitangi claims that can be brought against the Crown, historical claims and contemporary claims. Historical claims relate to actions and omissions by the Crown in relation to a particular claimant group between 1840 and 21 September 1992. The date of 21 September 1992 was chosen as the cut off date as that was the day that the Cabinet agreed on the general principles for settling Treaty of Waitangi Claims.¹⁵⁹

The Office of Treaty Settlements (OTS) was created in 1995 and sits within the Ministry of Justice. OTS negotiates the settlement of historical Treaty of Waitangi claims with claimant groups on behalf of the Crown.¹⁶⁰ OTS reports directly to the Minister for Treaty of Waitangi Negotiations.¹⁶¹

There is a lengthy process to go through to get to an agreed settlement and the main points are bullet pointed below in sequential order:¹⁶²

1. Mandate – claimants groups must go through a mandating process set by the Crown. The mandate must then be recognised by the Minister for Treaty of Waitangi Negotiations and the Minister of Maori Affairs.
2. Terms of Negotiations – this sets out the ground rules of negotiations.
3. Agreement in Principle – outlines the agreed redress proposed for the Deed of Settlement.

¹⁵⁸ Office of Treaty Settlements <http://www.ots.govt.nz> (last accessed 24 January 2009).

¹⁵⁹ Office of Treaty Settlement *Healing the Past, building a future* (Office of Treaty Settlement, Wellington, 2004) 27.

¹⁶⁰ *Ibid*, 23.

¹⁶¹ During the last Labour administration the Minister was called the Minister in Charge of Treaty of Waitangi Negotiations. After the 2008 elections the new government (National Party) renamed the title to Minister for Treaty of Waitangi negotiations. The new Minister is Hon Christopher Finlayson.

¹⁶² Office of Treaty Settlements, above n 174, 37.

4. Deed of Settlement – lists the finalised details of the settlement package.
5. Settlement Legislation – the Deed of Settlement is incorporated in to Legislation where required.
6. Implementation – phase where the implementation of the Deed of Settlement and Legislation occurs (e.g. when redress is transferred to claimant groups).

A Treaty Settlement is made up of three main elements: Crown Apology; Cultural redress; and Commercial Redress. To date 24 Deeds of Settlement have been signed, including the Fisheries Settlement.¹⁶³

The Treaty Settlement Framework has largely been constructed by the Crown with minimal input from Maori. Maori have challenged the Crown's framework and its policies. The Crown's policy of dealing with large natural groupings has been heavily criticised. This does not demonstrate a process that is reflective of the "will of the people" which is the essence of autonomy.

New Zealand Crown and the State have not recognised that Maori have an inherent right as has been stated in the Waitangi Tribunal. However the Waitangi Tribunal has recognised the right to autonomy as being "inherent" and related to indigenous peoples affairs.¹⁶⁴ Dispute between the State and Maori has largely been by regards to the Treaty of Waitangi and its associated principles. It has been noted earlier the different versions of the Treaty are conflicting. The English version states that Maori ceded sovereignty to the Crown and the Maori version states that Maori retain their *tino rangatiratanga* (translated to mean sovereignty) over their *whenua* (resources).

¹⁶³ See paragraph 20 of the *Te Kaitiaki* where it is stated: "The situation of indigenous peoples with their rights to dignity and their capacity to choose and that the significance of national and regional particularities and circumstances and cultural backgrounds should be taken into consideration"

¹⁶⁴ *Te Kaitiaki* 195, 11

¹⁶⁵ *Te Kaitiaki* 195, 11

¹⁶³ Office of Treaty Settlements www.ots.govt.nz last accessed 25 January 2009.

B *Constitutive/Political self determination*

Self-determination is exercised around the world in many different ways and the Declaration recognises the different situations of indigenous peoples all around the world¹⁶⁴. Shin Imai discusses four different models of self-determination: 'sovereignty and self-government'; 'self management and self-administration'; 'co-management and joint management'; and 'participation in public government'.¹⁶⁵ The following sections will illustrate different examples for each of the four models in New Zealand.

1 *Sovereignty and Self-Government*

Sovereignty and self-government is recognised as being the inherent right of indigenous peoples to make laws over a defined territory.¹⁶⁶ In other words indigenous peoples have this right irrespective of whether the settler government has delegated the authority to them. The Tribunal has described autonomy or aboriginal self-government as the right of indigenous peoples to manage their own policy, resources, and affairs, within minimum parameters necessary for the proper operation of the State.¹⁶⁷

New Zealand Courts and the State have not recognised that Maori have an inherent right as has court in the United States. However the Waitangi Tribunal has recognised the right to autonomy as being 'inherent' and central to indigenous peoples affairs.¹⁶⁸ Dialogue between the State and Maori has largely been in regards to the Treaty of Waitangi and its associated principles. As has been noted earlier the different versions of the Treaty are conflicting. The English version states that Maori ceded sovereignty to the Crown and the Maori version states that Maori retain tino rangatiratanga (translated to mean sovereignty) over their taonga (treasures).

¹⁶⁴ See Preambular paragraph 23 of the Declaration where it recognises "that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration"

¹⁶⁵ Imai, above n 162, 11.

¹⁶⁶ Ibid

¹⁶⁷ Ibid.

¹⁶⁸ Waitangi Tribunal *The Taranaki Report*, (Waitangi Tribunal, Wellington) 1.4

The sovereignty/self-government model can be found in the United States and Canada. In 1998 the provincial and federal governments of Canada reached an agreement with the Nisga's people of British Columbia for the right, as a nation, to 'self government and the authority to make laws'.¹⁶⁹ This is an example of where a group had the ability to make laws (though limited ability) within an existing nation. Though the Nisga'a people were based in a remote geographical area away from the majority population and owned a large land base.¹⁷⁰

It may be possible to use this model in New Zealand for those groups where there is a large Maori population, in a remote area with a large land base. This may be the case with Ngati Porou, Nga Puhi and Ngai Tuhoe. The Crown may look at giving these Crown limited law making powers over their own tribal matters e.g. education, social services and health. However authority over all other matters such as policing, foreign affairs, security etc can be retained by the New Zealand Parliament.

The Crown is in negotiations with Ngai Tuhoe and one of the main aspects of the negotiations is discussions around the constitution and the ability of Ngai Tuhoe to have a self-government model. It is unclear exactly what Ngai Tuhoe envisages as self-governance as they are in early negotiations with Crown. However they have signalled that anything less than ownership and authority over their lands and territories will not be acceptable.¹⁷¹

In the past Treaty Settlements or the Crown in general has not allowed sovereignty or self-governance arrangements for Maori. However with the current negotiations with Ngai Tuhoe discussing this very issue this stance may change in the near future. What the self-governance mechanism would look like, if any, is yet to be seen.

¹⁶⁹ Mason Durie, *Nga Kahui Pou: Launching Maori Futures* (Huia Publishing, Wellington, 2004) 170.

¹⁷⁰ *Ibid*, 171.

¹⁷¹ Tuhoe - Te Kotahi a Tuhoe <http://www.tekotahiatuhoe.iwi.nz> (last accessed 18 January 2009).

2 *Self-Management and Self-Administration*

Under the model suggested by Shin, self-management and self-administration is considered the next tier of the right to self-determination. This category leads to greater control of local affairs and the delivery of services within the existing state system.¹⁷²

This model allows indigenous peoples less control over their lands and resources than sovereignty and self-government model. There are variations of this model dependent on whether or not there is a land base. Where indigenous peoples have a land base, then, there is the possibility of indigenous organisations having the power to make by-laws over local matters. Where no land base exists then there is the possibility of devolving government services and funding to indigenous organisations.¹⁷³ The latter option is based on indigenous rights and not a strong claim to major property rights.¹⁷⁴ Many Maori groups may fall under the latter category due to Crown breaches and urbanisation.

The Treaty Settlement process may remedy this to some extent as the Crown may transfer properties back to claimant groups. However the amount of land that is transferred back to claimant groups through Treaty Settlements is only a small portion of land that was taken from Maori. The Crown looks primarily at returning surplus core Crown properties. Unfortunately much of the land that was taken from Maori is now in private ownership and private land is usually not used as redress in Treaty Settlement.

¹⁷² Imai, above n 162, 11.

¹⁷³ Imai, above n 162, 18.

¹⁷⁴ Nga Kahui Pou: Launching Maori Futures, above n 186, 171.

(a) Example of Self-Management in New Zealand - Customary Fishing Regulations and Mataitai Reserves

The Crown has established regulations for fisheries in New Zealand¹⁷⁵ which creates a system where Maori are able to manage customary food gathering in their own rohe (area). Customary food gathering is defined in the regulations as the "taking of fish, aquatic life, or seaweed or managing of fisheries resources...to the extent that such purpose is consistent with Tikanga Maori (Maori customs) and is neither commercial in any way nor for pecuniary gain or trade."¹⁷⁶

The regulations provide for mataitai reserves to be established.¹⁷⁷ A mataitai reserve is defined in the regulations as an "identified traditional fishing ground..." Tangata whenua (people of the land or people from the area) manage all customary fishing in the traditional fishing ground by making by-laws. The by-laws will apply to everyone who fish in the reserve. All commercial fishing in the area is prohibited unless the tangata kiatiaki/tiaki (guardians) or authorised Maori/iwi representative makes a request to the Minister recommending the making of regulations to allow commercial fishing of a specified quantity, species and in a specific time period.¹⁷⁸

This is an example of self-management in New Zealand where Maori have some control over their customary fishing. However this is not considered full control as it is always within the oversight and at the whim of the Minister of Fisheries. Also this model has been designed and created by the Crown and not Maori. This goes against the idea of reflecting the collective will of the people as noted by James Anaya.

¹⁷⁵ Kaimoana Customary Fishing) Regulation 1998 and the Fisheries (South Island Customary Fishing) Regulations 1999.

¹⁷⁶ Fisheries (Kaimoana Customary Fishing) Regulations 1998, reg 2(1); Fisheries (South Island Customary Fishing) Regulations 1999, reg 2(1).

¹⁷⁷ Fisheries (Kaimoana Customary Fishing) Regulations 1998, reg 18-32 govern the creation and administration of mataitai reserves.

¹⁷⁸ Fisheries (Kaimoana Customary Fishing) Regulations 1998, reg 27(3).

(b) Example of Self-Administration in New Zealand – Maori Health Providers

Many Maori have moved away from their traditional areas and into the cities. As a result urban Maori have very little to no land base and would instead be looking at a self-administration model where particular government services would be devolved to their representative body. Services or issues which are usually considered for devolution include: culture, language, education, health, employment, social services, economic activities, land and resource management, environment and financing their functions and housing.¹⁷⁹

In New Zealand there are a number of Maori health providers who are contracted to the District Health Board. They usually get very little of the overall health budget but do achieve some great results. Maori health providers deliver various health services primarily to Maori. What differentiates Maori health providers from main stream health providers is the Maori approach that is utilised, whereby different programmes are designed to combat the unique circumstances of Maori.¹⁸⁰

However this model can not be considered a power sharing arrangement as power is not being shared. Instead Maori organisations are only delivering a service. Money is provided by the Crown and given to Maori Health Providers. These organisations are accountable ultimately to the Minister of Health and not to Maori. The basis of accountability has been designed by the Crown and its officials. It lacks the sense of Maori having the ability to control their own destiny as the Maori do not get a say in the design of major health policies. There is a Maori Health unit within the Ministry of Health but it still gets directions from Cabinet and not Maori. I do note that recently the Hon Tariana Turia was appointed the Associate Minister of Health and is also the co-leader of the Maori Party.¹⁸¹ I am sure that she will have a direct influence over the Maori health sector and also have a voice in constructing major health policies. This may be a way of allowing Maori more control over their destinies. Though this idea is based

¹⁷⁹ See Shin, above n 162, 22.

¹⁸⁰ Maori Health Website www.maorihealth.govt.nz (last accessed 24 February 2009),

¹⁸¹ Official Website of the New Zealand Government www.beehive.govt.nz (last accessed 25 January 2009).

on the fact that the Maori Party represents all Maori people. This is not the case as iwi have spoken out and confirmed that they are in fact the representatives of Maori.¹⁸²

3 *Co-Management and Joint Management*

During the Treaty Settlement process, if possible, land is transferred back to iwi in fee simple. This allows iwi the fullest range of rights one can have over land (i.e. the right to exclude others, ownership of land and all that is on it, and the control and management of land and naming rights).¹⁸³ These sites are usually small and discrete.

However some cultural sites which are owned by the Department of Conservation or other Crown bodies can not be transferred back to iwi and must be retained in ownership by the Crown for the enjoyment of all New Zealanders. Another reason for not transferring certain sites back to iwi is the financial burden of the on-going management costs of the site. In these circumstances other redress mechanisms have been created. One such instrument, an "Overlay Classification", allows iwi to have input into the management of a particular site.¹⁸⁴

A recent example of the use of a co-management is the Waikato Raupatu River Settlement. During the last year of negotiations a model of co-management was developed between iwi and the Crown to work together to restore the health of the Waikato River. The settlement allows Waikato-Tainui more of a decision making role in the management of the Waikato River and not just participatory or consultative rights. A Statutory Board was created after the Deed of Settlement was signed with the purpose of ensuring the Waikato River is managed in a particular way. Iwi representatives make up half of the Board with the remaining members representing Regional and Local Councils. Also iwi will have the power to make regulations relating to fisheries, flora and fauna along the Waikato River and are to create an environment plan which must be taken into account by decision makers under the Resource Management Act in regards to planning

¹⁸² See Apirana Mahuika speech at the signing of the Ngati Porou Foreshore and Seabed Deed of Agreement at Parliament in 2008.

¹⁸³ Office of Treaty Settlements, above n 174, 126.

¹⁸⁴ Ibid, 131.

and approving resource consents.¹⁸⁵ This particular process is unique as it has not been done before in Treaty Settlements. Waikato-Tainui now have more control over their river and there is now a clear commitment to the Crown to improve the health of the river. This is a huge undertaking and as such the Crown is providing a lot of money to fund this as it is also in the best interests of the Crown to have the river in a healthy state. This is a good model to illustrate how Maori, the Crown, local and regional councils as well as interested third parties can work together. This model will probably be used in other parts of the country if relevant.

4 *Participation in Government*

Shin outlines three variations to the government participation model: guaranteed seats in Parliament, a public government and lastly an elected indigenous Parliament.¹⁸⁶ The Treaty settlement process has not provided redress that fits in this category. I will therefore briefly discuss examples of the first and third models which have been created outside the Treaty settlement process.

(a) *Maori seats in Parliament*

In New Zealand seats are set aside in Parliament for Maori representation. The seats were created in 1867 where four were set aside. To be able to vote for candidates to sit in one of the Maori seats the voter needs to be enrolled on the Maori roll. The rationale behind setting aside four seats was not based on the principles of the Treaty or fair representation as the proportionality compared to the general electoral seats was unbalanced.¹⁸⁷ The number of seats changed after 1993 as a result of a changed in electoral systems in New Zealand (First Past the Post system to Mix Member Proportional Representation). The representation of Maori in the Maori seats was then tied to the number of people registered on the Maori electoral roll. Today there are 7 Maori seats. After the 2008 election the Maori party holds five seats while the Labour

¹⁸⁵ Office Of Treaty Settlements Website www.ots.govt.nz (last accessed 20 November)

¹⁸⁶ Shin, above n 162, 27-29.

¹⁸⁷ Durie, above n 186, 96-97 and Shin, above n 162, 27.

Party hold the remaining two. New Zealand is the only country with seats set aside for their indigenous voters.¹⁸⁸ Also the adoption of MMP has seen the number of Maori MPs increase by 10% between 1993 and 2005.¹⁸⁹

(b) Elected Indigenous Parliament

The inclusion of Maori seats in parliament is argued as being a poor substitute for real and effective participation. This is because the views of Maori Members of Parliament were secondary to the view of that particular political party they belonged too. However this has arguable changed with the establishment of the Maori Party and its current arrangement with the National Party government.

Since the signing of the Treaty of Waitangi, Maori have been disillusioned and concerned with their representation in Parliament. As a result there have been many calls for a separate Maori parliament. The view shared was that a separate Maori Parliament would help Maori work better together and with non-Maori.¹⁹⁰ There was a push for this in the late 1880s however this vision did not come into fruition. Many Maori were progressing through the settler state school education system and learning English. People like Sir Apirana Ngata were engaging with the new world and believed that establishing a separate Maori Parliament would be a step backwards.¹⁹¹

Waikato-Tainui iwi has its own parliamentary body or tribal parliament (Te Kauhanganui o Waikato Incorporated) which is made up of 198 representatives from each of their 66 marae. Te Kauhanganui is the primary decision making body of that iwi where they will make decision relating to their own internal matters.

¹⁸⁸ Shin, above n 162, 28.

¹⁸⁹ Elections New Zealand, www.elections.org.nz (last accessed on 20 November 2008)

¹⁹⁰ Alan Ward and Janine Hayward "Tino Rangatiratanga – Maori in the political and administration system" in Paul Haveman (ed) *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Oxford University press, Auckland, 1999) 387.

¹⁹¹ Alan Ward and Janine Hayward "Tino Rangatiratanga – Maori in the political and administration system" in Paul Haveman (ed) *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Oxford University press, Auckland, 1999) 388.

§ *Governing Institutions*
Governing Institutions

Not only does the constitutive aspect of self-determination involve choosing the political model that the people will live in, it also involves creating governing intuitions. Having autonomy allows Maori the ability to determine the structure of their own institutions in accordance with their own procedures.¹⁹²

In regards to Treaty Settlement framework, for Maori to receive settlement redress they must create a post settlement governance entity to which the Crown will transfer the redress. This entity must also satisfy a set of criteria set out by the Crown.

- All post settlement governance entities must:
- represents all members of the claimant group;
 - be transparent;
 - have dispute resolution processes;
 - be accountable to the correct beneficiaries of the settlement; and
 - ensure they have listed the correct beneficiaries of the settlement; and
 - be ratified by the claimant community.

Though there are many different types of governance entities to choose from, in reality there are a limited number that will be able to meet the needs and purposes of Maori. Over time Maori have used many different structures to receive settlement redress from the Crown including: trusts,¹⁹⁴ entities created through Legislation¹⁹⁶ and Maori incorporations under the existing governance structures that have been used by the Commission has criticised the existing Maori as not catering adequately for the multi-purpose objectives of tribal entities and not catering adequately for the m

¹⁹² New Zealand Law Commission *Waka Umanga: a proposed law for Maori governance entities* (NZLC, Wellington, 2006) 68.

¹⁹³ Office of Treaty Settlements *Waka Umanga* (Wellington, 2006) 68.

¹⁹⁴ Ibid.

¹⁹⁵ For example the entity used above to receive redress through the Waikato-Tainui Raupatu Settlement.

¹⁹⁶ For example the Te Runanga o Ngai Tahu entity. See Te Runanga o Ngai Tahu Act 1996.

¹⁹⁷ For example the Mawhera Incorporations: Meredith Gibbs "What Structures are appropriate to receive redress?" (2004) NZLJ 197, 198.

¹⁹⁸ Pounamu and the Mawhera Incorporations: Meredith Gibbs "What Structures are appropriate to receive redress?" (2004) NZLJ 197, 198.

being based on Maori values and aspirations.¹⁹⁸ The Law Commission designed a new governance model, Waka Umanga, which was set to address all identified inadequacies of existing structures. At present the Waka Umanga Bill has not been enacted.

This illustrates that the process for creating governing entities to receive settlement redress through the Treaty Settlement process does not currently allow Maori to freely choose which entity they wish. Any entity must be approved by the Crown before settlement redress will be transferred to a claimant group. This goes against the idea of being the 'will of the people' and is not what internal self-determination is envisaged in the Declaration.

However the model also must be ratified by the claimant community and be accountable to its members. Many iwi have nonetheless used the existing structures successfully as will be demonstrated in the following section.

C *On-going Self Determination*

1 *Economic self-determination*

To enable Maori to be able to function on its own it must be able to support itself financially. Due to Crown actions since the signing of the Treaty of Waitangi, Maori have lost the majority of their land and therefore any real economic base they had. This has lead to Maori leading the statistics in regards to poverty.

The Declaration states that indigenous peoples "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".¹⁹⁹ [emphasis added] The settling of Treaty settlements is one way in which Maori will be able to finance their autonomous functions. The Treaty Settlement process provides financial and commercial redress to

¹⁹⁸ New Zealand Law Commission *Waka Umanga: a proposed law for Maori governance entities* (NZLC, 92, Wellington, 2006) 24.

¹⁹⁹ The Declaration, above n 100, art 4.

claimant groups. Types of redress include cash and commercial properties. Economic and financial redress is provided in Treaty Settlements in recognition and settlement of historical claims against the Crown and is based on the nature and extent of the breach of the Treaty and its principles.²⁰⁰ Commercial and financial redress is supposed to provide for an economic base for a claimant group and contribute to their resources for future development.²⁰¹

The Crown recognises that the redress provided to claimant groups is not considered full compensation of the total loss suffered. Some argue that the amount of redress provided in Treaty settlements is only 1% of the total value of land that was taken from Maori. Former Minister in Charge of Treaty of Waitangi Negotiations, Hon Margaret Wilson, states that "it is an honest and sincere attempt to provide just redress within the context of modern society."²⁰² The primary constraints on providing full compensation to claimant groups is the difficulty in calculating the total loss suffered and the financial burden of this amount on present and future generations of New Zealanders.²⁰³ The losses incurred by Maori have been estimated to run into the tens of billions of dollars.²⁰⁴

A recent example of a major Treaty Settlement which will provide large economic base is the Central North Island Forests Iwi Collective Deed of Settlement. The Deed of Settlement was signed on 25 June 2008 between eight iwi and the Crown.²⁰⁵ Together the collective represents more than 100,000 members. The Deed of Settlement provides a settlement package which includes the transfer of 176,000 hectares of forest in the Central North Island. The value of the forest is valued at approximately \$200 million. Rentals that have accumulated from the Crown Forest licenses have valued at approximately \$250 million. This is a substantial settlement which will go along way to

²⁰⁰ Office of Treaty Settlements, above n 174, 87.

²⁰¹ Office of Treaty Settlements, above n 174, 3 and 87.

²⁰² Office of Treaty Settlements, above n 174, 3.

²⁰³ *Ibid*, 89.

²⁰⁴ *Ibid*.

²⁰⁵ See Office of Treaty Settlement Website www.ots.govt.nz (last accessed 20 February 2008). The eight iwi groups are Ngai Tuhoe, Ngati Tuwharetoa, Ngati Whakaue, Ngati Whare, Ngati Manawa, Ngati Rangitahi, Ngati Raukawa and Affiliate Te Arawa Iwi and Hapu.

allowing the 100,000 members the ability to move towards economic independence from the state.²⁰⁶

Examples of past settlements include the Ngai Tahu and Waikato-Tainui Settlement which were settled in the mid-late 1990s. Ngai Tahu received their Treaty Settlement in 1998 which included cash settlement of \$170 million as well as cultural redress.²⁰⁷ Ngai Tahu have work hard over the last ten years and have now built their assets up to a value of over half a billion dollars. As a result of their Treaty Settlement they have been able to establish their own savings scheme which has over 13,500 members and also provide financial independence programmes to help their people. They have created a business mentoring programme, various scholarships, and educational projects and have their own finance company.²⁰⁸ Ngai Tahu has an estimated 50,000 members according to the 2006 census making it the fourth largest tribe in New Zealand.²⁰⁹

The Waikato-Tainui Deed of Settlement was signed in 1995 and provided redress of \$170 million. The iwi has had its ups and downs reportedly losing millions of dollars in the late 1990s due to high risk investments and questionable purchase of a Rugby League franchise. However since then the governance structure has had a major restructure and is now back on track with their total assets worth over half a billion dollars. Just like Ngai Tahu, Waikato Tainui are able to provide their people with health and social services without the aide of the State. They are also considered the most powerful landlord in Hamilton.²¹⁰

The examples above illustrate how the Treaty settlement process can enable Maori to achieve economic self-determination. This process provides Maori with an economic

²⁰⁶ See CNI Forest Website www.cniforest.co.nz (last accessed 24 February 2009).

²⁰⁷ See Ngai Tahi Deed of Settlement on OTS website www.ots.govt.nz (last accessed on 22 February 2009).

²⁰⁸ See Ngai Tahi Iwi website www.ngaitahu.iwi.nz (last accessed 22 February 2009)

²⁰⁹ See Statistics New Zealand website www.stats.govt.nz (last accessed 22 February 2009).

²¹⁰ Anne Gibson "Tainui bullish despite gloomy profit forecast" (9 August 2008) *The New Zealand Herald*, Auckland.

base from which to grow from. Maori are quickly becoming powerful players in the commercial market.

2 *Social self-determination*

Treaty settlement packages do not usually provide for social self-determination mechanisms. However in the past year new initiatives have been included in some settlement packages under the former Minister in Charge of Treaty of Waitangi Negotiations, the Hon Dr Michael Cullen.

In one settlement package, the Crown is gifting land back to an iwi for the purposes of a building papakainga (housing) for their people.²¹¹ Affordability of housing is a big problem for many Maori around the country. The transfer of land back to iwi will help alleviate this problem to some extent. The Government is also looking into easing up the current restrictions on building on Maori Land and amending the Resource Management Act 1993.

The Crown has also offered to provide funds to a particular claimant group to establish an education endowment fund. The Crown is also providing funds for a needs assessment for another iwi for the purpose of identifying and remedying social service needs.²¹² A government facilitator is also to be employed to discuss the outcome of the needs assessment with various different Crown agencies. The notion of social redress is related a contemporary issue which is beyond the scope of settling historical Treaty claims. However the Treaty Minister has offered to explore options for social redress and is committed to having discussions with his colleagues.

Other methods of achieving social self-determination include devolution of social services by the Crown to Maori. This does provide a limited form of autonomy for Maori under the watchful eye of the State. Final decisions and policy advice is made by the

²¹¹ Ngati Apa (North Island) Deed of Settlement see on OTS Website www.ots.govt.nz (last accessed 22 February 2009).

²¹² Waitaha Agreement in Principle see on OTS Website www.ots.govt.nz (last accessed 22 February 2009).

relevant Minister and Crown officials. This type of arrangement has given Maori more responsibility in certain areas though it falls well short of autonomy. The devolution model gets Maori to deliver social service on behalf of the Crown and is not promoting a power sharing relationship.

The Crown's devolution policy has given Maori more responsibility in respect of some areas of social services. Recent innovative Treaty settlement redress instruments have assisted Maori move towards social self-determination however it does not go far enough to qualify as autonomy. However having an economic base will allow Maori to fund their own social services programmes as is already being done by big tribes like Ngai Tahu and Waikato-Tainui.

3 *Cultural self-determination*

Maori have a unique relationship with the land, mountains and waterways. Over the years the land was taken away and access to significant sites was lost. The Treaty settlement process aims to rights the wrongs of the past by returning sites back to Maori where possible or recognising the guardianship role Maori had over land. An important part of a Treaty settlement package is cultural redress. Where able, the Crown will gift sites of cultural significance back to iwi. If this is not possible the Crown will look at ways in which to recognise a claimant groups' relationship with a particular site such as a river, lake, or a mountain. The Crown will also explore the possibility of providing a claimant groups greater ability to participate in the management of certain sites.²¹³ Many of the sites that are of significance to Maori are owned and managed by the Department of Conservation on behalf of all New Zealanders. Some examples of cultural redress provided by the Crown include:²¹⁴

- recognition of cultural, spiritual, historical and traditional associations with areas or natural resources;

²¹³ Office of Treaty Settlement, above n 174, 96.

²¹⁴ Ibid, 99.

- protection of wahi tapu (sites of cultural significance);
- recognition of the role of Maori as guardians of natural resources; and
- access to certain sites.

In recent settlements cultural revitalisation packages have been offered to claimant groups. These include funds to: restore maraes, employ cultural advisors, compile historical records and establish cultural centres.²¹⁵ All negotiations regarding cultural redress between the Crown and Maori is on an “interest basis”. In other words the Crown will look to at ways in which to meet those interests.²¹⁶ Therefore sometimes ownership of a site is not necessary to meet the interests of groups.

As previously discussed one recent example of a cultural redress mechanism is the Waikato River Settlement. Under the proposed co-management model Maori are given a substantial decision making role around the management of the well-being of the Waikato River. On the spectrum of rights this model sits on the end of the spectrum closest to autonomy. Waikato-Tainui already believe they own the river, though in New Zealand water is not owned by anyone but is managed by the Crown. Therefore the focus of negotiations between the two parties has been on how to share decision making powers.

Components of cultural redress have developed over the years to reflect the different need and interests of each group. It is also a reflection of the increase in political will in this area. The instruments and redress provided do go a long way in enabling Maori to exercise a level of autonomy in this area and innovative mechanisms such as co-management has also furthered Maori aspirations towards cultural autonomy.

²¹⁵ See Ngati Apa (North Island) Deed of Settlement, Ngati Makino Agreement in Principle, Waitaha Agreement in Principle and Ngati Kahu Agreement in Principle on OTS website www.ots.govt.nz (last accessed 22 February 2009).

²¹⁶ Office of Treaty Settlement, above n 174, 97.

D Conclusion on New Zealand examples of self-determination

The Declaration affirms Maori peoples' right to self-determination and in doing so allows Maori the right to determine their political status and pursue economic, social and cultural development.

Political self-determination underpins economic, social and cultural development and as a result is the most important aspect of self-determination. In regards to political self-determination New Zealand does not recognise any inherent rights to sovereignty by Maori like the United States and Canada. Any discussion on rights is always based on the Treaty and its principles. There are several different models of political self-determination with some of them being analysed in this paper. The different modes reflect the multiple needs and interests of indigenous groups. The models that I have analysed also illustrate the different levels of autonomy.

In general the Crown fails to provide Maori the right to determine their own political status. Though there are different models to choose from Maori usually do not have a choice of which model to use i.e. can not freely choose their political status.

Autonomy and self-governance is not even an option which is practiced in New Zealand. The Treaty settlement process has not provided any redress relating to autonomy or self-government. However Ngai Tahu are currently in negotiations with the Crown over possible self-government arrangements. Any settlement package accommodating constitutional change will be a major development for Maori in general.

The different models of political self-determination listed by Shin are utilised in New Zealand in different situations and to respond to the different needs of Maori. The self-management and self-administrative examples in New Zealand given in this paper allow Maori more responsibility in certain areas. However the real decision making is made by Ministers. Great strides have been made recently in regards co-management where Maori have been offered greater decision making powers over an important natural

resource. The guarantee of Maori seats in parliament and a Maori Electoral Roll are measures of ensuring Maori participation in Parliament and are also unique to this country.

All of these examples show the varying levels of political self-determination in New Zealand. Treaty settlements provide redress which allows limited autonomy. However the Crown has recently given Maori more decision making powers over an important natural resource and is in discussions with another iwi over possible constitution change.

One of the purposes of Treaty settlements is to provide Maori with an economic base for future development. Ngai Tahu and Waikato-Tainui have between them \$1 billion in assets which is largely attributed to the \$170 million each received in the 1990s through their own Treaty Settlement deals. They are both considered major iwi players on the commercial scene. A recent \$500 million settlement with Central North Island iwi will also provide those iwi an economic base. The amount provided by the Crown to Maori is only a fraction of the total loss suffered by Maori. However iwi have been able to prosper and grow the value of the settlement thus enabling them to provide services for their people and rely less and less on the government. Therefore Treaty settlements' enables Maori to pursue their economic development.

In regards to social self-determination the devolution policies by the Crown required Maori organisations to provide service delivery to their people on behalf of the Crown. This gives Maori greater responsibility than they previously had but it fall short of autonomy as Maori organisations are accountable to Ministers and not to their people. Treaty settlements generally do not provide redress to address this aspect other than providing cash which will enable Maori to pursue their social development. The Ngai Tahu and Waikato-Tainui settlements enable these iwi to fund their own social services. Recent Treaty settlements have provided instruments which address this area.

In regards to cultural self-determination Treaty Settlements provide many different instruments which allow Maori to exercise their right as stated under the Declaration. Negotiations between Maori and the Crown on cultural redress are interest based and various instruments have been created to meet the different needs of Maori.

I explored the evolution of the self-determination under the creation of the United Nations regime in the 1940s. Through analysis of each phase will can determine that international law did not recognise indigenous population as peoples who had the right to self-determination. The United Nations Declaration on the Rights of Indigenous Peoples affirmed indigenous peoples' right to self-determination. Thereby allowing indigenous peoples the ability to freely determine their political status and freely pursue their economic, social and cultural development. In exercising their right to self-determination indigenous peoples have the right to autonomy or self-government in matters relating to their own internal and local affairs. This paper examined New Zealand examples of the four key aspects of the right to self-determination (political, economic, social and cultural) and measured them against an interpretation of self-determination as contained in the Declaration. This paper has argued that the Treaty settlement framework enables Maori to exercise sufficient levels of economic and cultural self-determination. However it currently fails to provide Maori sufficient level of political and social autonomy.

Political self-determination underpins all other aspects of the right to self-determination so the Crown's failure to enable Maori to freely determine their own political status affects the ability of Maori to fully exercise self-determination. However the Crown is currently in negotiations with Ngai Tahu and one of the primary issues to be discussed is the requirements. It will be interesting for Maori and indigenous people around the world to see what arrangement can be agreed.

V CONCLUSION

This paper analysed whether the redress provided in the Treaty settlement framework allowed Maori to exercise self-determination as specified under the United Nations Declaration on the Rights of Indigenous Peoples (The **Declaration**).

I examined the evolution of the self-determination since the creation of the United Nations regime in the 1940s. Through analysis of each phase will can determine that international law did not recognise indigenous population as peoples who had the right to self-determination. The United Nations Declaration on the Rights of Indigenous Peoples affirmed indigenous peoples' right to self-determination. Thereby allowing indigenous peoples the ability to freely determine their political status and freely pursue their economic, social and cultural development. In exercising their right to self-determination indigenous peoples have the right to autonomy or self-government in matter relating to their own internal and local affairs. This paper examined New Zealand examples of the four key aspects of the right to self-determination (political, economic, social and cultural) and measured them against an interpretation of self determination as contained in the Declaration. This paper has argued that the Treaty settlement framework enables Maori to exercise sufficient levels of economic and cultural self-determination. However it currently fails to provide Maori sufficient level of political and social autonomy.

Political self-determination underpins all other aspects of the right to self-determination so the Crown failure to enable Maori to freely determine their own political status affects the ability to Maori to truly exercise self-determination. However the Crown is currently in negotiations with Ngai Tuhoe and one of the primary issues to be discussed is tino rangatiratanga. It will be interesting for Maori and indigenous peoples around the world to see what arrangement can be agreed.

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United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Noting that the recommendations of the Human Rights Council contained in its resolution 12/13 of 29 June 2007, by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 29 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution,

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

VII APPENDIX I

United Nations A/61/L.67

General Assembly

12 September 2007

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006, by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights¹ and the International Covenant on Civil and Political Rights as well as the Vienna Declaration and Programme of Action,² affirm the

¹ See resolution 2200 A (XXI), annex.

² A/CONF.157/24 (Part I), chap. III.

fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing also that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights³ and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

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

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.

³ Resolution 217 A (III).

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.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
 - (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
 - (d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect,

and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

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.

Article 19

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.

Article 20

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.

Article 21

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.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

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

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

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

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

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

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