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Abstract

This Comment argues that Maori land claims will be bolstered through the use of existing and emerging customary international law, including principles in the Declaration. Part I discusses land issues in New Zealand, beginning by providing an overview of developments since the signing of the Treaty of Waitangi ("Treaty"), the founding document of New Zealand. It then discusses Maori customary title, the foreshore and seabed controversy, and the first settlement under the F.S.A., and concludes with the reasons for New Zealand's vote against the Declaration. Part II reviews indigenous rights in international law and the role of international law in the New Zealand judiciary. Part III argues that international law, including the Declaration, provides support for successful claims of traditional land rights, especially those arising out of the F.S.A., and that the principles of the Declaration are applicable in New Zealand domestic law regardless of New Zealand's official position on the Declaration.

COMMENT

INDIGENOUS LAND RIGHTS AND THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: IMPLICATIONS FOR MAORI LAND CLAIMS IN NEW ZEALAND

*Sarah M. Stevenson**

INTRODUCTION

The rights of indigenous peoples worldwide were recognized and affirmed by the international community on September 13, 2007, when the General Assembly of the United Nations ("U.N.") adopted, by overwhelming majority, the Universal Declaration on the Rights of Indigenous Peoples ("Declaration").[1] Only four States voted against the Declaration,[2] and two have since indicated a change in their position.[3] One State that has maintained its negative vote is New Zealand, where the Maori, the tangata whenua, or indigenous peoples,[4] currently make up

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1. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/Res/61/295 (Sept. 13, 2007) [hereinafter Declaration]; *see also* Press Release, General Assembly, United Nations General Assembly Adopts Declaration on Rights of Indigenous Peoples, U.N. Doc. GA/10612 (Sept. 13, 2007) [hereinafter U.N. Press Release] (stating that 143 countries voted in favor of the Declaration, four voted against, and eleven abstained); S. James Anaya & Siegfried Wiessner, *The U.N. Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*, JURIST LEGAL NEWS & RESEARCH, Dec. 4, 2007, http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php.

2. *See generally* U.N. Press Release, *supra* note 1 (recording votes against the Declaration from Australia, Canada, New Zealand, and the United States ("U.S.")); Anaya & Wiessner, *supra* note 1.

3. *See* U.N. Experts Welcome Canada's Backing For Indigenous Rights Declaration, U.N. NEWS CENTRE, Apr. 18, 2008, http://www.un.org/apps/news/story.asp?NewsID=26376&Cr=indigenous&Cr1=rights (reporting Canada's House of Commons endorsement of the Declaration); *Call to Honour Indigenous Promise*, DAILY TELEGRAPH (Sydney, Austl.), Sept. 13, 2008, at 15 (stating that the Labour government said it would support the Declaration but had yet to do so); *see also* H.R.J. Res. 1681, 123d Leg., 1st Spec. Sess. (Me. 2008) (adopting an endorsement of the Declaration).

4. *See* Off. of the U.N. High Comm'r for Hum. Rts., *Core Document Forming the Initial Part of the Reports of States parties: New Zealand*, U.N. Doc. HRI/CORE/NZL/2006, ¶ 36, (Oct. 26, 2006) [hereinafter Core Document] (stating that Maori were established in

approximately fourteen percent of New Zealand's population.[5] New Zealand has long prided itself on support of and adherence to the international human rights regime,[6] as well as respect for Maori rights within national law.[7] The vote against the Declaration brings New Zealand's relationship with its indigenous population into the spotlight.

In international law, the concept of indiginenity[8] refers to the non-dominant people who lost traditional ownership and power over their lands as part of the colonization process and have historical continuity with the inhabitants of the same land

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settlements throughout the islands that comprise New Zealand by the twelfth century, and that the first Polynesians were believed to have arrived over a century earlier); Douglas Graham, *The New Zealand Government's Policy*, *in* RECOGNISING THE RIGHTS OF INDIGENOUS PEOPLES 3, 7 (Alison Quentin-Baxter ed., 1998) (referring to Maori as the tangata whenua of New Zealand) (author was a Member of Parliament at the time of publication).

5. *See* Off. of the U.N. High Comm'r for Hum. Rts., Seventy-First Session of the Committee on the Elimination of All Forms of Racial Discrimination, *Overview and Update on Developments Since December 2005: New Zealand* ¶ 1 (July 31, 2007) http://www2.ohchr.org/english/bodies/cerd/docs/NZ_overview71.pdf (reporting 2006 census figures for New Zealand as 67.6% European, 14% Maori, 9.2% Asian, 6.6% Pacific, and 11.1% "New Zealander") [*hereinafter* Overview and Update]; Jacqueline F. Pruner, *Aboriginal Title and Extinguishment Not So "Clear and Plain": A Comparison of the Current Maori and Haida Experiences*, 14 PAC. RIM. L. & POL'Y J. 253, 263 (2005) (noting that Maori are the only indigenous group recognized by New Zealand law).

6. *See* Claire Charters, *Developments in Indigenous Peoples' Rights under International Law and Their Domestic Implications*, 21 N.Z.U.L.REV. 511, sec. I (2005) (noting that New Zealand's government purports to be a strong supporter of international human rights); New Zealand Bill of Rights Act 1990 ("BORA"), 1990 S.N.Z. No. 109 (providing human rights protections under domestic law); Core Document, *supra* note 4, ¶ 53 (stating that New Zealand must observe international obligations, including human rights).

7. *See, e.g.*, Explanation of Vote by New Zealand Permanent Representative to the United Nations, Rosemary Banks, Sept. 13, 2007, (on file with author) [*hereinafter* Statement of Banks] (proclaiming importance of Maori rights in New Zealand, and their protection under domestic law); *cf.* Todd Ward, *Turia: Maori Party Ashamed of N.Z. Failure on Rights*, TARANAKI DAILY NEWS (N.Z.), Sept. 19, 2007, at 2 (quoting Maori Party co-leader Tariana Turia saying the current government was changing course with their lack of respect for Maori rights).

8. *See* Jeremy Waldron, *Indigeneity? First Peoples and Last Occupancy*, 1 N.Z. J. PUB. & INT'L L. 55, § 1 (2003) (discussing the implications of different principles invoked when discussing indigenous peoples and advancing the use of term "indigeneity"); *see also* F.M. (JOCK) BROOKFIELD, WAITANGI & INDIGENOUS RIGHTS: REVOLUTION, LAW & LEGITIMATION 77-78 (2d ed. 2006) (noting that defining indigenous can be difficult when the group generally recognized as indigenous earlier displaced the actual original inhabitants of the land, and stating that western imperialist countries are the only ones included as foreign powers).

prior to its invasion or colonization by a foreign power.[9] Worldwide, there are 370 million indigenous peoples in at least seventy countries.[10] Due to the nature of indiginenity, indigenous peoples have suffered many historical wrongs at the hands of the foreign powers and, as a result, have valid claims against their contemporary governments for redress of these wrongs.[11] In New Zealand, most of these claims relate to land that was occupied and used by the indigenous populations before foreign intervention.[12]

While New Zealand protects human rights with both domestic and international law, Maori land rights are located almost solely in domestic law.[13] New Zealand's vote against the Declaration was a reflection of the government's desire to limit the law applicable to Maori land claims to domestic law, as the rights stated in the Declaration are arguably broader than those in New Zealand statutory law.[14] As this Comment will explore, however, the legal standards available to Maori land claimants may not be so limited. The recent passage of the Foreshore and Seabed Act 2004 ("F.S.A.")[15] and settlements thereunder, provides a con-

9. *See* U.N. Dept. of Economic & Social Affairs, Workshop on Data Collection and Disaggregation for Indigenous Peoples, *The Concept of Indigenous Peoples*, § 2, U.N. Doc PFII/2004/WS.1/3 (2004); S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 3-5 (2d ed. 2004) (stating that indigenous peoples are those that have been subject to subjugation by a colonial power).

10. U.N. Press Release, *supra* note 1; Todd, *supra* note 7.

11. Anaya, *supra* note 9, at 5; *see also* Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 93 (1999) (noting that indigenous communities occupy the "bottom rung" in most countries and new avenues are being explored for remedying that position via domestic and international laws).

12. *See* CHRISTA SCHOLTZ, NEGOTIATING CLAIMS: THE EMERGENCE OF INDIGENOUS LAND CLAIM NEGOTIATION POLICIES IN AUSTRALIA, CANADA, NEW ZEALAND, AND THE UNITED STATES 78 (2006) (noting that Maori claims are generally for reparative justice based on the breach of the Treaty); Peter Manus, *Sovereignty, Self-Determination, and Environment-Based Cultures: The Emerging Voice of Indigenous Peoples in International Law*, 23 WIS. INT'L L.J. 553, 555 (2005).

13. *See* Charters, *supra* note 6, § VI (noting that the New Zealand government's actions towards Maori land rights seems generally uninformed by international law); Paul Rishworth, *The Treaty of Waitangi and Human Rights*, [2003] N.Z.L.REV. 381, 381 (remarking that Treaty rights are not considered protected by international law).

14. *See* U.N. Press Release, *supra* note 1 (noting New Zealand's stated reasons for voting against the Declaration included objections over the Declaration's statement on land rights); Statement of Banks, *supra* note 7 (describing incompatibility of specific articles in the Declaration with domestic law).

15. Foreshore and Seabed Act 2004, 2004 S.N.Z. No. 93 [hereinafter F.S.A.] (placing title to all foreshore (beach) and seabed not privately owned in the government).

temporary lens for viewing New Zealand's treatment of indigenous land claims.

This Comment argues that Maori land claims will be bolstered through the use of existing and emerging customary international law, including principles in the Declaration. Part I discusses land issues in New Zealand, beginning by providing an overview of developments since the signing of the Treaty of Waitangi ("Treaty"),[16] the founding document of New Zealand. It then discusses Maori customary title, the foreshore and seabed controversy, and the first settlement under the F.S.A., and concludes with the reasons for New Zealand's vote against the Declaration. Part II reviews indigenous rights in international law and the role of international law in the New Zealand judiciary. Part III argues that international law, including the Declaration, provides support for successful claims of traditional land rights, especially those arising out of the F.S.A., and that the principles of the Declaration are applicable in New Zealand domestic law regardless of New Zealand's official position on the Declaration.

I. *MAORI AND THEIR TRADITIONAL LANDS: FROM THE TREATY OF WAITANGI TO THE FORESHORE AND SEABED ACT SETTLEMENTS*

Land and resources are necessary to the survival of indigenous peoples,[17] both as a matter of subsistence and of cultural integrity.[18] The history of the relationship between the New Zealand government and the Maori is the history of government policy towards Maori and their lands.[19] This Part will review this history, beginning with the Treaty, the document that estab-

16. Treaty of Waitangi, U.K.-Maori, Feb. 6, 1840, *reprinted in* PHILIP A. JOSEPH, CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND § 3.3 (2d ed. 2001) [hereinafter Treaty].

17. *See* Anaya, *supra* note 9, at 141; *see also* Jérémie Gilbert, *Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples*, 14 INT'L J. ON MINORITY AND GROUP RTS. 207, 223-24 (2007) (noting general consensus that land rights are important to indigenous peoples apparent from the Declaration's emphasis on land).

18. *See* Ani Mikaere et al., *Treaty of Waitangi and Maori Land Rights*, [2003] N.Z.L.REV. 447, 460 (reporting on a Waitangi Tribunal report discussing the importance of land to Maori as "an internal part of self-identification" (quoting Waitangi Tribunal, *Ngati Awa Settlement Cross-Claims Report* 84 WAI 958 (2002)); Erica-Irene A. Daes, *The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft Declaration on the Rights of Indigenous Peoples*, 14 ST. THOMAS L. REV. 259, 264 (2001).

19. *See generally* Scholtz, *supra* note 12; Bryan Gilling, Raupatu*: The Punitive Confis-*

lished British governance over New Zealand in the mid-nineteenth century, and continue to its most recent chapter, settlements between the government and Maori groups under the F.S.A.

A. *The Treaty of Waitangi*

The founding document of the New Zealand government is the Treaty,[20] signed in 1840 between the representatives of the British Queen and over 500 Maori chiefs.[21] Although not all Maori tribes were parties to the original treaty, it is now applied to all Maori as official policy.[22] The British government procured the signatures of the chiefs to legally settle New Zealand and purported to protect Maori property and culture from settlers.[23] Maori were granted some rights under the new colonial govern-

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cation of Maori Land in the 1860s, in LAND AND FREEDOM: LAW, PROPERTY RIGHTS AND THE BRITISH DIASPORA 117, 117 (A.R. Buck et al. eds., 2001).

20. Treaty, *supra* note 16; *see also* Joseph, *supra* note 16, § 3.1 (stating that the Treaty is generally considered the founding document of New Zealand); Core Document, *supra* note 4, ¶ 74 (noting the Treaty established the legal basis for England's settlement of New Zealand); Graham, *supra* note 4, at 5 (discussing the Treaty as a founding document of New Zealand and comparing it to the Magna Carta as a historical document that can be used to instruct future relations); GEOFFREY PALMER & MATTHEW PALMER, BRIDLED POWER: NEW ZEALAND'S CONSTITUTION AND GOVERNMENT 333 (4th ed. 2004) (discussing the Treaty signing).

21. *See* New Zealand Maori Council v. Attorney General, [1987] 1 N.Z.L.R. 641, 662 (CA) (stating that over 500 Maori chiefs signed the Treaty, including some women chiefs); Joe Williams, *Colonization Stories from Across the Pacific*, 7 ASIAN-PAC. L. & POL'Y J. 65, ¶ 4 (2006) (stating that 545 Maori chiefs signed the Treaty, mostly signing the Maori version); *see also* Heads of Agreement Relating to Ngâ Rohe Moana o Ngâ Hapû o Ngâti Porou, Background, § A, Feb. 5, 2008, http://www.justice.govt.nz/foreshore/negotiations/te-runanga-o-ngati-porou/agreement-february-2008/index.html [hereinafter Heads of Agreement] (noting that, prior to 1840, Ngati Porou owned all land within their territory).

22. *See* Brookfield, *supra* note 8, at 105-06 (noting that all Maori are considered parties to the Treaty whether or not their chief signed the Treaty in 1840); PETER SPILLER ET AL., A NEW ZEALAND LEGAL HISTORY 130 (1995) (noting that failure to procure the signature of the totality of the Maori chiefs is disregarded); *see generally* Kirsty Gover & Natalie Baird, *Identifying the Maori Treaty Partner*, 52 U. TORONTO L.J. 39 (2002) (providing a thorough discussion of the multiplicity of Maori groups and its impact on the relationship formed by the Treaty).

23. *See* Palmer & Palmer, *supra* note 21, at 334 (stating that dual goals of the Treaty were to preserve Maori culture and ease British settlement); Core Document, *supra* note 4, ¶ 74 (stating that protection of Maori property rights was a Treaty goal); *see also* Attorney General v. Ngati Apa, [2003] 3 N.Z.L.R. 643, ¶ 37 (CA) (noting that Britain assumed Maori owned New Zealand's land, in contrast to the application of the *terra nullius* theory during colonization of Australia).

ment,[24] but conflict exists as to the extent of the sovereignty the Maori surrendered to the Crown due to differences in the meaning of the language used in the English and Maori versions.[25] The Treaty has three articles: in Article I, the Maori chiefs cede sovereignty in the English version, but *kawanatanga* (governorship) in the Maori, to the British government;[26] in Article II, the British government guarantees to the Maori "full, exclusive, and undisturbed possession" or *te tino rangatiratanga* (full chieftanship) of lands held collectively or individually;[27] and in Article III, Maori are guaranteed legal equality with New Zealanders of British citizenship.[28] Article III has the same meaning in the English and Maori versions of the Treaty,[29] but Articles I and II grant far more authority to the British government in the English version than in the Maori version.[30]

The Treaty, though never adopted as part of New Zealand's positive law, is a very important document in New Zealand.[31]

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24. *See New Zealand Maori Council*, 1 N.Z.L.R. at 663 (noting that the Treaty, when signed, was believed to guarantee Maori chieftainships and land ownership); *see also* Palmer & Palmer, *supra* note 21, at 335-36 (stating that the Treaty created both substantive and procedural rights for Maori in New Zealand's government, substantive rights being the protection of Maori interests when balanced against government concerns, and procedural rights being the fiduciary-like relationship between the Maori and the Crown).

25. *See New Zealand Maori Council*, 1 N.Z.L.R. at 662-63 (quoting a literal translation of the Treaty to demonstrate difference in text); Treaty of Waitangi Act 1975, 1975 S.N.Z. No. 114 pmbl. (noting that English and Maori texts of the Treaty are different); *see also* Pruner, *supra* note 5, at 264 (2005) (noting dispute over conflicts between language in Maori and English versions of the Treaty has continued since 1840 signing of the Treaty).

26. Treaty, *supra* note 16, art. I; *see also* PETER C. OLIVER, THE CONSTITUTION OF INDEPENDENCE: THE DEVELOPMENT OF CONSTITUTIONAL THEORY IN AUSTRALIA, CANADA, AND NEW ZEALAND 31 (2005) (discussing differences between sovereignty and governorship).

27. Treaty, *supra* note 16, art. II; *see also* Erica-Irene A. Daes, *Final Report of the Special Rapporteur on Indigenous Peoples' Permanent Sovereignty Over Natural Resources*, ¶ 26, U.N. Doc. E/CN.4/Sub.2/2004/30 (July 13, 2004) (describing *tino rangatiratanga* as Maori sovereignty, and noting difference between possession and sovereignty).

28. Treaty, *supra* note 16, art. III; *see also* Palmer & Palmer, *supra* note 20, at 334; Brookfield, *supra* note 8, at 98.

29. *See* Scholtz, *supra* note 12, at 77 (noting that Article III, guaranteeing equal process to Maori, has never been in dispute); Palmer & Palmer, *supra* note 20, at 334.

30. *See* Joseph, *supra* note 16, § 3.4; Scholtz, *supra* note 12, at 77; Maui Solomon, *The Context for Maori (II)*, *in* RECOGNISING THE RIGHTS OF INDIGENOUS PEOPLES 60, 67 (Alison Quentin-Baxter, ed. 1998) (stating that continued disagreement over the content of the Treaty is due to the translations used at the signings and arguing that Maori chiefs who signed the Treaty believed they were retaining the right to self-governance).

31. *See* Anaya, *supra* note 9, at 188 (noting that Maori look to the Treaty as the

While its validity as an international instrument is doubtful,[32] the Treaty established a relationship between the Maori and the State government that is best understood as a partnership.[33] This partnership is implemented through legislation and a constitutional convention that require the New Zealand government to seek the consent of Maori groups before taking any action which may directly affect Maori rights.[34] These procedures are underscored by an overarching requirement of both parties to act in good faith to respect the principles of the Treaty.[35] Claims for Treaty breaches, which often involve disputes over land,[36]

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most important constitutional document); Oliver, *supra* note 26, at 31 (referring to the Treaty as an important historical document); Scholtz, *supra* note 12, at 90-91 (noting that, although the National Party considered ratifying the Treaty in the 1970s, it remains unincorporated); Charters, *supra* note 6, § V.A. (discussing the dualist system of treaty incorporation).

32. *See* Joseph, *supra* note 16, § 3.2 (noting that many scholars consider the Treaty an invalid cession under international law, but others argue that Maori did have sovereign standing under international law and the Treaty is valid); *see also* Brookfield, *supra* note 8, at 99 (stating that even if the Treaty was formerly valid under international law, it is no longer, as Maori chiefs do not have sovereign status).

33. *See* Treaty of Waitangi Act 1975, 1975 S.N.Z. No. 114, art. 4(2)(A)(a) (referring to the Treaty parties as partners); New Zealand Maori Council v. Attorney General [1987] 1 N.Z.L.R. 641, 664 (CA) (stating that the Treaty created a partnership); *see also* Heads of Agreement, *supra* note 21, Letter of Understanding (stating that agreement was formed between partners, as equals and in good faith). *But see* Palmer & Palmer, *supra* note 20, at 336 (discussing fiduciary relationship created by the Treaty).

34. *See* Human Rights Act 1993, 1993 S.N.Z. No. 82, § 5(2)(D) (amended 2001) (listing understanding human rights components of the Treaty in light of national and international law as a function of the Human Rights Commission); State Owned Enterprise Act 1986, 1986 S.N.Z. No. 124, § 6 (requiring the government to observe the principles of the Treaty when acting under the mandate of the statute); Geoffrey Palmer, *The New Zealand Constitution and the Power of Courts*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 551, 568-69 (2006) (discussing the thirty statutes that incorporate the Treaty); *see also* Joseph, *supra* note 16, § 1.4.8 (describing constitutional conventions as a non-statutory rule of political obligation); S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13, 52-60 (2004) (discussing importance of a consultative process to the preservation of indigenous rights and the incorporation of a consent principle into international documents such as the World Bank Operational Directive 4.20). *But see New Zealand Maori Council*, 1 N.Z.L.R. at 665 (stating that a general duty to consult was unworkable when it was unclear who to consult and whose rights would be violated).

35. *See* Treaty of Waitangi Act 1975, art.4(2)(A)(a) (describing parties in partnership); Heads of Agreement, *supra* note 21 (noting importance of good faith in Treaty-related agreements).

36. *See* Andrew Sharp, *Blood, Custom, and Consent: Three Kinds of Maori Groups and the Challenges They Present to Governments*, 52 U. TORONTO L.J. 9, 11-12 (2002) (identifying three types of claims Maori most commonly bring against the State as those seeking to better their socio-economic position, redress for historical wrongs, and infringements on Maori autonomy); *see also* Scholtz, *supra* note 12, at 74-75 (noting the Treaty

may be resolved by the Waitangi Tribunal[37] ("Tribunal") or in official settlement negotiations with the government.[38]

B. *Maori Customary Title and the Foreshore and Seabed Act*

The Waitangi Tribunal and official settlement process exist to resolve land disputes under the Treaty. Maori land rights also exist in the doctrine of indigenous title, or Maori customary title, which creates legal title in lands traditionally occupied by indigenous peoples.[39] Maori customary title, although lost to most of New Zealand's land in the years following the signing of the Treaty,[40] is formally recognized by Te Ture Whenua Maori Act,

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established Maori had rights to all of what became the British colony, and claims arose from the Treaty).

37. Treaty of Waitangi Act 1975 (giving the Tribunal jurisdiction over claims by Maori alleging prejudicial effect by any government action inconsistent with the Treaty, and empowering the Tribunal to make recommendations); Treaty of Waitangi Amendment Act 1985, 1985 S.N.Z. No. 148 (extending the Tribunal's jurisdiction to 1840); Treaty of Waitangi Amendment Act 2006, 2006 S.N.Z. No. 077 (creating 2008 deadline for historical Treaty claims); *see also* Palmer & Palmer, *supra* note 20, at 336, 338 (noting that the Treaty of Waitangi Act creating the Tribunal was passed in 1975, but the Tribunal was not established until 1977 and noting that the Tribunal can order publically held land be returned to claimants but that power has not been exercised); Overview and Update, *supra* note 5, at 2 (noting that, due to most claims being settled, Parliament set a 2008 deadline for filing historical claims with the Waitangi Tribunal).

38. *See* Core Document, *supra* note 4, ¶¶ 76, 78, 80 (noting that, as of June 2005, New Zealand had entered into eight Treaty settlements, with six completed through legislation, for NZ $709 million and that Office of Treaty Settlements was established in 1995 in Ministry of Justice to advise the government on Treaty issues and negotiate on behalf of the Crown, and reciting six principles of Treaty negotiation set forth by the government); *see also* Scholtz, *supra* note 12, at 14 (noting that land claim negotiations are both symbolically and substantively important, in that government is acknowledging validity of claims and Maori as equal bargaining partners); Joseph, *supra* note 16, § 3.9.1 (stating that the negotiation process is intended to avoid time and cost of a Tribunal hearing); *see generally* Scholtz, *supra* note 12 (providing a thorough discussion of land settlement policies).

39. *See* Andrew Erueti, *Translating Maori Customary Title into a Common Law Title*, [2003] N.Z.L.J. 421, 421 (describing customary title as concept in common law countries of Australia, Canada, New Zealand, and the U.S. that holds title of indigenous peoples continued to exist following assumption of sovereignty by England); Brookfield, *supra* note 8, at 51-52 (defining doctrine of aboriginal title to locate property rights held by indigenous populations after a foreign government has become sovereign, except where the government acquired land by seizure, purchase, or otherwise).

40. *See* Erueti, *supra* note 39, at 421 (stating that most Maori customary title to land was extinguished by 1900, due to sales, confiscation, and decisions by the Maori Land Court); Spiller et al., *supra* note 22, at 132-54 (discussing various ways by which the Crown and British settlers obtained title to most of New Zealand's land); Wiessner, *supra* note 11, at 70-71 (discussing Maori loss of land to colonial power).

the Maori Land Act of 1993 ("Maori Land Act").[41] The Maori Land Act empowers the Maori Land Court to find that Maori customary title exists when land is held following *tikanga Maori*, Maori customary values and practices.[42] Due to the extinguishment of Maori customary title, however, the theory has been of little value in Maori efforts to regain traditional lands.[43]

Maori customary title to the foreshore and seabed, however, continued to exist despite its termination inland.[44] In 2003, in *Attorney General v. Ngati Apa*,[45] the Court of Appeal held that Maori customary title to the foreshore and seabed of New Zealand may exist, as it was not extinguished by prior government act.[46] The court found that no prior general legislation had extinguished the customary title to the foreshore and seabed,[47] reversing a prior judgment that had held otherwise.[48] As a result of this ruling, Maori had the right to bring claims for customary title to the foreshore and seabed to the Maori Land Court.[49]

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41. Te Ture Whenua Maori Act 1993 (Maori Land Act 1993), 1993 S.N.Z. No. 4, ¶ 129 (2)(a)[hereinafter Maori Land Act 1993); *see also* Spiller et al., *supra* note 22, at 168-69 (noting that Maori Land Act 1993 had goal of achieving Maori land retention and use).

42. Maori Land Act 1993, ¶ 129; *see also* Pruner, *supra* note 5, at 263-64 (noting that Maori Land Act 1993 requires *tikanga Maori* to exist at time of claim).

43. *See* Pruner, *supra* note 5, at 266 (stating that land acts passed by colonial and New Zealand governments between 1862 and 1993 extinguished Maori customary title); Scholtz, *supra* note 12, at 77-78 (noting that most government acts served to extinguish Maori customary title to land).

44. *See* Erueti, *supra* note 39, at 421 (noting that customary title to foreshore and seabed survived as assertable claim despite extinguishment of such claims to most land); *cf.* Paul McHugh, *Setting the Statutory Compass: The Foreshore and Seabed Act 2004*, 3 N.Z. J. PUB. & INT'L L. 255, § I (2005) (noting that *Ngati Apa* held that customary title "might" exist).

45. Attorney General v. Ngati Apa, [2003] 3 N.Z.L.R. 643 (CA).

46. *See Ngati Apa*, 3 N.Z.L.R. 643, at ¶¶ 88, 91 (finding Maori Land Court had jurisdiction over claims of customary title to the foreshore and seabed); *see also* Erueti, *supra* note 39, at 421, 423 (discussing *Ngati Apa* decision giving the Maori Land Court jurisdiction over foreshore and seabed claims, with the power to convert Maori customary title into Maori freehold title if held according customary title as set forth in the Maori Land Act 1993); *see generally* Mikaere et al., *supra* note 18 (discussing *Ngati Apa* and other recent decisions affecting Maori land rights before the passing of the F.S.A.).

47. *Ngati Apa*, 3 N.Z.L.R. 643, at ¶ 83.

48. *Ngati Apa*, 3 N.Z.L.R. 643, at ¶ 87 (reversing *In re the Ninety Mile Beach* [1963] N.Z.L.R. 261 (CA)); *see also* Brookfield, *supra* note 8, at 189-90 (noting that *Ngati Apa* overturned *In re the Ninety Mile Beach*, which denied existence of customary Maori title).

49. *Ngati Apa*, [2003] 3 N.Z.L.R. 643, at ¶ 91; *see also* Pruner, *supra* note 5, at 279 (noting that the *Ngati Apa* holding did not establish customary Maori title to foreshore and seabed but rather that the Maori Land Court had jurisdiction over such claims).

Official reaction to the decision was swift.[50] Public and government concern that the *Ngati Apa* decision would result in the loss of public beach access and adversely affect private marine-based industries caused Parliament to pass legislation to overturn the holding.[51] The F.S.A. preemptively extinguished the Maori customary title that the Court of Appeal found may exist in the foreshore and seabed by vesting all title that was not held in fee simple in the government[52] and removed Maori Land Court jurisdiction to hear claims of title to the foreshore and seabed filed before the enactment of the F.S.A.[53]

The F.S.A. does not guarantee a right to redress, but instead allows applications for the recognition of territorial customary rights to the High Court or a customary rights order to the Maori Land Court.[54] Rather than having jurisdiction to grant freehold title to these lands using the doctrine of Maori customary title, as contemplated by the *Ngati Apa* court, a customary rights order allows the Maori Land Court to protect rights and uses but

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50. *See* Claire Charters & Andrew Erueti, *Report from the Inside: The CERD Committee's Review of the Foreshore and Seabed Act 2004*, 36 VICT. U. WELLINGTON L. REV. 257, § III.A.2 (2005) (noting announcement of intention to introduce legislation overturning *Ngati Apa* decision within days of ruling); Mikaere et al., *supra* note 18, at 471; *see also* Deed of Agreement, Nga Hapu O Ngati Porou and Her Majesty the Queen in Right of New Zealand, initialed Aug. 7, 2008, § D, http://www.justice.govt.nz/foreshore/negotiations/te-runanga-o-ngati-porou/deed.html [hereinafter Deed of Agreement] (reciting government introduction of legislation to overturn *Ngati Apa* decision).

51. *See* Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* ¶ 47, U.N. Doc. E/CN.4/2006/78/Add.3 (Mar. 13, 2006) (noting that the F.S.A. was Parliament's reaction to the *Ngati Apa* decision); Brookfield, *supra* note 8, at 191-92 (stating that reasons for the F.S.A. included government and Pakeha concern over use of sea and beach for recreation, concern the Maori Land Court would convert foreshore and seabed into Maori freehold title and fear that marine development would be adversely affected); Charters, *supra* note 6, § II (noting the F.S.A. was Parliament's response to *Ngati Apa* decision); *cf.* Mikaere et al., *supra* note 18, at 462 (characterizing Maori reaction to decision as one of relief).

52. F.S.A., *supra* note 15, § 13; *see also* Charters, *supra* note 6, § II; Stavenhagen, *supra* note 51, ¶ 52 (describing F.S.A. as a unilateral extinguishment of Maori customary title claims to the foreshore and seabed).

53. F.S.A., *supra* note 15, §§ 12, 46; *see also* Charters, *supra* note 6, § II.

54. F.S.A., *supra* note 15, §§ 32-90; *see also* McHugh, *supra* note 44, § II (explaining that territorial customary rights refer to exclusivity in the use and occupation of the foreshore and seabed that would have been recognized at common law, and that customary rights orders recognize non-exclusive, use-based rights); Charters & Erueti, *supra* note 50, § III.B.4 (arguing that the F.S.A. provided only a possibility of redress, such as recognition of property rights or compensation, not a guaranteed right to redress).

requires the denial of legal ownership.[55] The standard of proof to obtain a customary rights order is as high as to prove Maori customary title, but the result is less than ownership.[56]

To receive a customary rights order, the Maori claimants must prove that, in the absence of the F.S.A., they would have had a claim of Maori customary title to the foreshore and seabed areas.[57] Upon the granting of an order by the Court of Appeal, the government must conduct negotiations with the Maori group for redress, and any agreement reached would be subject to Cabinet approval and Parliament's allocation of funds for its enactment.[58] Any settlement negotiation would result in the granting of territorial customary rights, and would take into account the rights of any third parties that may be affected,[59] and no action taken by the collective rights holders with relation to the foreshore and seabed would be free from government review.[60] The one settlement currently completed under the F.S.A. is discussed below.

Maori reaction to the F.S.A. was critical, as foreclosing Maori customary title to the foreshore and seabed was viewed as an unnecessary reaction on the part of the New Zealand government.[61] Certain Maori groups filed a complaint objecting to the

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55. F.S.A., *supra* note 15, §§ 42, 52; *see also* Charters & Erueti, *supra* note 50, § III.B.4.

56. *See* Stavenhagen, *supra* note 51, ¶ 52 (stating that the F.S.A. allows redress only by difficult to obtain court orders for protection of customary uses and practices); *see also* Charters, *supra* note 6, § VI (noting that tests are difficult to show).

57. F.S.A., *supra* note 15, §§ 32-90; *see also* Heads of Agreement, *supra* note 21, Fact Sheets, Context of Agreement, 5 (describing two-part test for receiving government confirmation of territorial customary rights requiring, from 1840 to 2004, continuous customary title to land adjacent to foreshore and use and occupation to exclusion of others without substantial interruption). *But see* McHugh, *supra* note 44, § I (arguing that such title could not be shown at common law).

58. F.S.A., *supra* note 15, §§ 33, 36-38, 40-44; Charters, *supra* note 6, sec. II; *see also* McHugh, *supra* note 44, § I (discussing that Maori were opposed to listing rights that could be protected by the F.S.A., preferring instead to pursue use the F.S.A. as a legal avenue for protection of *mana*, the traditional relationship with the land, including control of the land).

59. F.S.A., *supra* note 15, §§ 7, 8; *see also* Statement of Position and Intent: Foreshore and Seabed Negotiations between the Crown and Te Runanga o Ngati Porou (2005) § 20, http://www.justice.govt.nz/foreshore/negotiations/te-runanga-o-ngati-porou/agreement-february-2008/index.html (stating that agreement must be administratively convenient and consider rights of third parties).

60. F.S.A., *supra* note 15, § 56; *see also* Statement of Position and Intent, *supra* note 59, § 33 (guaranteeing government ability to overrule *hapu* (sub-tribe) decisions).

61. *See* U.N. Committee on the Elimination of Racial Discrimination, Decision

U.N. Committee on the Elimination of Racial Discrimination ("CERD"), arguing that the F.S.A. violated the Convention of the Elimination of All Forms of Racial Discrimination's prohibition on racial discrimination by treating Maori property rights differently from non-Maori property rights.[62] The CERD found that the F.S.A. discriminated against Maori by treating Maori property rights different from those of non-Maori, extinguishing Maori customary title to the foreshore and seabed, and by failing to provide a guaranteed right to redress.[63] The CERD agreed that the New Zealand government did not explore other potential solutions.[64] The government rejected CERD's findings and declared that no changes would be made based on the decision, implying that the CERD report was not important and CERD did not fully grasp the complexity of the issue or the government response.[65]

1(66), New Zealand Foreshore and Seabed Act 2004, ¶ 5 U.N. Doc. CERD/C/66/NZL/Dec.1, ¶ 5 (April 27, 2005) [hereinafter CERD decision] (noting large scale Maori opposition to the F.S.A.); *see also* Brookfield, *supra* note 8, at 192 (noting that Maori protested the F.S.A. before it was passed); Charters & Erueti, *supra* note 50, § III.A.2 (discussing critical reaction to the F.S.A. upon its introduction, including a Waitangi Tribunal report); Pruner, *supra* note 5, at 285-86 (concluding that non-Maori access to and use of the foreshore and seabed would not be precluded by allowing Maori increased control over areas to engage in customary use and practice). *But see* McHugh, *supra* note 44, § I (arguing benefits of the F.S.A. allowed Maori *mana* to be rooted in legal system, something that was never guaranteed under common law); Muriel Newman, *When Radicals Agree*, New Zealand Centre for Political Research, Feb. 15, 2008, http://www.scoop.co.nz/stories/PO0802/S00178.htm (expressing view that the F.S.A. was beneficial to Maori and discriminatory against non-Maori).

62. *See* CERD Decision, *supra* note 61, ¶ 1 (noting that complaint was reviewed under early warning and urgent action procedure, after receiving information from the New Zealand government and NGOs representing Maori); *see generally* Charters & Erueti, *supra* note 50 (discussing their arguments in front of U.N. Committee on the Elimination of Racial Discrimination ("CERD").

63. CERD Decision, *supra* note 61, ¶ 6 (stating that extinguishment of Maori claim to customary title over the foreshore and seabed discriminated against Maori); *see also* Stavenhagen, *supra* note 51, ¶ 43 (noting that CERD had found the F.S.A. discriminates against Maori by extinguishing customary title and failing to provide a right of redress); *cf.* Charters, *supra* note 6, § VI (stating that the F.S.A. breaches New Zealand's international law obligations, such as CERD General Recommendation 23, which requires States to provide compensation where restitution is impossible).

64. CERD Decision, *supra* note 61, ¶ 4 (stating that the government failed to properly consider other methods of resolving *Ngati Apa* reaction); *cf.* Deed of Agreement, *supra* note 50, § Q (noting that Ngati Porou *hapu* remains opposed to the F.S.A.); Annie Mikaere, *Settlement of Treaty Claims: Full and Final, or Fatally Flawed?*, 17 N.Z.U.L.REV. 425 (1997) (questioning the finality of Treaty claim settlements and the logic of entering into full and final settlement agreements).

65. *See* Moana Jackson, *The United Nations on the Foreshore: A Summary of the Report of*

International and domestic criticism of the F.S.A. befell the government from other arenas as well. The U.N. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples reviewed the F.S.A. and found it to be a regression in New Zealand's recognition of Maori rights under previously completed treaty settlements.[66] The New Zealand Human Rights Commission expressed concern that the F.S.A. extinguished customary title to the foreshore and seabed, but also noted the positive aspects of the F.S.A., such as the protection of beach access, important to most New Zealanders.[67]

Although the F.S.A. does not provide a guaranteed right to redress, it does contain a remedy provision, of which Maori groups were quick to take advantage.[68] The first settlement agreement under the F.S.A. was reached in August 2008,[69] between the government and the *hapu*[70] of Ngati Porou.[71] The Deed of Agreement, based on Heads of Agreement signed in February 2008, must now be approved by the Ngati Porou *hapu*, confirmed by the High Court,[72] and implemented by legisla-

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the Special Rapporteur, April 5, 2006, http://www.converge.org.nz/pma/mj050406.htm; Charters & Erueti, *supra* note 50, § IV.I (discussing the government's rejection of the decision, and contrasting it with New Zealand's Permanent Representative to the United Nations statement declaring New Zealand's commitment to defending human rights).

66. *See* Stavenhagen, *supra* note 51, ¶ 55 (finding the F.S.A. to be a "step backward" for Crown recognition of Maori rights).

67. New Zealand Human Rights Comm'n, Submission on the Foreshore and Seabed Bill (July 12, 2004), http://www.hrc.co.nz/home/hrc/newsandissues/foreshoreandseabedbill.php; *see also* Stavenhagen, *supra* note 51, ¶ 49 (discussing analysis of New Zealand Human Rights Commission).

68. *See* Press Release, Te Runanga o Ngati Porou, Another Key Step in Takutai Moana Negotiations (Aug. 8, 2008) (on file with author) (stating that the *hapu* continues to object to the F.S.A. but entered into settlement to ensure protection of rights); New Zealand Ministry of Justice, Foreshore and Seabed Negotiations (June 23, 2008), http://www.justice.govt.nz/foreshore/negotiations/index.html (stating that the government is in F.S.A. negotiations with five *hapu*); Yvonne Tahana, *Seachange for Foreshore Law*, THE NEW ZEALAND HERALD, Mar. 1, 2008, at A06 (noting that less than ten traditional rights orders have been filed with the Maori Land Court).

69. Deed of Agreement, *supra* note 50; *see also* Tahana, *supra* note 68 (noting that settlement involved 289 km of coast, 90% of which owned by Ngati Porou *hapu*).

70. *See* Sharp, *supra* note 36, at 15 (defining *hapu* as sub-tribe and *iwi* as tribe); Glossary, RECOGNISING THE RIGHTS OF INDIGENOUS PEOPLES xvii-xviii (Alison Quentin-Baxter, ed. 1998).

71. Deed of Agreement, *supra* note 50 (noting settlement was conducted in accord with the F.S.A.); *see also* Tahana, *supra* note 68 (noting that settlement the first under the F.S.A.).

72. The New Zealand High Court is the court of general jurisdiction that hears

tion.[73] The settlement recognized the continued *mana*, the "authority, control, influence, prestige and power on one hand, and psychic force on the other,"[74] of the Ngati Porou to the foreshore and seabed area in question as a collective right.[75] This right entails the right to conduct and regulate activities on, over or within the foreshore and seabed, and to exercise influence over private actors in, or with an impact on, the foreshore and seabed.[76] Ngati Porou's rights are clearly limited in the settlement agreement: they do not confer legal or equitable title to the foreshore and seabed areas comprised in the settlement,[77] and any action taken by the *hapu* is subject to legislative action.[78] Interests of the general public remain protected,[79] reflecting the impetus behind the F.S.A. to guarantee public use of the foreshore and seabed.[80]

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serious jury trials and civil and administrative cases. *See* Core Document, *supra* note 4, ¶ 65.

73. *See generally* Deed of Agreement, *supra* note 50; Press Release, Te Runanga o Ngati Porou, *supra* note 68; Press Release, New Zealand Government, Foreshore and Seabed Deed of Agreement (Aug. 7, 2008) (on file with author).

74. Law Comm'n, Te Aka Matua O Te Ture, *Maori Customs and Values in New Zealand Law*, Study Paper 9, ¶ 137 (March 2001); *see also id.*, ¶¶ 137-49 (discussing *mana*, including *mana wahine*, women's power within community).

75. *See* Deed of Agreement, *supra* note 50, ¶¶ 5, 6 (stating that the deed protects the territorial customary rights and exercise of *mana* by Ngati Porou); *see also* Tahana, *supra* note 68 (stating that the agreement provides protection of customary activities, such as fishing, as well as increased management powers); *Govt, Ngati Porou Strike Deal*, TVNZ (Feb. 5, 2008) (on file with author) (noting that Dr. Apirana Mahuika, spokesman for Ngati Porou, stated that reaffirmation of *mana* with the land was settlement goal, not financial compensation).

76. Deed of Agreement, *supra* note 50, § 6; *see also* Tahana, *supra* note 68 (noting that the Agreement will allow for more local control of activities such as fishing).

77. Heads of Agreement, *supra* note 21, Schedule 5: Extent of Legal Expression, Protection and Recognition of Mana, § 2.1.a.i.

78. Heads of Agreement, *supra* note 21, Schedule 5: Extent of Legal Expression, Protection and Recognition of Mana, § 2.1.c.i–iii (stating that right to *mana* cannot impact or override any legislation, or affect rights of any person); *id.*, § 2.1.e.iii.A (stating that *mana* will not infringe on the government "performing its functions, duties and powers"). *But see* Newman, *supra* note 61 (stating that Ngati Porou settlement will prevent other New Zealanders from enjoying beaches and will lead to government payments to Maori).

79. *See* Press Release, New Zealand Government, *supra* note 73 (stating the Deed of Agreement protects the general public's foreshore and seabed access); Tahana, *supra* note 68 (noting that the beach will remain open for all to use and quoting an elder stating that settlement will change nothing for himself or his *hapu*).

80. *See* Charters, *supra* note 6, § II (noting the F.S.A. was Parliament's response to concern over public beach access after the *Ngati Apa* decision); Stavenhagen, *supra* note 51, ¶ 47 (discussing passage of F.S.A. to protect public access to foreshore and seabed).

In sum, the Ngati Porou settlement is significant in that it protects the *hapu*'s *mana* and customary rights to the foreshore and seabed area. The settlement agreement affirms the good faith of the deed negotiations as required by the partnership principle underlying the Treaty,[81] and the government's obligations to international law in its duties under the settlement.[82] The Ngati Porou, however, continue to oppose the F.S.A. and its bar on ownership.[83] The recognition and protection of the settlement, however, falls short of the ownership that was feasible under the doctrine of Maori customary title, and does not address the criticism of the CERD decision that the F.S.A. treats Maori property rights differently from those of non-Maori.

C. *Land and New Zealand's Vote Against the Declaration*

New Zealand's concern over issues related to land ownership were displayed in the international arena at the adoption of the Declaration on the Rights of Indigenous Peoples. The adoption of the Declaration is the strongest international statement to date on indigenous rights,[84] coming over twenty years after the decision of the U.N. to investigate indigenous rights.[85] New Zealand played a large role in drafting the Declaration,[86] as did indigenous peoples, including Maori.[87] New Zealand was one of

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81. Deed of Agreement, *supra* note 50, § 1.1, princ. 4.

82. Deed of Agreement, Schedule Two, §§ 2.2-2.3, http://www.justice.govt.nz/foreshore/negotiations/te-runanga-o-ngati-porou/deed/schedule_2.pdf (reciting obligation of Minister of Justice to comply with international obligations, including those relating to the environment).

83. *See* Deed of Agreement, *supra* note 50, § Q; Press Release; *see generally* Te Runanga o Ngati Porou, *supra* note 68; Press Release, New Zealand Government, *supra* note 73.

84. *See* U.N. Press Release, *supra* note 1 (stating that 143 Member States voted in favor of the Declaration and four voted against, with eleven abstentions); Anaya & Wiessner, *supra* note 1.

85. *See* U.N. Press Release, *supra* note 1 (noting negotiations that resulted in the Declaration began nearly twenty-five years prior); Graham, *supra* note 4, at 3-4 (discussing process, beginning in 1982, creating Declaration, adopted by the Human Rights Council in June 2006).

86. *See* Statement of Banks, *supra* note 7; Anaya, *supra* note 9, at 64, 221 (stating that New Zealand, along with Australia and Canada, played a large role in drafting the Declaration and noting that, although no country was required to issue reports to the working group, New Zealand did so on a regular basis).

87. *See* Erica-Irene A. Daes, *Equality of Indigenous Peoples under the Auspices of the United Nations Draft Declaration on the Rights of Indigenous Peoples*, 7 ST. THOMAS L. REV. 493, 494 (1995); Press Release, U.N. Perm. Forum on Indigenous Issues, Statement of Victoria Tauli-Corpuz, Chair of the U.N. Permanent Forum on Indigenous Issues on

only four States that voted against the Declaration.[88] Its vote against the Declaration resulted from an official position that, although most of the standards elucidated in the Declaration were already in practice in New Zealand,[89] four provisions, primarily relating to land, are incompatible with New Zealand law.[90]

The four provisions to which New Zealand specifically objected relate to land, which the government perceives to be stronger than those provided for in New Zealand law.[91] Specifically, the four provisions are: Article 19, directing States to consult and cooperate with and gain the consent of indigenous populations before taking legislative acts that may affect them;[92] Article 26, reciting indigenous peoples' right to own, use, de-

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the Occasion of the Adoption of the U.N. Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, U.N. General Assembly, http://www.un.org/esa/socdev/unpfii/en/declaration.html [*hereinafter* Statement of Tauli-Corpuz] (noting that the Declaration was drafted by rights holders); Graham, *supra* note 4, at 20 (noting important role Maori contingencies played in drafting the Declaration); Te Atawhai Taiaroa, *The Context for Maori (I), in* RECOGNISING THE RIGHTS OF INDIGENOUS PEOPLES 54, 57 (Alison Quentin-Baxter, ed. 1998) (stating that Maori made a large contribution to the Draft Declaration).

88. *See* UN Press Release, *supra* note 1 (stating that States voting against the Declaration were Australia, Canada, New Zealand, and the U.S.); *see also* Phil Fontaine, *Canadian Vote Left Stain on Country's Reputation*, TORONTO STAR, Sept. 26, 2007, at 8 (noting that Canada's vote against the Declaration will damage country's reputation as human rights leader).

89. *See* Alison Quentin-Baxter, *The International and Constitutional Law Contexts, in* RECOGNISING THE RIGHTS OF INDIGENOUS PEOPLES 22, 32 (Alison Quentin-Baxter, ed. 1998) (stating that main concepts in the Declaration, autonomy and participation in decision-making, are "parallel" to those in the Treaty); U.N. Press Release, *supra* note 1 (noting position of New Zealand government that it "had been implementing most of the standards in the Declaration for many years.").

90. *See* Statement of Banks, *supra* note 7 (describing vote against the Declaration as premised on perceived incompatibility of Articles 19, 26, 28, and 32); *see also* Statement by Clive Pearson, Representative of New Zealand, on behalf of Australia, New Zealand, and the United States of America on the Declaration on the Rights of Indigenous Peoples, Permanent Forum on Indigenous Issues, May 17, 2006, http://www.mfat.gov.nz/Media-and-publicaitons/Media/MFAT-speeches/2006/0-17-May/2006.php (stating that concerns of Australia, New Zealand, and the U.S. were greatest regarding land provisions).

91. *See* Graham, *supra* note 4, at 11 (noting government concern over extension of Maori land rights beyond those recognized in New Zealand law and Treaty land settlements); Pruner, *supra* note 5, at 287-88 (noting that the Declaration provides indigenous peoples with stronger rights to traditional lands, and would thereby provide Maori with a much stronger claim against the government).

92. Declaration Article 19 states:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain

velop and control their traditional lands;[93] Article 28, stating that indigenous peoples have a right to redress, prioritizing restitution of land over compensation;[94] and Article 32(2), emphasizing the rights of Article 19 in regard to land.[95] New Zealand objected to Articles 26 and 28 because, theoretically, the entire country would fall under the provisions of recognition and redress, and because Article 28 prioritized redress in the form of restitution over redress by compensation.[96] Articles 19 and 32(2) caused concern due to the perceived implication of a veto right for the indigenous population[97] and for their effect on pri-

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their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Declaration, *supra* note 1, art. 19.

93. Declaration Article 26 states:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owner, 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 concern.

Declaration, *supra* note 1, art. 26.

94. Declaration Article 28 states:

1. Indigenous peoples shall 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.

Declaration, *supra* note 1, art. 28.

95. Declaration Article 32(2) states:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free 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.

Declaration, *supra* note 1, art. 32(2)

96. *See* Statement of Banks, *supra* note 7 (describing objection of New Zealand to Articles 26 and 28 as unworkable and potentially affecting the entire country); U.N. Press Release, *supra* note 1.

97. *See generally* Statement of Banks, *supra* note 7, (discussing Crown's position that

vate landowners.[98]

In addition to these specific objections, the States voting against the Declaration were concerned that the inclusion of a right of self-determination implied a right to secession.[99] A right to secession does not exist in international law or in the Treaty.[100] Indeed, New Zealand participants in the drafting of the Declaration understood self-determination to signify the right to self-determination of indigenous peoples' internal affairs.[101] States were concerned with the lack of definition of "in-

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Article 26 implied existence of class of citizens with veto power over land issues); U.N. Press Release, *supra* note 1.

98. *See generally* Statement of Banks, *supra* note 7; U.N. Press Release, *supra* note 1; *cf. supra* note 51 and accompanying text (discussing concern for private parties as an impetus behind the F.S.A.).

99. *See generally* Anaya & Wiessner, *supra* note 1 (noting that inclusion of right to self determination was contentious, and that most governments recognize right to autonomy and self-governance of indigenous groups); *see also* Gilbert, *supra* note 17, at 219 (noting that Australia, Canada, New Zealand, and the U.S. objected to inclusion of self-determination in the Declaration, concerned that it included a right to secession); William Van Genugten & Camilo Perez-Bustilo, *The Emerging International Architecture of Indigenous Rights: The Interaction between Global, Regional, and National Dimensions*, 11 INT'L J. ON MINORITY AND GROUP RTS. 379, 384 (2004) (discussing existence during drafting negotiations of fear that the right to self-determination conflicts with State territorial integrity); New Zealand Ministry of Foreign Affairs and Trade, Manatu Aorere, Declaration on the Rights of Indigenous Peoples: Chronology of Events since June 2006, http://www.mfat.govt.nz/Foreign-Relations/1-Global-Issues/Human-Rights/Indigenous-Peoples/draftdec-jun07.php (noting New Zealand's concern over issues of self-determination, consent, redress and land were not addressed, and so New Zealand refused to vote for the Declaration).

100. *See* Russell A. Miller, *Collective Discursive Democracy as the Indigenous Right to Self-Determination*, 31 AM. INDIAN L. REV. 341, 349, 371 (2006); Federico Lenzerini, *Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples*, 42 TEX. INT'L L.J. 155, 165-66 (2006) (stating that self-determination as applied to indigenous peoples generally means internal self-determination); Graham, *supra* note 4, at 8 (discussing other international instruments, including the Declaration on Friendly Relations among States, establishing that exercise of self-determination cannot undermine territorial sovereignty); *see also* Pruner, *supra* note 5, at 287-88 (discussing similarities of the Declaration and the Treaty).

101. *See* Gilbert, *supra* note 17, at 219-20 (noting that the Declaration is limited in scope by the U.N. Charter, and thus self-determination for indigenous peoples is the same as that available to all peoples); Van Genugten & Perez-Bustilo, *supra* note 99, at 384 (noting that most States, including Canada, accept notion of self-determination as used in the Declaration to apply to internal affairs of indigenous groups, with external self-determination reserved for extraordinary circumstances); Quentin-Baxter, *supra* note 89, at 28 (stating that goal of the Declaration was never secession, but rather increasing rights of indigenous populations to traditional practices while remaining within society); Taiaroa, *supra* note 87, at 58 (noting that author's *iwi* believes self-determination means the right to make decisions in matters that affect only them); *see*

digenous"[102] and the focus on communal rights rather than individual rights.[103] The Declaration states that self-determination is the right of indigenous peoples to "freely determine their political status and freely pursue their economic, social and cultural development,"[104] and does not mention any broader right to self-determination that may imply secession.[105]

While the Declaration sets forth many specific rights, its primary goal is to strengthen the relationship between indigenous populations and the States in which they live by affirming the equality of citizenship of indigenous peoples.[106] Although the vote against the Declaration seems to reflect a general concern that Maori receive special treatment from the government,[107] New Zealand emphasized that it voted against the Declaration because it was impossible to implement.[108] New Zealand viewed

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also Anaya, *supra* note 9, at 109 (noting that secession would likely leave indigenous peoples worse off).

102. *See* Declaration, *supra* note 1, arts. 9, 33 (allowing indigenous groups and individuals to self-identify as such); *see also* Gilbert, *supra* note 17, at 216-17 (noting that lack of definition a point of contention during drafting, but Articles 9 and 33 affirm self-identification must comport with community's view of group membership).

103. *See* Declaration, *supra* note 1, art. 1 (guaranteeing enjoyment of rights stated in Declaration to individuals and communities); *see also* Anaya & Wiessner, *supra* note 1 (stating that rights in the Declaration are directed towards indigenous peoples as groups).

104. Declaration, *supra* note 1, art 3.

105. *See* Van Genugten & Perez-Bustilo, *supra* note 99, at 384; Lenzerini, *supra* note 100, at 187 (describing self-determination included in the then-draft Declaration as internal self-government); Solomon, *supra* note 30, at 62 (noting that fear of secession by indigenous peoples if the Declaration includes a right to self-determination does not reflect political reality).

106. *See* Gilbert, *supra* note 17, at 220 (stating that goal of the Declaration is greater inclusion in, rather than exclusion from, State); Daes, *supra* note 87, at 498 (noting that the Declaration is the first international document to affirm the equality of indigenous peoples with other citizens); Miller, *supra* note 100, at 366-73 (arguing that the Declaration contributes to establishment of discursive democracy in States with indigenous populations); Quentin-Baxter, *supra* note 89, at 29-30 (noting that the Declaration will not create separate classes of citizens, but rather enhances enjoyment of indigenous populations of civil and political rights by requiring participation in decision-making, and citing U.S. practice of granting American Indians distinct political rights).

107. *See* Stavenhagen, *supra* note 51, ¶ 54 (noting, in discussion of the F.S.A., Maori have been historically discriminated against); Sharp, *supra* note 36, at 10 (noting socio-economic disadvantages of Maori).

108. *See generally* Statement of Banks, *supra* note 7 (describing view of many countries of the Declaration as an aspirational statement and New Zealand's position that the important topic required a document capable of being implemented in country's positive law); *see also* Graham, *supra* note 4, at 5-7 (discussing concerns of New Zealand

the Declaration as undermining, rather than strengthening, the partnership between the State and the indigenous population.[109]

New Zealanders involved in the drafting of the Declaration knew that any international instrument to which New Zealand became a party would require consistency with domestic law.[110] As a result, they worked to ensure the compatibility of the Declaration with existing New Zealand law.[111] The Declaration received widespread support from indigenous peoples worldwide because of its goal of achieving equality for indigenous peoples and improving relations with national governments.[112] In addition, the Declaration is well regarded in the Maori community.[113] Scholars argue the adoption of the Declaration would have given New Zealand an additional tool for the interpretation

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government that the Declaration, then in draft phase, was incompatible with existing New Zealand law).

109. *See generally* Statement of Banks, *supra* note 7 (asserting importance of Crown-Maori partnership in resolving historical wrongs and inability of the Declaration to contribute to that partnership); Press Release, The Maori Party, Questions—Rights of Indigenous Peoples, http://www.scoop.co.nz/stories/PA0709/S00221.htm (Sept. 13, 2007) (recording remarks of Minister of Customs Nanaia Mahuta, on behalf of the Minister of Maori Affairs, stating that New Zealand government is committed to Maori equality regardless of the vote on the Declaration); Elisa Burchett, *A Perfect Opportunity for CANZUS States*, U.N. Observer and International Report (Dec. 22, 2006), http://www.unobserver.com/printen.php?id=2988 (stating that the Declaration is opportunity for Australia, Canada, New Zealand, and the U.S. to dissociate themselves from colonial-era practices and attitudes towards indigenous populations).

110. *See* Graham, *supra* note 4, at 5-6 (noting that any rights the Declaration granted Maori must be consistent with New Zealand domestic law, including the Treaty); Solomon, *supra* note 30, at 62.

111. *See* Graham, *supra* note 4, at 6 (discussing feasibility of this goal because the Declaration was designed to be consistent with all existing human rights instruments, and contemporary New Zealand laws were compatible with same); *see also* Solomon, *supra* note 30, at 61 (arguing that the right to self-determination in the Draft Declaration is analogous to rights granted to Maori under Article II of the Treaty). *But see* Press Release, Maori Legal Service, U.N. Working Group on the Declaration of the Rights of Indigenous Peoples, Nov. 22, 2000, http://www.converge.org.nz/pma/indwork.htm (noting that the position that the Declaration must be consistent with domestic law would limit potency of the Declaration).

112. *See* Taiaroa, *supra* note 87, at 54-55 (noting commitment of indigenous groups to creating an international document that will improve their situation); Solomon, *supra* note 30, at 62.

113. *See generally* Ward, *supra* note 7 (noting Maori leaders' anger at negative vote); Initiative on the U.N. Declaration on the Rights of Indigenous Peoples, http://www.converge.org.nz/pma/in210806.htm (information on New Zealand's official position on the Declaration and letter for interested parties to send to members of Parliament encouraging them to support the Declaration).

and implementation of the Treaty,[114] as many of the rights therein are analogous to those in the Declaration.[115]

II. *INDIGENOUS RIGHTS, INTERNATIONAL LAW AND NEW ZEALAND*

The Declaration is the most recent addition to the corpus of law available to further the rights of indigenous peoples worldwide. Human rights treaties and customary international law provide protection for indigenous rights.[116] This Part explores the content of the international human rights law on indigenous rights, discusses the legal status of the Declaration, in New Zealand and globally, and examines the use of international law in New Zealand.

A. *Indigenous Land Rights in International Law*

International instruments protecting indigenous peoples' rights are relatively new to the international legal forum.[117] The only binding international instruments are two International La-

114. *See* Melissa A. Poole, *International Instruments in Administrative Decisions: Mainstreaming International Law*, (1999) VICT. U. WELLINGTON L. REV. 29, § VI.C (analogizing fiduciary-type relationship created by the Treaty to that created by ratified international human rights treaties); Pruner, *supra* note 5, at 288 (stating that then-Draft Declaration could assist Crown and Maori in reaching a friendly solution to customary Maori title claims to the foreshore and seabed of New Zealand).

115. *See* Charters, *supra* note 6, § VI (stating that Maori land rights could be better addressed by New Zealand's alignment of domestic law with international law); Quentin-Baxter, *supra* note 89, at 33-35, 42-43, 44 (stating that the Declaration could help New Zealand in interpretation and implementation of the Treaty, noting that Maori already have the right to make autonomous decisions in areas that do not affect non-Maoris, that the government seeks Maori consent and participation through Treaty negotiations and statutory duties, and noting that the Declaration will assist in empowering Maori population so that Article 3 of the Treaty can be fully realized).

116. *See* Anaya, *supra* note 34, at 16-17 (discussing indigenous rights under principles of non-discrimination and cultural integrity embodied in many human rights instruments, including the U.N. Charter); *see generally* Manus, *supra* note 12 (discussing international law on indigenous rights).

117. *See* Austen L. Parrish, *Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights*, 31 AM. INDIAN L. REV. 291, 308-10 (2006) (discussing recent emergence and acceptance of indigenous peoples rights as such in international law and listing international instruments that protect indigenous rights); S. James Anaya, *Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 237, 242-43 (2005) (declaring then-Draft Declaration and proposed American Declaration on the Rights of Indigenous Peoples "future normative texts" of indigenous rights law); *see also* Lenzerini, *supra* note 100, at 181-822 (discussing emerging customary international law on indigenous rights).

bour Organisation ("ILO") conventions.[118] The more recent of those, ILO Indigenous and Tribal Peoples Convention Number 169 ("ILO No. 169"), explicitly recognizes indigenous land rights and directs governments to respect the special relationship between indigenous peoples and their traditional lands.[119] ILO No. 169, however, is generally not considered to be a strong statement of international law because of the meager number of signatories.[120] Notably, New Zealand is not a party to ILO No. 169.[121]

Although indigenous rights are not widely addressed by international law, international human rights treaties and declarations have widespread international support.[122] Scholars frame indigenous rights issues within the broader human rights framework, as well as a developing indigenous rights body of law.[123] Specifically, scholars have located a right protecting land held by

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118. *See* Gilbert, *supra* note 17, at 209 (noting that International Labour Organization ("ILO") Conventions Nos. 107 and 169 are the only binding international instruments on indigenous rights); *see also* Chidi Oguamanam, *Indigenous Peoples and International Law: The Making of a Regime*, 30 QUEEN'S L.J. 348, 364 (2004) (noting ILO Convention No. 169 attempts to preserve indigenous culture, a change from ILO Convention No. 107 of 1957, which encouraged assimilation of indigenous peoples); Anaya, *supra* note 117, at 242 (reporting that an American Declaration on the Rights of Indigenous Peoples is being developed).

119. International Labour Organisation, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, ILO Official Bull. 59 (entered into force Sept. 5, 1991) (Convention No. 169) (discussing indigenous land rights in Part II, directing government recognition and respect of indigenous land rights in Article 13); *see also* Anaya, *supra* note 9, at 155 (discussing requirements in ILO No. 169 of consultation and participation of indigenous peoples based on principles of self-government and self-determination).

120. *See* Gilbert, *supra* note 17, at 209 (noting that assimilationist policies of ILO No. 157 have subjected it to much criticism, and that ILO No. 169 had been ratified by only 17 countries); *see also* Anaya, *supra* note 34, at 40-41 (stating that, despite its sparse ratification, most States seem to accept the general principle of protecting indigenous land rights as shown in reports to international bodies).

121. *See* Gilbert, *supra* note 17, at 209; Charters, *supra* note 6, § III.B.1 (noting that New Zealand has not ratified ILO No. 169).

122. *See* Charters, *supra* note 6, § III.B.2(a) (noting that, as of 2004, 152 States were parties to the International Covenant on Civil and Political Rights ("ICCPR") and 169 States were parties to the Convention of Racial Discrimination); Off. of the U.N. High Comm'r for Hum. Rts., *Status of the Ratification of International Human Rights Treaties* (July 14, 2006), http://www2.ohchr.org/english/bodies/docs/status.pdf.

123. *See* Gilbert, *supra* note 17, at 211 (arguing that advocating and protecting rights of indigenous peoples can be accomplished by using both general human rights norms and developing indigenous rights legal framework); Anaya, *supra* note 117, at 241-42 (discussing two methods of locating indigenous rights in international law: as rights belonging to independent political communities, or human rights whose recog-

indigenous peoples within the general human rights framework.[124] The right to property is a human right, and this precept supports a broader right to land.[125] Indigenous land rights are also protected as part of the rights to culture and non-discrimination found in the International Covenant on Civil and Political Rights ("ICCPR") and the Convention on the Elimination of all forms of Racial Discrimination ("CERD").[126] For example, the Inter-American Court on Human Rights has located the indigenous right to property, communally held and without formal title, in both international human rights norms and the evolving indigenous rights framework.[127] The Special Rapporteur on the Prevention of Discrimination and Protection of Indigenous Peoples found a developed legal principle that indigenous peoples have the right to use, own, control and occupy

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nition is morally compelled, and noting that the international community is more hospitable to indigenous claims in a human rights framework).

124. *See, e.g.*, Charters, *supra* note 6, § III.B.2(b) (identifying protection of right to land by rights of culture, non-discrimination and property); Pruner, *supra* note 5, at 256-57 (discussing concept of indigenous title located within broader range of indigenous rights).

125. *See* Universal Declaration of Human Rights, G.A. Res 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810, Art. 17 (Dec. 12, 1948) ("UDHR") ("(1) Everyone has the right to own property alone as well as in association with other. (2) No one shall be arbitrarily deprived of his property."); Anaya, *supra* note 34, at 36-52 (discussing land rights found in existing international instruments such as the UDHR and Inter-American and European conventions); Charters, *supra* note 6, § III.B.2(b); *see also* Maia S. Campbell & S. James Anaya, *The Case of the Maya Villages of Belize: Reversing the Trend of Government Neglect to Secure Indigenous Land Rights*, 8 HUM. RTS. L. REV. 377, 398 (2008) (discussing the Belize Supreme Court's discussion of protection of indigenous land rights by customary international law and general principles of international law).

126. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; *see also* Lovelace v. Canada, Human Rights Committee (1981), ¶ 16, U.N. Doc. CCPR/C/OP/1 (finding that ICCPR Article 27 includes a right to occupy traditional lands when culture cannot be enjoyed in another place); Pruner, *supra* note 5, at 258, 270-71 (finding support for indigenous title in Article 17 of the UDHR, protecting property rights; Articles 1 of the ICCPR and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), guaranteeing self-determination; Article 27 of the ICCPR, the right of minorities to enjoy their own culture; ILO No. 169, requiring respect of traditional land values by the government; CERD General Recommendation 23, calling on parties to the CERD to recognize traditional land rights).

127. *See* Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Court H.R. (Ser. C) No. 79 (Judgment on merits and reparations of August 31, 2001), ¶¶ 43-44 [hereinafter *Awas Tingni*]; *see also* Gilbert, *supra* note 17, at 210-11 (discussing the *Awas Tingni* conclusion based on both international human rights norms and an emerging legal framework of indigenous rights).

their traditional lands, but that doing so may not necessitate full ownership.[128] By protecting indigenous rights through more widely recognized norms, the indigenous rights in question, such as a general right to land, have acquired legal status indirectly.[129]

Although indigenous rights have been achieved more through a human rights framework than a body of law specific to indigenous rights, such rights are often considered to be *sui generis*.[130] The Supreme Court of Belize has identified indigenous rights as *sui generis* because they are rooted in the customs and traditions of the people concerned, rather than an established corpus of law.[131] The Declaration is the most recent development in the field, and joins the ILO Conventions as founding documents of the body of international law addressing indigenous rights.[132]

1. Customary International Law and Indigenous Rights

In addition to the nascent international law on indigenous rights and existing human rights jurisprudence, indigenous

128. Daes, *supra* note 27, ¶¶ 39, 41.

129. *See* Charters, *supra* note 6, § III.B.2(a) (stating that indirect affirmation of indigenous peoples rights is stronger than direct protection provided in ILO No. 169 due to large number of signatories to international human rights treaties, and noting that rights found in customary international law, such as this indirect affirmation of indigenous peoples land rights, are binding as New Zealand law); *see also* Jérémie Gilbert, *Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title*, 56 INT'L & COMP. L.Q. 583, 587 (2007) (discussing indigenous peoples' land rights supported by human rights); Wiessner, *supra* note 11, at 127 (finding human rights supports indigenous peoples right to land, though not necessarily ownership); Daes, *supra* note 27, ¶ 39 (stating that international law and human rights norms support "a developed legal principle that indigenous peoples have a collective right to the lands they traditionally use and occupy.").

130. *See* Gilbert, *supra* note 17, at 210; Anaya, *supra* note 34, at 38 (describing *sui generis* field of indigenous rights as product of rights to cultural integrity, non-discrimination, self-determination and property).

131. *See* Cal v. Attorney General, Claim Nos. 171 & 172 of 2007, ¶ 101 (Supreme Court of Belize).

132. *See* Anaya, *supra* note 117, at 242-43 (noting that the Inter-American Commission on Human Rights has proposed an American Declaration on the Rights of Indigenous Peoples, and referring to proposed American Declaration and the Declaration as "future normative texts"); Lenzerini, *supra* note 100, at 187-88; *cf.* Anaya & Wiessner, *supra* note 1 (stating that the Declaration surpasses ILO No. 169 in guaranteeing rights of self-determination, land, resources, and political autonomy to indigenous peoples).

rights are protected by customary international law.[133] Customary international law is not static, but evolves to reflect contemporary practices and concerns.[134] The traditional method of establishing a norm as customary international law requires widespread state practice and *opinio juris*, a sense of legal obligation on the part of the States to act according to in a particular manner.[135] The requisite state practice need not be unanimous or universal,[136] and the State against which the rule is being invoked need not adhere to the practice.[137]

Changes in modern international law making, with much greater reliance on international instruments, are modifying the establishment of customary international law norms.[138] *Opinio juris* is increasingly located in international instruments rather

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133. *See* Lenzerini, *supra* note 100, at 181-83; *see generally* Anaya & Wiessner, *supra* note 1.

134. *See* Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat, 1060 (stating that courts may locate customary international law in international conventions, international custom, general principles of law, judicial decisions and work of jurists); Teresa Dunworth, *Hidden Anxieties: Customary International Law in New Zealand*, 2 N.Z.J. PUB. INT'L L. 67, 68, 78-80 (2005) (noting that a political process leads to formation of customary international law, and discussing four arguments against application of customary international law: it requires adherence to international rules over domestic rules; it is unstable; it has a democracy deficit; and it violates separation of power); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 529 (1993) (noting that customary international law reflects evolving international issues); *cf.* Palmer & Palmer, *supra* note 20, at 338 (discussing New Zealand court's recognition of the Treaty's requirement of interpretation that reflects changing social and legal circumstance).

135. *See* Dunworth, *supra* note 134, at 68; *see also* Charters, *supra* note 6, § III.C.2(a); Charney, *supra* note 134, at 536-37; Ted L. Stein, *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 458 (1985).

136. *See* Anaya & Wiessner, *supra* note 1; Charters, *supra* note 6, § III.B.2(b) (discussing decision of the International Court of Justice in Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 40 (June 27), holding that State action should be consistent with rule and that inconsistent acts should be seen as breaches of the rule rather than absence of a rule, and noting that near-unanimous consent is necessary only for a *jus cogens* norm).

137. *See* Stein, *supra* note 135, at 458; *see also* Charney, *supra* note 134, at 536 (stating that international community, not individual States, must accept the norm); *cf.* Anaya, *supra* note 117, at 252-56 (discussing *Awas Tingni* concurring opinion of Judge Garcia Ramirez, referencing ILO No. 169, though Nicaragua not party to the treaty, and to the then-Draft Declaration and proposed American Declaration).

138. *See* Stein, *supra* note 135, at 465; Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71, 86-90 (2008) (discussing erosion of state consent required for application of norms developed in human rights treaties).

than state practice.[139] Although international instruments are not necessarily codifications of customary international law, their formation, application and interpretation are illustrative of the *opinio juris* held by the States creating and becoming party to the instruments.[140]

Retreating from a formalist interpretation of customary international law strengthens the protection of indigenous rights by customary international law.[141] The indigenous rights to self-determination and cultural integrity are established in customary international law.[142] A narrow right of state protection of indigenous peoples to lands traditionally owned or occupied is recognized as a principle of customary international law.[143] New Zealand and other States that voted against the Declaration observe the practice of protecting the rights of indigenous peoples

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139. *See, e.g.*, Charney, *supra* note 134, at 543 ("Rather than state practice and *opinio juris*, multilateral forums often play a central role in the creation and shaping of contemporary international law."); Stein, *supra* note 135, at 465 (noting that *opinio juris* attaches to an internationally created rule upon its creation, rather than evolving over time); Helfer, *supra* note 138, at 90 (discussing the "erosion of the consent principle" some commentators find in human rights treaties).

140. *See* Charters, *supra* note 6, § III.C.2 (stating that international instruments may codify or crystallize customary international law, but that customary international law cannot be found in General Assembly resolutions alone); Oguamanam, *supra* note 118, at 398 (arguing that *opinio juris* for indigenous rights is found in international law jurisprudence rather than individual State practice, and that obligation is moral as well as legal); Charney, *supra* note 134, at 543 (stating that customary international law is often made by and influenced in multilateral forums); Stein, *supra* note 135, at 465.

141. *See* Anaya, *supra* note 117, at 248-49 (stating that adoption of overly formalist approach to the Declaration prevents flexibility and evolution that will occur and contribute to normative evolution of rights, and arguing for a realist approach); Charters, *supra* note 6, § III.B.2 (discussing indigenous rights from a formalist perspective, and noting that if such rights are found in formal and positivist analysis, they are present under realist or natural law perspective).

142. *See* Wiessner, *supra* note 11, at 127 (arguing that international instruments on indigenous peoples rights, together with State practice of countries who have indigenous populations, create *opinio juris* to rights to cultural identity, political, economic and social self-determination, traditional lands, and to government commitment to protecting those rights); Lenzerini, *supra* note 100, at 186-87; Parrish, *supra* note 117, at 310; Oguamanam, *supra* note 118, at 350; Manus, *supra* note 12, at 565-70.

143. *See Awas Tingni*, ¶¶ 151-55 (finding rights of indigenous peoples to traditional lands in customary international law); Anaya & Wiessner, *supra* note 1 (discussing factors that ground right to State protection of indigenous peoples control over their lands); Charters, *supra* note 6, § V.B.4 (finding that customary international law exists to establish State duty to protect indigenous rights to land, albeit a narrow duty); Wiessner, *supra* note 11, at 127; *see also* Gilbert, *supra* note 129, at 586-87 (discussing customary international law of indigenous title).

to traditional lands in various degrees.[144] For example, since the creation of the Waitangi Tribunal in 1975, New Zealand has embraced the recognition of indigenous peoples' rights to land,[145] and Article II of the Treaty is similar to a guarantee of Maori self-determination.[146]

2. The Declaration as Customary International Law

The Declaration does not, in itself, have a legally binding effect.[147] The importance of the Declaration should not be understated: since international declarations can serve as the starting point for the development of a greater corpus of law.[148] The Declaration is arguably a codification of the developing body of international indigenous rights law.[149] Regardless of its legal status, the Declaration has persuasive moral and political force as the first international statement on the rights of indigenous peo-

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144. *See generally* Anaya & Wiessner, *supra* note 1; *see also* Wiessner, *supra* note 11, at 109-10 (stating that no government, during drafting of the Declaration, opposed principle that indigenous peoples have rights relating to their lands).

145. *See generally* Anaya & Wiessner, *supra* note 1 (noting that four States who voted against the Declaration all recognize indigenous land rights in domestic practice); *see also* Statement of Banks, *supra* note 7 (stating that Maori have a right to redress for historical land claims and participate in democratic decision-making processes).

146. *See generally* Anaya & Wiessner, *supra* note 1; *see also* Marguerite L. Spencer, *A White American Female Civil Rights Attorney in New Zealand: What Maori Experience(s) Teach Me About the Cause*, 28 WM. MITCHELL L. REV. 255, 277 (2001) (discussing similarities of rangatiratanga, as used in Article II of the Treaty, to the partnership concept implicit in a relational approach to indigenous rights).

147. *See generally* U.N. Press Release, *supra* note 1 (noting that the Declaration is non-binding); *see also* Statement of Banks, *supra* note 7 (stating New Zealand's position that the Declaration is an aspirational statement rather than clear guidelines, and as such the Declaration will go unimplemented in the majority of countries, an unacceptable fate for a document of such importance).

148. *See generally* Anaya & Wiessner, *supra* note 1 (comparing the Declaration to the UDHR, articles of which reflect and embody customary international law); *see also* Gilbert, *supra* note 17, at 229-30 (noting that the UDHR was a framework for development of an international human rights regime, and that the Declaration affirms emergence of indigenous peoples as actors in the international human rights system); Brent D. Hessel, *United Nations Update*, 15 No. 1 HUM. RTS. BRIEF 53, 53 (2007) (noting that indigenous rights activists believe the international community will adopt an indigenous rights convention within years).

149. *See* Van Genugten & Perez-Bustilo, *supra* note 99, at 407 (arguing that an indigenous rights declaration with broad support has more value than one with specific guidelines); Oguamanam, *supra* note 118, at 368, 398-99 (considering the then-Draft Declaration proof of growing international agreement and attempt to codify indigenous rights); Quentin-Baxter, *supra* note 89, at 23 (arguing that then-Draft Declaration codified and developed international law on indigenous rights).

ples to enjoy such widespread support.[150] The Declaration may be considered a set of guidelines for countries when addressing claims by indigenous peoples.[151] Indeed, the Declaration states that the rights it guarantees are the "minimum standards" necessary for indigenous peoples worldwide.[152] Moreover, two States have already acted to implement the Declaration into domestic law.[153]

Although four States voted against the Declaration, and have issued statements that the Declaration is not evidence of customary international law, the argument that all or part of the Declaration has the character of customary international law is not foreclosed.[154] The States who voted against the Declaration

150. *See* Brookfield, *supra* note 8, at 77 (stating that the Declaration will have moral rather than legal force, and will help legitimize indigenous peoples claims against national governments); *see also* Graham, *supra* note 4, at 4 (stating that New Zealand's government recognizes then-Draft Declaration would have moral rather than legal force).

151. *See* Matthew S R Palmer, *The International Practice, in* RECOGNISING THE RIGHTS OF INDIGENOUS PEOPLES 87, 87 (Alison Quentin-Baxter ed. 1998) (stating that then-Draft Declaration consists of broad principles to assist governments in relationships with indigenous populations); New Zealand Human Rights Comm'n, About the Human Rights Commission, http://www.hrc.co.nz/home/hrc/newsandissues/indigenousrightsdeclarationtoguidecommissionwork.php (last visited Sept. 17, 2008) (noting that the Declaration is not legally binding but a statement of standards governments should strive for in relations with indigenous peoples); *see also* Statement of Tauli-Corpuz, *supra* note 87 (calling the Declaration a minimum standard to which laws must conform); *cf.* Charters, *supra* note 6, § III.B.1 (stating that, although New Zealand is not a signatory to ILO No. 169, it may still be regarded as a benchmark for the Crown's relations with Maori, and, indeed, claimants before CERD on the F.S.A. argued that the Committee should not allow its jurisprudence to fall below the standards set in ILO No. 169).

152. *See* Declaration, *supra* note 1, art. 43 ("The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."); *see also* CERD, Concluding Observations, Report of United States of America, 72nd session, Feb., 2008, U.N. Doc. CERD/C/USA/CO/6, ¶ 29 (recommending use of the Declaration as a guideline for interpretation of obligations to indigenous peoples in the U.S.).

153. *See generally* U.N. News Centre, *supra* note 3 (noting that Bolivia and Ecuador have enacted legislation to give the Declaration domestic force); Rodolfo Stavenhagen, *Preliminary Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum, Preliminary note on the mission to Bolivia* (Dec. 11, 2007), U.N. Doc. A/HRC/6/15/Add.2, ¶ 5 (noting Bolivian government was taking steps to incorporate the Declaration into domestic law).

154. *See generally* Anaya & Wiessner, *supra* note 1 (discussing possibility of locating customary international law in general principles and specific articles of the Declaration and probable legal recognition of provisions of the Declaration recognizing rights to culture, language, religion and identity); *see* Lenzerini, *supra* note 100, at 175 (referring to the then-draft Declaration as evidence of state practice regarding indigenous

in the U.N. General Assembly have well-established state practices recognizing the land rights of indigenous peoples.[155] In New Zealand, this practice is found in the Treaty and subsequent government actions recognizing and respecting Maori land rights.[156] New Zealand, as well as Australia, Canada, and the U.S., recognize the rights and special status of indigenous peoples within their domestic law, thus making them part of an international consensus recognizing indigenous rights as customary international law.[157]

Courts and scholars cite the large number of votes in favor of the Declaration in support of the conclusion that it represents evolving principles of international law.[158] Furthermore, the fact that the four States contributed to the formation of the Declaration for many years before deciding to vote against it points to a sense of *opinio juris*: if the final draft had reflected their desired

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rights); *see also* Statement of Tauli-Corpuz, *supra* note 87 (stating that preambular reference to the U.N. Charter affirms that the Declaration and the rights stated therein are based on international legal principles). *But see* U.N. Press Release, *supra* note 1 (noting position of Australian government that the Declaration was not evidence of State practice or *opinio juris*).

155. *See generally* Anaya & Wiessner, *supra* note 1 (noting that surveys they previously, and individually, conducted found State practice conformed to most rights in the Declaration); *see also* Oguamanam, *supra* note 118, at 373-80 (discussing practices of the four States voting against the Declaration recognizing and protecting indigenous rights).

156. *See* Oguamanam, *supra* note 118, at 379-80 (identifying creation of Tribunal to protect Treaty rights); Quentin-Baxter, *supra* note 89, at 32 (stating that main concepts in the Declaration are also found in the Treaty, and that Maori already have autonomy in areas that do not affect non-Maoris and give consent to government proposals affecting Maori interests).

157. *See generally* Anaya & Wiessner, *supra* note 1 (stating that four States voting against the Declaration all recognize indigenous rights to land); Oguamanam, *supra* note 118, at 373-80; Wiessner, *supra* note 11, at 109-10 (stating that States did not object to the principles included in then-draft Declaration, including principle that indigenous peoples have rights to their traditional lands, signifying an international consensus on indigenous land rights).

158. *See* Cal v. Attorney General, Claim Nos. 171 & 172 of 2007, ¶ 131 (Supreme Court of Belize) (referring to "overwhelming number" of States adopting the Declaration as indicative of the Declaration's embodiment of emerging international principles on indigenous peoples and land rights); Campbell & Anaya, *supra* note 125, at 398 (discussing the Belize Court's use of the Declaration as a reflection of general principles of international law); *see generally* Anaya & Wiessner, *supra* note 1 (discussing almost unanimous vote adopting the Declaration). *But cf.* Julie Mertus, *The New U.S. Human Rights Policy: A Radical Departure*, 4 INT'L STUD. PERSP. 371, 371 (2003) (assuming that the U.S. is powerful enough to have the sole influence on the creation and application of international human rights law, despite the positions and practices of other countries).

changes and preferences, the States, including New Zealand, would likely have voted for the Declaration.[159] New Zealand's government, upon the adoption of the Draft Declaration in 1996, believed that New Zealand's participation in the drafting of the Declaration signified its belief in the importance of the subject and projected that the Declaration would influence domestic government behavior.[160] Scholars argue these acts signify a general sense of legal obligation on the part of the New Zealand government to protect the rights of indigenous peoples set forth in the Declaration.[161]

The Declaration already has been applied by a country's highest court to protect the rights of indigenous peoples. The Supreme Court of Belize used the Declaration as a statement of international law in October 2007, only one month after its adoption, in holding that the government must recognize Mayans customary rights to land.[162] Although noting that the Declaration is not a binding legal document, the Belize Supreme Court described it as containing principles of international law as relating to indigenous peoples and their land.[163]

At a minimum, the Declaration signifies a broad customary international law norm that indigenous peoples do have land rights.[164] Although New Zealand objected to specific state duties

159. *See generally* Anaya & Wiessner, *supra* note 1 (stating that States who voted against the Declaration would have voted in favor, and demonstrated their willingness to be legally bound, had their own policy and political preferences been reflected in the final document); U.N. Press Release, *supra* note 1 (reporting statement of Banks emphasizing importance of indigenous rights to New Zealand, and commitment of New Zealand to remedying historical wrongs to Maoris).

160. *See* Graham, *supra* note 4, at 15 (stating that the Declaration would have great moral and persuasive power on government actions); *see generally* Statement of Banks, *supra* note 7 (stating that New Zealand government wanted a document that could be incorporated into domestic law, but voted against the Declaration when it was perceived to be unimplementable).

161. *See generally* Anaya & Wiessner, *supra* note 1; *see also* Graham, *supra* note 4, at 15.

162. *See Cal v. Attorney General*, ¶ 131 (citing to art. 26(1) of the Declaration in holding the government of Belize must demarcate and otherwise recognize indigenous title of Mayan plaintiffs to land customary held and used); Campbell & Anaya, *supra* note 125, at 398 (noting the Belize Court was the first to use the Declaration in deciding a case); *see generally* Kim Peterson, *Indigenous Rights and the Mayan Victory in Belize*, UPSIDE DOWN WORLD, Feb. 1, 2008, http://upsidedownworld.org/main/content/view/1113/68/ (noting that the Belize Court was the first to refer to the Declaration, and that, as a result, the case will likely become international legal precedent).

163. *See Cal v. Attorney General*, ¶ 131.

164. *See generally* Anaya & Wiessner, *supra* note 1 (stating that lack of unanimous

included in the Declaration, such objections do not undermine the emergence of an international norm, recognizing at a minimum, a duty to respect indigenous peoples' relationships with the land.[165] Scholars consider the Declaration to be a broad statement of customary international law on indigenous land rights rather than specific customary international law on how States must treat those rights.[166]

3. The Persistent Objector Theory and the Declaration

The persistent objector theory in international law allows a State to avoid compliance with a customary international law norm if the State has consistently objected to the rule during its formation.[167] Historically, this has been difficult to establish.[168] As customary international law is established increasingly through or codified in multilateral instruments.[169] As a result, the aspiring persistent objector can oppose the instrument, or a part thereof, to declare its position against the emerging rule.[170]

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international support for rights is a limitation on the right, not a denial of the right); *see also* Charters, *supra* note 6, § III.C.2(a) (stating that negotiation process for the Declaration shows indigenous land rights are generally accepted, and noting that most State objection to then-Draft Declaration was to the right of self-determination).

165. *See id.* (noting New Zealand's objection to a duty to protect indigenous lands and provide restitution for taking of such); Anaya & Wiessner, *supra* note 1; *see also* Helfer, *supra* note 138, at 124-25 (concluding that States are increasingly bound by rules they did not affirmatively accept).

166. *See* Cal. v. Attorney General, Claim Nos. 171 & 172 of 2007, ¶ 132 (Supreme Court of Belize) (referring to the Declaration as "embodying . . . general principles of international law relating to indigenous peoples and their land and resources"); Anaya & Wiessner, *supra* note 1; Charters, *supra* note 6, sec. V (noting unlikelihood of courts finding a broad customary international law right to indigenous peoples' land, but that a narrow right could be found in the Declaration to provide protection of Treaty rights).

167. *See* Stein, *supra* note 135, at 457. *But see* Charney, *supra* note 134, at 539-40 (discussing lack of State practice regarding persistent objector principle, making its existence as rule questionable).

168. *See* Stein, *supra* note 135, at 466-67 (noting that customary international law historically emerged from practice of a few States, making objection difficult); Charney, *supra* note 134, at 538-39.

169. *See* Anaya, *supra* note 117, at 240-43 (discussing development of customary international law norms in the absence of express state acceptance of legal principles); Helfer, *supra* note 138, at 86-90 (discussing emergence of customary international law though multilateral forums).

170. *See* Stein, *supra* note 135, at 466 (noting that the voting process for General Assembly resolutions allows States to voice their objections on record); *see also* Anaya & Wiessner, *supra* note 1 (discussing possibility of States who voted against the Declaration being persistent objectors only to provisions identified in vote).

New Zealand, as well as the other States voting against the Declaration, stated that the Declaration does not embody customary international law, rooting its vote against the Declaration in an objection to any legal status the Declaration may have or gain.[171] The vote against the Declaration allowed New Zealand to easily state its objections to being bound by any emerging norms in indigenous rights.[172] This modern use of the persistent objector theory allows States to avoid the rules created through a multilateral process.[173] Because New Zealand specified the articles that caused it to vote against the Declaration, New Zealand may argue that it has persistent objector status to those articles.[174]

New Zealand's status as persistent objector to the document as a whole, however, is doubtful.[175] As States become subject to an increasing number of international obligations they did not affirmatively accept, the persistent objector rule has become a weaker tool for avoiding international obligations.[176] New Zea-

171. *See generally* Anaya & Wiessner, *supra* note 1; U.N. Press Release, *supra* note 1 (discussing objections of States voting against the Declaration due to its legal status); *see also* Statement of Banks, *supra* note 7 (explaining that negotiation history and manner the Declaration was adopted prevent it from reflecting State practice or general principles of law, especially the articles to which New Zealand specifically objected); *cf. Cal v. Attorney General* ¶ 131 (noting that reliance the Declaration was strengthened by Belize's vote in favor); Anaya & Wiessner, *supra* note 1 (stating that Canada's position as persistent objector is tenuous because of its strong support of the Declaration before the change in government).

172. *See generally* Anaya & Wiessner, *supra* note 1; *see also* Stein, *supra* note 135, at 467 (noting that ability to object by vote was not possible for persistent objectors during the principle's emergence).

173. *See* Stein, *supra* note 135, at 468 (stating that the persistent objector principle gives the United States and other States a way to avoid being bound by rules developed through multilateral channels with which they disagree); Charney, *supra* note 134, at 544-45 (discussing importance of analyzing reasons for objection, and noting that States objecting at a multilateral forum to a new rule may be isolated in their viewpoint, or they may be important enough to prevent the emergence of a new norm).

174. *See generally* Anaya & Wiessner, *supra* note 1 (stating that States voting against the Declaration could be, at most, persistent objectors to specific articles they found objectionable); *see also* Lenzerini, *supra* note 100, at 187-88 (noting that States may invoke sovereignty as reason for non-acceptance of emerging customary international law norms).

175. *See generally* Anaya & Wiessner, *supra* note 1 (stating that Canada's status as persistent objector is doubtful); *see also* Lenzerini, *supra* note 100, at 187-88 (discussing minimum requirements established in customary international law for indigenous sovereignty that cannot be breached even by purported objector).

176. *See* Anne Peters, *Global Constitutionalism Revisited*, 11 INT'L LEGAL THEORY 39, 51 (2005) (stating that changes in international law making have caused the persistent objector doctrine to weaken); Helfer, *supra* note 138, at 74 (noting multilateral treaty creation no longer requires consensus); *see also* Stein, *supra* note 135, at 477 (arguing

land's appears to accept the *opinio juris* behind the majority of the Declaration[177] and has a domestic practice that belies its position that the Declaration is incompatible with domestic law.[178] This limits New Zealand's ability to raise the persistent objector defense to general statements of indigenous rights as well as the portions of the Declaration to which it did not specifically object.[179] As a result, scholars assert that an attempt by New Zealand to raise a persistent objector defense to argue against any customary international law norms stated in the Declaration is on shaky ground.[180]

B. *New Zealand's Domestic Application of International Human Rights Laws*

International law, including international human rights law, is a part of New Zealand law.[181] New Zealand's Parliament must take the country's international obligations into consideration before new legislation can be enacted,[182] and its courts must

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that the persistent objector principle should only be permitted to protect those rights already enjoyed by a State, and not to rights that were unaddressed by international law, such as the rights stated in the Declaration, prior to the objectionable statement).

177. *See generally* Anaya & Wiessner, *supra* note 1 (noting that New Zealand was in support of the majority of the Declaration, and the Declaration's purpose of protecting indigenous rights); U.N. Press Release, *supra* note 1 (noting the importance of indigenous rights to New Zealand).

178. *See generally* Denise Henare, *A Case Study: Health Care, in* RECOGNISING THE RIGHTS OF INDIGENOUS PEOPLES 104 (Alison Quentin-Baxter, ed. 1998) (comparing the Maori Co-Purchasing Organizations, a health care initiative, with the then-Draft Declaration to show that the New Zealand government is willing and able to allow for Maori autonomy within the nation-State); Catherine J. Iorns Magallanes, *A New Zealand Case Study: Child Welfare, in* RECOGNISING THE RIGHTS OF INDIGENOUS PEOPLES 132 (Alison Quentin-Baxter ed. 1998) (discussing New Zealand child welfare policies and stating that, should New Zealand adopt the Declaration, little change would be needed in that area).

179. *See generally* Anaya & Wiessner, *supra* note 1; *see also* Lenzerini, *supra* note 100, at 187-88; Charney, *supra* note 134, at 544-45.

180. *See generally* Anaya & Wiessner, *supra* note 1 ("The internal practice of the four opposing states, as well as their consent to accord a special status and rights to indigenous peoples in principle, makes them part of the world consensus on customary international law . . . ."); Charters, *supra* note 6, § VI (stating that New Zealand has breached international law in its domestic policy).

181. *See* Law Comm'n, Te Aka Matua O Te Ture, *A New Zealand Guide to International Law and its Sources*, Report 34 (1996) ¶ 65 (describing five ways for New Zealand courts to consider signed treaties, including as statement of customary international law which is part of domestic law); Core Document, *supra* note 4, ¶ 53 (stating that New Zealand government must consider its international obligations as New Zealand law).

182. *See* Charters, *supra* note 6, § V.A (discussing requirement of cabinet members

construe domestic law to be consistent with international law, obligations and standards, including international human rights law.[183] As a result, domestic law may serve as a conduit through which the courts can import international standards on human rights.[184]

1. International Human Rights and Domestic Legislation

Legislation must be consistent with New Zealand's international law obligations.[185] Customary international law is automatically binding in New Zealand,[186] but treaty law is binding only when incorporated into domestic law.[187] Since New Zealand operates under a dualist system of treaty incorporation, legislation must be passed before any international agreement will have domestic effect.[188] In determining whether to become a

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to vet all bills to ensure compliance with international obligations); Core Document, *supra* note 4, ¶ 117 (noting that failure of Parliament to consider relevant international law, where the statute permits, will lead to review).

183. *See* Governor of Pitcairn and Associated Islands v. Sutton, [1995] 1 N.Z.L.R. 426, 430 (CA) (describing interpretative rule used by New Zealand courts that construes domestic statutes to be consistent with international law); Sellers v. Maritime Safety Inspector, [1999] 2 N.Z.L.R. 44, 57 (CA) (stating that international law obligations must be considered when construing domestic maritime law); *see also* Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 660-61 (2007) (stating that common law countries are increasingly receptive to use of a tool of interpretation that requires courts to interpret statutes to avoid conflict with international law).

184. *See* Nicholls v. Registrar of the Court of Appeal, [1998] 2 N.Z.L.R. 385, 398 (using decisions of the Human Rights Committee and European Committee on Human Rights to determine bounds of right to legal assistance stated in the BORA); *see also* Joseph, *supra* note 16, § 26.5.3 (noting that BORA is an affirmation of New Zealand's obligations under and commitment to the ICCPR and, as such, allows courts to apply international human rights jurisprudence and standards to domestic cases).

185. *See* Quentin-Baxter, *supra* note 89, at 43 (noting that compliance with international law is required as a constitutional convention); Core Document, *supra* note 4, ¶ 117.

186. *See* Charters, *supra* note 6, § III.A; *see also* Joseph, *supra* note 16, § 1.4.4 (stating that New Zealand courts follow the ICJ approach to locating customary international law norms).

187. *See* Charters, *supra* note 6, § V.A; Joseph, *supra* note 16, § 1.4.4; Law Comm'n, *supra* note 181, ¶¶ 33, 43 (stating that treaties require legislative action to become domestic law).

188. *See* Core Document, *supra* note 4, ¶ 89 (stating that any treaty to which New Zealand is party must be enacted through legislation to have domestic effect, and domestic law is reviewed before ascending to a treaty to ensure compatibility with domestic law and evaluate the necessity of reservations to the treaty or implementing legislation); Law Comm'n, *supra* note 181, ¶¶ 33, 43 (stating that treaties require legislative action to become part of domestic law).

party to a treaty or other international instrument, the government undertakes a review of existing domestic law to determine what changes to the law, or the treaty, are necessary to ensure compliance of domestic law with international law.[189]

Likewise, any domestic legislation must be consistent with international law.[190] An explicit legislative affirmation of New Zealand's international human rights obligations is the Bill of Rights Act 1990 ("BORA").[191] The preamble of the BORA affirms New Zealand's commitment to the ICCPR,[192] and the text directs the Attorney General to ensure that all bills are consistent with BORA, and thus the ICCPR.[193] The Minister sponsoring a bill must verify that it complies with New Zealand's international law obligations, and the Attorney General must consider international human rights jurisprudence when evaluating whether a bill complies with BORA.[194]

2. International Human Rights in New Zealand Courts

New Zealand courts have not been hesitant to look to both international and foreign decisions in discerning the content of

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189. *See* Law Comm'n, *supra* note 181, ¶ 89; Core Document, *supra* note 4, ¶ 117; Charters, *supra* note 6, § V.A; *see also* Law Comm'n, *supra* note 181, ¶ 54 (stating that New Zealand became a party to the Convention on Torture, the Genocide Convention and the Convention on Crimes against Internationally Protected Persons without making changes to domestic law, as it was considered to already offer adequate protection).

190. *See* Charters, *supra* note 6, § V.B.2(a) (discussing requirement of cabinet members to vet all bills to ensure compliance with international obligations); Core Document, *supra* note 4, ¶ 117 (noting that failure of Parliament to consider relevant international law, where the statute permits, will lead to review).

191. New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109; *see* Palmer, *supra* note 34, at 566-67 (discussing BORA); Charters, *supra* note 6, § V.B.II(b) (discussing duty of courts to interpret laws consistent with BORA, and therefore the ICCPR rights incorporated therein).

192. New Zealand Bill of Rights Act 1990, pmbl. ("An Act . . . [t]o affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.").

193. New Zealand Bill of Rights Act 1990, § 7; *see also* Hosking v. Runting, [2005] 1 N.Z.L.R. 1, ¶ 92 (looking to law of other common law countries and the rights contained in the ICCPR and Convention of the Rights Child ("CRC") to determine that a right to privacy is protected by BORA because it is protected internationally); Joseph, *supra* note 16, § 26.5.3; Palmer, *supra* note 34, at 566 (noting BORA is a statute equal to all others, and must be interpreted as such); Law Comm'n, *supra* note 181, ¶ 59 (describing the necessity of all legislation to conform to BORA and to New Zealand's international obligations and international standards).

194. *See* Charters, *supra* note 6, § V.B.II(b); Law Comm'n, *supra* note 181, ¶ 7 (noting that necessity of ensuring amendments to existing legislation are consistent with international law is especially true in the area of human rights).

New Zealand human rights law.[195] The courts apply an interpretive tool that presumes consistency with international obligations rather than requiring mandatory review.[196] Although New Zealand's courts are under no obligation to look at international tribunal decisions or cases from foreign jurisdictions,[197] decisions of international tribunals, treaty bodies and foreign tribunals are persuasive authority.[198] Recognition of the importance of observing a State's international obligations encourages the courts to look to non-domestic sources of law when reaching decisions.[199]

Specifically, because the BORA clearly affirms the domestic importance of the rights in the ICCPR, New Zealand courts look to decisions by the Human Rights Committee as "considerable persuasive authority."[200] In *Tavita v. Minister of Immigration*,[201]

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195. *See, e.g.*, *Hosking*, [2005] 1 N.Z.L.R. 1, ¶ 92; *see generally* Claudia Geiringer, *Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law*, 21 N.Z.U.L.REV. 66 (2004) (discussing cases in which the courts decisions considered or relied on international law).

196. *See* Sellers v. Maritime Safety Inspector [1999] 2 N.Z.L.R. 44, 57 (CA) (concluding a maritime statute was consistent with New Zealand's international obligations); *see also* Geiringer, *supra* note 195, at 72-88 (discussing the two models and advocating use of the former, especially in human rights cases); Jason N.E. Varuhas, *Keeping Things in Proportion: The Judiciary, Executive Action and Human Rights*, 22 N.Z.U.L.REV. 300, § V (2006) (advocating use of proportionality review of legislation that touches on human rights).

197. *See* Puli'uvea v. Removal Review Authority, [1996] 3 N.Z.L.R. 538 (CA) (holding that failure to look at international tribunal decisions or cases from foreign jurisdictions to reach holding on domestic law was not error because no general obligation exists to do so); Joanna Harrington, *The Democratic Challenge of Incorporation: International Human Rights Treaties and National Constitutions*, 38 VICT. U. WELLINGTON L. REV. 217, § III (2007) (noting New Zealand law does not require courts to consider non-domestic legal decisions).

198. *See* Hosking v. Runting, [2005] 1 N.Z.L.R. 1, ¶ 6 (stating that international obligations provide guidance to interpretation of domestic rights law, and decisions of treaty-based bodies should not be ignored when New Zealand courts are willing to draw on case law from other jurisdictions and New Zealand is a party to the First Optional Protocol to the ICCPR, allowing individuals to make complaints to the Human Rights Committee ("HRC")); Harrington, *supra* note 197, § III (noting that because BORA affirms New Zealand's commitment to the ICCPR, New Zealand courts have used HRC decisions as persuasive authority).

199. *See Hosking*, 1 N.Z.L.R. 1, ¶ 6 ("To ignore international obligations would be to exclude a vital source of relevant guidance. It is unreal to draw upon the decisions of Courts in other jurisdictions (as we commonly do) yet not draw upon the teachings of international law."); Waters, *supra* note 183, at 662 (discussing necessity of considering international obligations to avoid international criticism).

200. R v. Goodwin (No. 2), [1993] 2 N.Z.L.R. 390, at *11 (referring to application by the HRC of ICCPR Art. 9(1) to determine content of its analog in BORA, and giving

the Court of Appeal relied on decisions by the U.N. Human Rights Committee in concluding that the Minister of Immigration had to consider New Zealand's obligations under the ICCPR and the Convention on the Rights of the Child ("CRC") when exercising authority under the Immigration Act.[202] The Court explained that the ratification by New Zealand of the First Optional Protocol to the ICCPR indicated that the Human Rights Committee ("HRC") became part of the New Zealand's legal structure,[203] and that a failure to consider New Zealand's international obligations, regardless of their enactment in domestic law, would attract criticism.[204] *Tavita* signaled to the courts that international obligations must be considered when construing rights of people in New Zealand.[205] In essence, the courts use international law to fill gaps perceived in the domestic law protection of human rights.[206] The courts' concern that a

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the HRC decision much weight because BORA purports to be an affirmation of New Zealand's commitment to the ICCPR).

201. Tavita v. Minister of Immigration, [1994] 2 N.Z.L.R. 257 (holding that an immigrant man who serves as the primary caregiver for his small, New Zealand-born child should not be deported to Samoa); *see also* Melissa A. Waters, *Using Human Rights Treaties to Resolve Ambiguity: The Advent of a Rights-Conscious* Charming Betsy *Canon*, 38 VICT. U. WELLINGTON L. REV. 237, § I.A (2007) (noting that *Tavita* overturned *Ashby v. Minister of Immigration* [1981] 1 N.Z.L.R. 222 (CA) which adhered to a strict dualist requirement for treaty law application).

202. *Tavita*, 2 N.Z.L.R. at 262, 265, 266 (relying on two European Court of Human Rights ("ECHR") decisions, an English court decision, a Canadian court decision, and the ICCPR, CRC and First Optional Protocol to the ICCPR in concluding that deportation of primary care giver would violate the rights of the child); *see also* Waters, *supra* note 183, at 662.

203. *Tavita*, 2 N.Z.L.R. at 266; *see also* Waters, *supra* note 183, at 662 (discussing *Tavita*'s use of international law to grant greater human rights protections than allowed in domestic law).

204. *Tavita*, 2 N.Z.L.R. at 266; *see also* Waters, *supra* note 201, § I.A (discussing the Court's use of international law in reaching its holding); Geiringer, *supra* note 195, at 103-04 (listing international censure as one reason governments comply with international human rights obligations).

205. *See* Hosking v. Runting, [2005] 1 N.Z.L.R. 1, ¶ 6; Charters, *supra* note 6, sec. V.A (noting that *Tavita* implies that New Zealand must consider comments of international treaties, even those that are unincorporated, in making administrative decisions); Geiringer, *supra* note 195, at 71.

206. *See, e.g.*, H v. Y, [2005] N.Z.L.R. 152, ¶ 88 (CA) (noting that international law sources are useful for identifying New Zealand human rights law, but determining no customary international law standards existed as to right to know identity of biological father); Waters, *supra* note 183, at 662 (discussing the *Tavita's* court use of international law to grant greater human rights protections than allowed in domestic law); Charters, *supra* note 6, § V.A (noting that *Tavita* implies that New Zealand must consider the comments of international treaty bodies in national law); Poole, *supra* note 114, § III.A

breach of international legal obligations will have consequences in the international legal and political spheres results in a willingness to look to international jurisprudence.[207]

Other decisions prioritize domestic law and interests over international obligations. In an immigration case factually similar to *Tavita*, *Elika v. Minister of Immigration*[208] found that New Zealand's international obligations, such as the ICCPR and CRC, must be balanced against conflicting domestic interests, and that the Immigration Service acted lawfully in applying an internal policy directing that state interests should be given "substantial weight."[209] In *Lawson v. Housing New Zealand*,[210] the Court determined that it was not the proper venue to resolve whether if New Zealand's international legal obligations were fulfilled, leaving the question to the international forum.[211]

Unlike treaty law, customary international law is automatically binding on New Zealand courts.[212] One area in which courts have not hesitated to apply a customary international law norm when domestic law is silent is in the application of the doctrine of sovereign immunity.[213] Where international standards are less clear than in sovereign immunity, the court has engaged

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(stating that the *Tavita* court used international instruments in a manner consistent with legislative intent).

207. *See* Tavita v. Minister of Immigration, [1994] 2 N.Z.L.R. 257; Dunworth, *supra* note 134, at 78 (discussing importance of courts' adherence to international law obligations to avoid international criticism and accompanying implicit recognition of New Zealand's place in global community); Geiringer, *supra* note 195, at 103-04.

208. Elika v. Minister of Immigration, [1996] 1 N.Z.L.R. 741 (considering rights of a woman, set to be deported under an investigation compliant with New Zealand's Immigration Service's policy, who brought a claim that her removal would violate the rights and interests of her family, including her children born in New Zealand).

209. *Elika*, 1 N.Z.L.R. at 747 (quoting Immigration Service's policy); *see also* Poole, *supra* note 114, § III.B (discussing New Zealand Immigrant Service's response to *Tavita* by including New Zealand's international obligations in guidelines used for considering immigrant status).

210. Lawson v. Housing New Zealand, [1997] 2 N.Z.L.R. 474.

211. *Lawson*, 2 N.Z.L.R. at 498.

212. *See* Joseph, *supra* note 16, § 1.4.4 (noting that customary international law is part of New Zealand law); Dunworth, *supra* note 134, at 67 (stating that, unlike treaty law, customary law is binding on New Zealand courts without legislative action).

213. *See* Governor of Pitcairn and Associated Islands v. Sutton, [1995] 1 N.Z.L.R. 426, 430 (CA) (stating that customary international law, "in matters such as sovereign immunity," applies unless there is clear legislative intent otherwise); *see also* Dunworth, *supra* note 134, at 69-71 (discussing application of doctrine of sovereign immunity by New Zealand courts, a doctrine not located in legislative action but only in customary international law, so that there is no concern over conflicting intentions, and noting the strength of the doctrine of sovereign immunity in international law).

in analysis of whether a customary international law norm exists.[214] In *H v. Y*, the Court found that an adult had no right to learn the identity of his biological father under customary international law.[215] Although some support for the proposition existed in State practice, it did not have sufficient widespread support to be considered a norm.[216] While principles of customary international law addressing indigenous land rights are not as ingrained in State practice as that of sovereign immunity, they do enjoy State support to a far greater degree than that of the right at issue in *H v. Y*.[217]

3. The Declaration in New Zealand Tribunals and Commissions

Although New Zealand courts have not invoked the Declaration in explaining their decisions, other adjudicatory and review bodies in New Zealand have been quick to embrace the Declaration as a tool for interpreting New Zealand's domestic legal obligations. The Waitangi Tribunal, in a 1996 report on the Taranaki settlement, relied on the then-draft Declaration in making recommendations for the resolution of Taranaki Maori claims to traditional lands.[218] The Tribunal discussed the interplay between State sovereignty and Maori authority, rooted in the Treaty, and its increased significance due to a contemporaneous international focus on indigenous rights, specifically identifying the then-draft Declaration.[219] In issuing its conclusions,

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214. *See* H v. Y, [2005] N.Z.F.L.R. 152, ¶ 88 (CA); Dunworth, *supra* note 134, at 81-84 (advocating a "pedigree approach" to court's customary international law adherence).

215. H v. Y, [2005] N.Z.F.L.R. 152, at ¶ 88 (concluding, after reviewing the CRC, statements by the Committee of the CRC and European Court of Human Rights ("ECHR") decisions, that "international instruments, practice and jurisprudence have not yet reached the point where it can conclusively be said that adopted children possess a universal and internationally recognized right to know their biological parentage, although the tide of opinion is flowing in that direction").

216. *Id.*

217. *See, e.g.*, Lenzerini, *supra* note 100, at 163-64 (discussing indigenous peoples' right to sovereignty in customary international law); Wiessner, *supra* note 11, at 127 (discussing indigenous rights to culture and lands in customary international law).

218. Waitangi Tribunal, THE TARANAKI REPORT–KAUPAPA TUATAHI (1996), http://www.waitangi-tribunal.govt.nz/reports/downloadpdf.asp?ReportID={3FECC540-D049-4DE6-A7F0-C26BCCDAB345}. The report discusses Taranaki claim that confiscation of traditional lands by the Crown during the nineteenth century wars and subsequent lease of that land, officially reserved for Maori, to settlers a Treaty breaches. *Id.*

219. *Id.*, ch. 2.1 (Partnership and Autonomy).

the Tribunal quoted directly from Articles 21 to 39 of the then-draft Declaration,[220] and noted that parts of the draft Declaration embodied principles of the Treaty.[221] The Tribunal noted that both the Declaration and the Treaty recognize the importance of land to indigenous populations and the legacy of colonization.[222] The Tribunal noted that government-Maori relations were undeveloped[223] and concluded by stating that the Declaration is an affirmation of the Treaty principles and assists in the analysis of the relationship between indigenous peoples and state governments.[224]

The New Zealand Human Rights Commission ("NZHRC") uses the Declaration as a standard against which it measures the government's actions towards and with the Maori.[225] The NZHRC, an independent organization under the Ministry of Justice, has the task of protecting human rights, as set forth in the international covenants.[226] Despite New Zealand's vote against the Declaration, the NZHRC uses the Declaration in its analysis of the government's relationship with the Maori population.[227]

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220. *Id.*, ch. 12 (Conclusions).

221. *Id.*, ch. 12.1 (How Peoples Relate).

222. *Id.*

223. *Id.*, ch. 2.1.

224. *Id.*, ch. 12.2 (The Relationship in Taranaki).

225. New Zealand Human Rights Comm'n, *supra* note 151, quoting Race Relations Commissioner Joris de Bres' recognition of the negative New Zealand vote but stating that the Declaration remains a standard for looking at indigenous rights issues nationally and internationally, and noting the Commission's intent to use the Declaration "to further public discussion on the nature of indigenous rights, the Treaty of Waitangi and the relationship between the Maori and the Crown").

226. *See generally* New Zealand Human Rights Comm'n, *supra* note 151 (stating that the New Zealand Human Rights Commission ("NZHRC") was established in 1978 under the Human Rights Commission Act 1977 and that its mandate was enlarged by the Human Rights Act 1993); *see also* Core Document, *supra* note 4, ¶ 126; Joseph, *supra* note 16, § 6.15.3.

227. *See* New Zealand Human Rights Comm'n, *supra* note 151 (recognizing with regret New Zealand's no vote on the Declaration, but welcoming its approval by the U.N. General Assembly and stating NZCHR's intention to use the Declaration); *see also* New Zealand Comm'n on Human Rights, Treaty Developments Significant Over the Past Year (Feb. 4, 2008) (on file with author) (discussing the Declaration's adoption as a positive development for indigenous populations worldwide and for interpretation and application of the Treaty, and noting NZHRC planned to distribute copies of the Declaration in Maori on Waitangi Day); New Zealand Human Rights Comm'n, United Nations Declaration on the Rights of Indigenous Peoples, Te Whakapuakitanga o te Runanga Whakakotahi i ngā Iwi o te Ao mo ngā Tika o ngā Iwi Taketake, http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/30-Jan-2008_10-39-25_UN_Declaration

III. *CAN MAORIS USE THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES TO BOLSTER THEIR LAND RIGHTS IN NEW ZEALAND?*

New Zealand's vote against the Declaration was a step backwards for the realization of the partnership between the government and the Maori envisioned in the Treaty.[228] Land is one area that both illustrates and tests the partnership principle. The government must consult and consent with Maori before taking any actions which affect their rights, including those relating to land.[229] The official mechanisms for resolution of land claims under the Treaty purport to adhere to the partnership principle.[230] Yet, the enactment of the F.S.A. and the vote against the Declaration show, the ideal of a partnership may be lost to politics.[231]

Although methods for redress are available under the F.S.A., CERD found them to be discriminatory because Maori are not able to secure title to the foreshore and seabed areas where they can show traditional use and occupancy.[232] As the Ngati Porou settlement illustrates, the F.S.A. procedures in practice do not remedy these perceived faults: the Ngati Porou received recognition of their *mana* under the settlement, but seeking legal title to the foreshore and seabed under the doctrine of Maori customary title, found to exist in the *Ngati Apa* decision, was not even a possibility.[233]

Although international law plays a significant role in both legislative and judicial actions in New Zealand, it is historically

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_on_Rights_of_Indigenous_People.pdf (providing translation of the Declaration in Maori).

228. *See supra* notes 33, 109 and accompanying text (discussing the Treaty's establishment of a partnership between the parties, and the perceived incompatibility of the Declaration with that partnership).

229. *See supra* notes 34-35 and accompanying text (discussing the steps the government must take to comply with its Treaty obligations, including consulting with Maori who will be affected by a government action).

230. *See supra* notes 36-38 and accompanying text (discussing land claim resolutions through the Tribunal or settlement).

231. *See supra* notes 50-51, 107-09 and accompanying text (describing the political motivations behind the F.S.A. and the vote against the Declaration).

232. *See supra* notes 63-64 and accompanying text (discussing CERD finding of F.S.A. discrimination against Maori).

233. *See supra* notes 69-80 and accompanying text (discussing Ngati Porou settlement's protection of *mana* and territorial customary rights but denial of ownership).

missing from the process of resolution of Maori land claims.[234] The Ngati Porou settlement deed acknowledges the government's obligation to comply with international law.[235] Could rights and principles found in customary international law have furthered the claims of the Ngati Porou, allowing them to complete the settlements with ownership, or something close?

Both Parliament and the courts are implicated in F.S.A. settlements. The High Court must confirm a settlement deed of agreement, and Parliament must allocate monies necessary to implement any settlement that has been reached and subsequently approved by the Cabinet.[236] Any F.S.A. settlement, consequently, should be subject to the same international obligations that the courts and Parliament are obliged to follow.[237]

Although New Zealand is not party to international instruments on indigenous rights, customary international law is binding law in New Zealand.[238] This body of law includes principles that address indigenous land rights.[239] The indigenous land rights that currently exist in customary international law are narrow, but include state protection of land that was traditionally owned or occupied by indigenous peoples, as well as self-determination and cultural integrity.[240] The principle of state protection of indigenous land is already understood in New Zealand through the existence of an array of mechanisms in place to interpret and implement the Treaty.[241] The *mana* protected by F.S.A. settlements is analogous to the rights to culture, property

234. *See supra* note 13 and accompanying text (stating that Treaty rights are protected under domestic, not international, law).

235. *See supra* note 82 and accompanying text (noting government obligation to comply with international law stated in Deed of Agreement).

236. *See supra* notes 72-73 and accompanying text (reciting steps that must be taken after initialing of settlement Deed for it to be enacted).

237. *See supra* notes 181-217 and accompanying text (discussing the necessity of New Zealand's legislative and judicial branches to comply with international obligations).

238. *See supra* notes 186, 205-07 and accompanying text (discussing New Zealand's courts' use of customary international law and stating that it is binding unless there is clear legislative intent otherwise).

239. *See supra* notes 164-66 and accompanying text (discussing the Declaration as embodying broad customary international law on indigenous land rights).

240. *See supra* notes 143-45 and accompanying text (discussing indigenous rights located in customary international law).

241. *See supra* notes 109, 145-46 and accompanying text (discussing New Zealand State practice relating to indigenous land rights).

and self-determination located in customary international law.[242]

The Declaration is part of an emerging body of indigenous rights principles.[243] The principles of the text embody broad notions of respect for indigenous peoples' rights.[244] These rights include a right of indigenous peoples to ownership of lands traditionally owned, occupied or used.[245] It was this lacuna in the F.S.A. that drew criticism in the CERD decision.[246] This right to ownership, if established as a principle of customary international law, will become a principle that will be automatically binding in New Zealand and will allow ownership where the F.S.A. does not.

Successful invocation of the Declaration by Maori land claimants has a clear barrier: New Zealand voted against the Declaration, and made objections to specific articles and a general statement that the Declaration is not binding law.[247] New Zealand's stated reasons for voting against the Declaration do not make it a persistent objector to the general principles of the Declaration.[248] The general principles of the text embody a broad customary international law norm of indigenous peoples' land rights.[249] At one point, New Zealand was willing to vote in favor of the Declaration, and indeed, was a major participant in its formation.[250] The principles of the Declaration are analogous to those embodied in the Treaty.[251] New Zealand's state

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242. *See supra* notes 74-75 and accompanying text (discussing *mana* as the *hapu*'s "authority, control, influence, prestige and power," including a right to conduct and regulate activities on the land).

243. *See supra* notes 149-52 and accompanying text (discussing the broad scope of potential applicability of the Declaration).

244. *See supra* note 151 and accompanying text (discussing the Declaration's goal of improving the relationship between States and their indigenous populations).

245. *See supra* note 93 and accompanying text (discussing Declaration Article 26, reciting indigenous land rights).

246. *See supra* notes 62-64 and accompanying text (discussing the CERD decision that the F.S.A. discriminates against Maori by not allowing ownership of the foreshore and seabed).

247. *See supra* notes 96-98, 108-09 and accompanying text (discussing objections of New Zealand to particular articles and to the Declaration as an aspirational statement).

248. *See supra* notes 177-80 and accompanying text (discussing limitation of New Zealand's objections to specific articles and state practice contrary to those objections).

249. *See supra* note 166 and accompanying text (discussing the Declaration as an embodiment of a broad right of indigenous peoples to land).

250. *See supra* notes 86, 160 and accompanying text (discussing New Zealand's role in drafting the Declaration and subsequent reasons for a change in position).

251. *See supra* notes 111, 114-15 and accompanying text (discussing similarities of rights protected by the Treaty to those stated in the Declaration).

practice uphold the principles in the Declaration it purports to find objectionable out of a sense of domestic, rather than international, legal obligation.

The government primarily directed its objections to the right set forth in the Declaration that most strengthens Maori land claims: the right to ownership of land based on traditional use and occupancy.[252] Even by invoking the persistent objector principle it is doubtful that New Zealand can prevent the formation of a binding customary international law right.[253] A vast majority of States voted in favor of the Declaration. Moreover, countries have acted to implement the Declaration into domestic law and their courts have used it as proof of international law.[254]

Significantly, the Declaration is, and has been, used in New Zealand, by bodies of the New Zealand government. Although it has not been invoked by the courts, the NZHRC's and Waitangi Tribunal's use of the Declaration illustrate two manners in which the Declaration can be applied in New Zealand: as a guideline for measuring laws and programs that affect Maori, and as a tool of interpretation for the Treaty.[255] These uses of the Declaration points to an emergence of the Declaration as a set of principles by which governments, including New Zealand, can and do employ to guide their relationships with their indigenous populations.

The Ngati Porou settlement exposes the weaknesses of New Zealand's objections to the Declaration by showing the shortcomings of New Zealand's domestic protections and illustrating how the Declaration could strengthen the claim. The settlement affirms Ngati Porou's collective *mana* to the disputed foreshore and seabed, the traditional use of the land and provides in-

252. *See supra* notes 96-98 and accompanying text (discussing New Zealand's objections to rights relating to or having an effect on land).

253. *See supra* notes 176-78 and accompanying text (discussing weakening of persistent objector doctrine in face of near-unanimous international support and state practice by objector contrary to objection).

254. *See supra* notes 1, 3, 153, 162 and accompanying text (noting only four countries voted against the Declaration, two of which have since changed their position; two countries have moved to implement the Declaration in their domestic law; and one country's supreme court has invoked the Declaration as embodying general principles of international law).

255. *See supra* notes 218-27 and accompanying text (discussing the Waitangi Tribunal's and the NZHRC's use of the Declaration).

creased management over these traditional lands.[256] Although the powers granted to the Ngati Porou *hapu* under the settlement can be limited by (and any *hapu* decision made can be overcome by) legislative action,[257] the government must consult with and gain the consent of the Ngati Porou before taking any action that directly affects their rights.[258] This mechanism ensures balance between the *mana* asserted by the *hapu* and legislative action.[259] The objections of the government to the redress provisions of the Declaration are particularly unfounded in light of the Ngati Porou agreement, in which no demand for compensation was made and the interests of third parties remained protected.[260]

The Ngati Porou settlement highlights the continued objections of the *hapu* to the F.S.A.'s denial of ownership rights. Also, the decision of the *hapu* to enter into the settlement agreement reflects the *hapu*'s desire to have legal protection for their *mana*.[261] The F.S.A.'s limitation on ownership rights may be in violation of developing norms of international law that give indigenous peoples the right to ownership of lands traditionally owned, used and occupied. If so, the settlement agreement could be challenged for violating its own terms, those in which the government recites its obligations to international law.[262] Invoking the Declaration and principles of customary international law will give teeth to future challenges of the F.S.A. as a violation of international and domestic law. Maori land claimants, bringing claims under the F.S.A. and to the Waitangi Tribunal, will benefit from the addition of customary international law supporting indigenous land rights to the their claims.

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256. *See supra* notes 74-76 and accompanying text (discussing the rights protected by the Deed of Agreement).

257. *See supra* notes 77-79 and accompanying text (discussing limitations of the settlement rights).

258. *See supra* notes 73-76 and accompanying text (discussing the terms of the agreement).

259. *See supra* note 34 and accompanying text (discussing the constitutional convention requiring government consultation of Maori).

260. *See supra* note 75 and accompanying text (discussing the importance of preserving rights to land, not money, to the settlement).

261. *See supra* note 83 and accompanying text (discussing standing objection to F.S.A. by Ngati Porou).

262. *See supra* note 82 and accompanying text (noting the government acknowledgment of its international obligations in upholding the Deed of Agreement).

CONCLUSION

Using the Declaration and principles of customary international law will allow Maori land claimants to further their claims to ownership of lands traditionally owned, used and occupied. As the formation of international law and Treaty of Waitangi claim resolutions are both very political processes, arguing that customary international law supporting Maori right to ownership of traditional lands is applicable in New Zealand tribunals, may fail in the near future. The broad international support for the Declaration, and use of the Declaration by authoritative bodies in New Zealand, indicates indigenous rights will receive increased protection on the international level. In New Zealand, understanding indigenous rights in terms of domestic law as well as international law will contribute to the realization of the partnership principles behind the Treaty of Waitangi.