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# Ensuring Indigenous Rights: New Zealand and UNDRIP

Olivia Round  
roundolivia@gmail.com

Jodi Finkel  
Loyola Marymount University, jodi.finkel@lmu.edu

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# **Ensuring Indigenous Rights: New Zealand and UNDRIP**

A thesis submitted in partial satisfaction  
of the requirements of the University Honors Program  
of Loyola Marymount University

by

**Olivia Round**

**May 14, 2019**

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## INTRODUCTION:

### AN ANALYSIS OF NEW ZEALAND AND INDIGENOUS RIGHTS

In 2007, the United Nations adopted the Declaration on the Rights of Indigenous Peoples, the most comprehensive protection of indigenous peoples to date. With 144 countries voting in its favor, it was seen as a great achievement for indigenous rights. The Declaration's adoption put more emphasis on indigenous rights as an important field within international law and advanced the conversation around indigenous rights at the international level.<sup>1</sup> However, the document itself is not a set of binding laws. The Declaration is instead an overarching set of standards that were set out to protect indigenous peoples on a global scale.<sup>2</sup> Surprisingly, though, New Zealand, despite being regarded as a global leader in indigenous rights, was one of four countries that voted against the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) at the time of its adoption in 2007.

The four countries that voted against the Declaration were the CANZUS states, a group comprised of Canada, Australia, New Zealand, and the United States of America. Each of these four states, since the initial vote in 2007, however, have reversed their decision and have publicly announced support for the Declaration. This paper hopes to uncover the significance of these events by looking specifically at the complex history of indigenous rights in New Zealand, a history with which UNDRIP has now become irreversibly intertwined.

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<sup>1</sup> Erueti, Andrew Kaponga Clifford. "The UN Declaration on the Rights of Indigenous Peoples: A Mixed-Model Interpretative Approach," 2016, 1.

<sup>2</sup> When explaining their vote against UNDRIP in 2007, Rosemary Banks said that the New Zealand government shared the belief that a declaration to protect the rights of indigenous peoples is long overdue since many indigenous people are still deprived of human rights in many parts of the world.

Most accounts of New Zealand's relationship with the Declaration explore the complex dimensions of the text but fail to recognize the effect of the reversal of New Zealand's positions from 2007 to 2010. I argue that this reversal was accomplished on the international stage by a strategic navigation of symbolic politics. I hope to fill the gaps in understanding New Zealand's positions by examining the level of symbolic politics on which the government was able to, first, vote against the most up-to-date protection of indigenous rights and, second, reverse that decision with neither legal nor moral ramifications. Rather this use of symbolic politics resulted in a violent subversion of the rights of indigenous peoples while simultaneously boosting the international reputation of New Zealand. I am arguing that a study of these politics, founded on a study of international indigenous rights, shows the effect of symbolic politics on the legal and political conversation around indigenous rights, particularly pertaining to land rights and the right to self-determination in New Zealand.<sup>3</sup>

## **1 Defining indigenous rights**

The term "indigenous" is itself worth the work of an entire book, as its definition has been debated for years with no universally accepted result. What it means to be indigenous is not clearly defined in the UN Declaration. Paul Moon (2018) argues that, historically, the term explicitly refers to nonwhite or non-European people and therefore holds an undeniably discriminatory element.<sup>4</sup> Claire Charters (2018), however, disagrees with this argument, saying that the Declaration sort of provides a definition for who is indigenous; or, at least, an

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<sup>3</sup> Throughout this paper, I engage in a conversation that puts Maori citizens in contrast with the New Zealand government. This is tied to New Zealand's history as a colonized state. In no way am I trying to undermine the reality that Maori individuals are fully New Zealand citizens nor am I ignoring the fact that there are Maori individuals serving in government. Rather, I am making the distinction between the Maori community and the New Zealand government to highlight how the latter has not upheld the interests of the former.

<sup>4</sup> Moon, Paul. Interview by Olivia Round. Personal interview. Auckland, NZ, 2018.

understanding of who is indigenous has come about over the years.<sup>5</sup> Indigenous peoples that were involved in the formation of the Declaration wanted this ambiguity, however. They argued “that it was for indigenous peoples themselves to identify themselves.”<sup>6</sup> Some “criteria which have been utilized in defining indigenous groups or individuals are ancestry, culture, language, residence, group consciousness or self-identification, and acceptance by and indigenous community.”<sup>7</sup> These criteria help give an idea of what indigeneity means at both the group and individual level. The Declaration does state in its preamble that indigenous peoples “have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources,” which allows us to point to a specific group have people that have experienced a history of colonization.<sup>8</sup> This, however, has received some backlash from countries like China and the U.S.S.R., who claim that given the lack of colonization in their region, there are no “indigenous” peoples within their territories.<sup>9</sup> The Declaration also recognizes, however, “that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,” which allows for the inclusion of a global collection of indigenous peoples.<sup>10</sup>

Indigenous rights, then, are correspondingly vague in nature, given the loose definition of what it means to be indigenous. UNDRIP, in its first article, states that “indigenous peoples have the

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<sup>5</sup> Charters, Claire. Interview by Olivia Round. Personal interview. Auckland, NZ, 2018.

<sup>6</sup> Nettheim, Garth. “International Human Rights: Bases for Indigenous Rights.” In *What Good Condition?*, edited by Peter Read, Gary Meyers, and Bob Reece, Aboriginal History Monograph, 137. Reflections on an Australian Aboriginal Treaty 1986-2006. ANU Press, 2006. <https://www.jstor.org/stable/j.ctt2jbkr2.15>.

<sup>7</sup> Hannum, Hurst, “Indigenous Rights.” In *Autonomy, Sovereignty, and Self-Determination*, REV-Revised., 88. The Accommodation of Conflicting Rights. University of Pennsylvania Press, 1990.

<sup>8</sup> United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, 2011, Preamble.

<sup>9</sup> Hurst, *Autonomy*, 89.

<sup>10</sup> United Nations, 2011, Preamble.

right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms” that are outlined in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.<sup>11</sup> In the preamble, it states that these rights “are indispensable for their existence, well-being and integral development as peoples.”<sup>12</sup> This, then, reaffirms the need for a Declaration that specifically protects the rights of indigenous peoples.

## **2 The adoption of UNDRIP as the most comprehensive protection of global indigenous rights**

The Treaty of Waitangi, signed by a number of Māori chiefs and English settlers in 1840, is New Zealand’s founding document. It provides, however, a flawed foundation upon which the entire country is built. Furthermore, the breaches of the guarantees set out in the Treaty by the Crown give further evidence to the need for a more comprehensive protection of Māori rights. I will go into the history of the Treaty of Waitangi more thoroughly in the following chapters. First, I would like to provide background on the UN Declaration on the Rights of Indigenous Peoples as the most comprehensive protection of indigenous rights at the international level. This background will provide a basis for the analysis throughout the remainder of this paper.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was the result of “a strong and on-going push by Indigenous peoples to galvanise the international community into responding to their specific circumstances.”<sup>13</sup> The Declaration was drafted over several

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<sup>11</sup> United Nations, 2011, Art. 1.

<sup>12</sup> Ibid., Preamble.

<sup>13</sup> Charters, Claire, “The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples.” New Zealand Yearbook of International Law, 2007.

decades, beginning in 1982, by the Working Group on Indigenous Populations, which was established by the Economic and Social Council.<sup>14</sup> The group, made up of five experts, was tasked with providing a set of standards to protect indigenous peoples and came out with a first draft in 1993. This draft was heavily influenced by both indigenous peoples and states, and the draft was approved by the Sub-Commission in 1994.<sup>15</sup> With the publishing of the first draft, however, many governments voiced concern over a number of the articles outlined in the text through an open-ended inter-sessional working group that was created by the Human Rights Commission.<sup>16</sup> The main concerns coming from states had to do with the right to self-determination and the right to land as they were written in the Declaration.<sup>17</sup> This paper will explore these specific concerns more in depth in later sections.

The working group was unable to reach consensus on the text until 2004.<sup>18</sup> Eventually, after a couple more years of negotiations, the UN Human Rights Council adopted UNDRIP in June of 2006. It was not until September of 2007, however, that the Declaration was adopted by the UN General Assembly with 144 states in favor, four against, and 11 absentions.<sup>19</sup> The four states that voted against the Declaration were the CANZUS states: Canada, Australia, New Zealand, and the United States. In a press release from New York, the Declaration was called “an historic

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<sup>14</sup> “United Nations Declaration on the Rights of Indigenous Peoples | United Nations For Indigenous Peoples.” Accessed May 7, 2019. <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

<sup>15</sup> Charters, Claire, “The Road to the Adoption.”

<sup>16</sup> “United Nations Declaration on the Rights of Indigenous Peoples | United Nations For Indigenous Peoples.” Accessed May 7, 2019. <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

<sup>17</sup> Taonui, Rawiri, “The rise of Indigenous Peoples: The United Nations Declaration on the Rights of Indigenous Peoples. In *Conversations About Indigenous Rights: The UN Declaration on the Rights of Indigenous Peoples in Aotearoa New Zealand*, Massey University Press, 31-32.

<sup>18</sup> Charter, Claire. “The Road to the Adoption.”

<sup>19</sup> “United Nations Declaration on the Rights of Indigenous Peoples | United Nations For Indigenous Peoples.” Accessed May 7, 2019. <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

achievement for the more than 370 million indigenous peoples worldwide,” and was said to “[establish] an important standard for eliminating human rights violations against indigenous peoples worldwide and for combating discrimination and marginalization.”<sup>20</sup>

It is important to note here, however, that from the time of its adoption, many of the governments (both those that voted in favor of and those that voted against UNDRIP) used very specific wording to undermine its legal capabilities. The use of the word “standard” in the quote above highlights how the document’s terms were not to be seen as much more than something for states to work towards, rather than something for them to implement. This represents the significant difference between a Convention and a Declaration within the UN. A Convention signifies a legally binding agreement, while a Declaration simply states agreed upon standards between its signatories. Indigenous peoples, who had to lobby for decades before convincing the General Assembly to adopt the Declaration, still lack “adequate representation in the UN system” and therefore “have had to raise their cultural rights via the Human Rights Committee and the Inter-American Human Rights system.”<sup>21</sup> This is, of course, in the very nature of a UN Declaration that lacks legal force and will be very important throughout the analyses offered in this paper.

### **3 New Zealand as a global leader in indigenous rights**

This paper will examine UNDRIP and New Zealand specifically through the lens of New Zealand’s history. I start in 1840 with the Treaty of Waitangi and continue my research to 2019,

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<sup>20</sup> United Nations, “Historic Milestone for Indigenous Peoples Worldwide as UN Adopts Rights Declaration.” New York, 13 September 2007.

<sup>21</sup> Renteln, Alison Dundes. “The Significance of Cultural Differences for Human Rights.” *Human Rights: The Hard Questions*, May 2013. <https://doi.org/10.1017/CBO9780511758553.007>, 80.

offering a thorough examination of key events that specifically inform the events of the 21<sup>st</sup> century with the creation and adoption of the Declaration. I chose to focus on this country in particular because of the international standard they hold as a leader in the protection of indigenous rights. This title, while unofficial and often self-proclaimed, puts New Zealand in the spotlight of the conversation around indigenous rights, especially given their unique history as a country founded on the idea of indigenous sovereignty. This, however, is only the tip of the iceberg. What makes New Zealand a compelling case study, beyond their role on the international stage, is that despite this reputation, they have continued to be a major obstacle in the progression of indigenous rights in more recent years. Or, as Avril Bell (2018) put it rather bluntly,

Particularly at a local government level, the New Zealand state suffers severe historical amnesia, and, more broadly, the New Zealand state can be characterized as an incoherent, shape-shifting subject, enacting partnership in one instance and not the next, and frequently guilty of insincerity, saying one thing while doing another.<sup>22</sup>

This is what Dr. Fleur Te Aho calls ritualism. She accuses New Zealand of taking steps in their protection of indigenous rights that do not reflect a wholehearted devotion. Rather, they are more concerned with deflecting scrutiny.<sup>23</sup>

#### **4 Research methods**

In order to supplement the larger discourse on indigenous rights at the international and domestic levels, I am conducting a case study on the New Zealand government and its commitment, or

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<sup>22</sup> Bell, Avril. "A Flawed Treaty Partner:: The New Zealand State, Local Government and the Politics of Recognition." In *The Neoliberal State, Recognition and Indigenous Rights*, edited by Deirdre Howard-Wagner, Maria Bargh, and Isabel Altamirano-Jiménez, 78. New Paternalism to New Imaginings. ANU Press, 2018. <https://www.jstor.org/stable/j.ctv5cgbkm.11>.

<sup>23</sup> Te Aho, Dr. Fleurl. Interview by Olivia Round. Personal interview. Auckland, NZ, 2018.

lack thereof, to the protection of indigenous rights. This study requires thorough research of two important documents within New Zealand's framework on the protection of its Māori peoples: the Treaty of Waitangi (1840) and the Declaration on the Rights of Indigenous Peoples (2010).

My research examines three questions. The first is what explains New Zealand's initial rejection of UNDRIP in 2007, the second asks what explains the reversal of New Zealand's decision in 2010, and the third explores the result of this reversal during the last nine years—particularly in terms of land ownership and self-determination. I will explore these questions through field work in New Zealand; reading of ministerial statements and press releases; analysis of federal laws and court cases; and interviews with academics, legal scholars, members of indigenous groups and NGOs. By examining the complexity of New Zealand's history with indigenous rights, I will be able to highlight the fractures that exist in the current understanding of the country's unique history and its consistent discrimination against Māori.

## **5 Roadmap**

The first chapter of this thesis introduces the conversation around indigenous rights in New Zealand. I outline the Treaty of Waitangi as the country's founding document and examine its relationship in recent years with the UN Declaration. The second chapter will provide a broader discussion of human rights, particularly how they have been understood within the context of the UN. I will also provide a brief outline of the right to land and the right to self-determination, both of which are of great concern to my arguments in later chapters. The third chapter examines New Zealand's vote against UNDRIP in 2007, offering a well-rounded examination of both the pros and cons of the Declaration, but ultimately making an argument against the government's strategic navigation of symbolic politics and its consequences. The fourth examines the

government's decision to support the Declaration in 2010, arguing that the government at the time was tasked with not only the reversal of the previous government's vote, but also the reversal of their consequential claims made at the symbolic level. The fifth chapter specifically analyzes the effect of New Zealand's positions on the indigenous right to land, and the sixth does the same for the right to self-determination. Both chapters will look at specific court cases and the ways in which these cases must necessarily include the terms agreed upon in both the Treaty of Waitangi and UNDRIP. The conclusion will give advice for the continuation of scholarship around UNDRIP and global indigenous rights, particularly in light of recent advances in New Zealand politics.

**CHAPTER ONE:  
THE PROTECTION OF HUMAN RIGHTS IN THE UN**

**"The struggle for human rights is thus a struggle against domination. It is a struggle for new structures, institutions, and practices that will open up the developmental possibilities for the dominated." -A. Belden Fields**

**1 The origin of human rights protections in the UN**

The protection of human rights was not seriously considered by the United Nations until after 1945, when “human rights were made one of the principle aims” of the UN.<sup>24</sup> The UN’s major contributions to the larger human rights conversation were the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; and the International Covenant on Civil and Political Rights.<sup>25</sup> The first article of each of the two covenants states that all peoples have the right to self-determination “and that by virtue of that right they are free to determine their political status and to pursue their economic, social and cultural development.”<sup>26</sup> The UN Charter also mentions the protection of these rights. The General Assembly of the UN is required to “take actions short of intervention in its legal and technical sense to safeguard human rights” under Articles 55 and 56 of the UN Charter.<sup>27</sup> Article 55 reads:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

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<sup>24</sup> Ghaus, Khalida, “Human Rights and UN’s Role.” *Pakistan Horizon* 49, no. 2 (April 1996), 25.

<sup>25</sup> *Ibid*, 27.

<sup>26</sup> Pathak, Vineeta. “Promoting Human Rights: The UN Record.” *The Indian Journal of Political Science* 70, no. 1 (2009): 151–64.

<sup>27</sup> Ghaus, Khalida, “Human Rights and UN’s Role,” 26.

- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.<sup>28</sup>

Article 56 requires that all members of the UN cooperate in fulfilling the goals of the previous article. In 1947, the UN also formed the subcommission on Prevention of Discrimination and Protection of Minorities, a subsidiary body of the Commission on Human Rights.<sup>29</sup>

With all of these developments, however, the biggest flaw remains to be the lack of a legally enforceable set of laws to protect human rights. Without a thoroughly defined set of rules that can be legally enforced, the UN cannot adequately outline the expected conduct of the member states.<sup>30</sup> Even more consequentially, the UN cannot truly punish a state that violates human rights. In fact, each state has two lines of defense if they are accused of a human rights violation. First, they can claim that the UN is intervening in the domestic affairs of a member state, which violates the UN Charter, and, second, they can take the common stance of member states that claims that the rights of individuals and groups might be suspended during a crisis or war.<sup>31</sup>

## **2 UN and the protection of group rights**

One particularly contentious aspect to human rights as they are protected by the UN is the debate on whether human rights can belong to either a group or an individual (or both). Rights as they are discussed and protected by the UN are arguably “not merely rights of individuals within [a]

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<sup>28</sup> United Nations, United Nations Charter, 2016, Article 55.

<sup>29</sup> Ghaus, Khalida, “Human Rights and UN’s Role,” 27.

<sup>30</sup> Ibid, 28.

<sup>31</sup> Ibid, 29.

group but also of the group itself - rights of the group as such.”<sup>32</sup> Rights theorist A. Belden Fields writes, “since groups are never really homogeneous, there is the fear that the concept of group rights is antagonistic to individual rights, that individuals can be crushed as dominant elements within group manifest their rights to, for example, self-determination.”<sup>33</sup> There is, of course, precedence for both individual and group rights granted by the UN today. As for group rights, Women’s rights are protected by The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), children’s rights are protected by the Convention on the Rights of the Child (CRC), and persons with disabilities’ rights are protected by the Convention on the Rights of Persons with Disabilities (CRPD).<sup>34</sup> Such groups can be “voluntary, involuntary, organized, unorganized, ascriptive, identity-based, and so on,” but, importantly, people “do not lose all or any of their human rights because of their group affiliations or identities.”<sup>35</sup> This concept is important in the examination of indigenous rights as both group and individual rights that must be upheld at the domestic and international level. It is noteworthy that the need for a declaration like UNDRIP comes from the fact that this particular group has not received adequate protections under previously existing international law.

The next two chapters will focus on two categories of rights granted to indigenous peoples through UNDRIP that were, first, hard-fought for in negotiations for the Declaration, and, second, particularly of issue in New Zealand. The first of these two categories is the right to land

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<sup>32</sup> Martin, Rex. “Are Human Rights Universal?” Chapter. In *Human Rights: The Hard Questions*, edited by Cindy Holder and David Reidy, 70. Cambridge: Cambridge University Press, 2013. doi:10.1017/CBO9780511758553.005.

<sup>33</sup> A. Belden Fields. “Human Rights Theory: Criteria, Boundaries, and Complexities.” *International Review of Qualitative Research* 2, no. 3 (2009): 411. <http://www.jstor.org/stable/10.1525/irqr.2009.2.3.407>.

<sup>34</sup> Holder, Cindy, and David Reidy. “Introduction.” In *Human Rights: The Hard Questions*, edited by Cindy Holder and David Reidy, 1–20. Cambridge: Cambridge University Press, 2013. doi:10.1017/CBO9780511758553.001.

<sup>35</sup> Jones, Peter. “Groups and Human Rights.” Chapter. In *Human Rights: The Hard Questions*, edited by Cindy Holder and David Reidy, 102. Cambridge: Cambridge University Press, 2013. doi:10.1017/CBO9780511758553.008.

and the second is the right to self-determination. I will be focusing specifically on these rights as they are outlined in UNDRIP and will briefly discuss the importance to New Zealand.

## CHAPTER TWO: INDIGENOUS PEOPLES AND THE RIGHT TO LAND

### 1 Introduction

With my examination of New Zealand and its complicated history with indigenous rights, I am specifically interested in the role that land rights and the right to self-determination have played throughout the larger story. Beginning with the Treaty of Waitangi in 1840 and continuing to today, these two rights in particular have been a matter of tense debate between the government and the Māori people. Their sovereignty was meant to be upheld by the Treaty but was almost immediately undermined by the settlers in the 19<sup>th</sup> century. From the 1840s through the 1970s, “there was a steady alienation of Māori land.”<sup>36</sup> Even today, almost two hundred years after the Treaty of Waitangi was signed, Māori are fighting for the land that was stolen from them. Durie (1998) writes, “... for 160 or more years Māori energies have been consistently focused on land retention and the return of land alienated by force or unjust laws.”<sup>37</sup> In 2007, when UNDRIP was adopted by the UN General Assembly with 144 states voting in its favor, New Zealand claimed that one of the reasons they had to vote against the Declaration was because of the way it protected indigenous rights to land. They claimed that the articles that protected these rights would undermine their territorial integrity.<sup>38</sup> In New Zealand, a lot of this is rooted in the deeply embedded tension between the Māori perspective on governance and the Crown’s perspective. This tension can be traced back to the different versions of the Treaty of Waitangi that outline

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<sup>36</sup> Feary, Sue, “Forestry for Indigenous Peoples: Learning From Experiences With Forest Industries,” Australia: University of Wollongong, 16.

<sup>37</sup> Durie, Mason, *Te Mana, Te Kawanatanga*. Auckland: Oxford University Press 1998.115.

<sup>38</sup> See page 43.

entirely different approaches to shared governance and sovereignty. The table below shows how these differing perspectives manifests itself into contradicting approaches to policy.

<b>Maori Perspective</b>	<b>Crown Perspective</b>
<ul style="list-style-type: none"> <li>• Maori tribes are seen as tangata whenua (people of the land) and owners,</li> <li>• The Crown were given kawanatanga (governance) or management.</li> <li>• The Crown hasn't done a very good job at it well where Maori are concerned</li> <li>• The Crown is responsible for many social, environmental and economic problems through insidious policies detrimental to Maori.</li> <li>• Maori want to self-determination there future.</li> </ul>	<ul style="list-style-type: none"> <li>• Maori are an interest group</li> <li>• The Crown are owners of natural resources</li> <li>• The Crown is able to allocate property rights.</li> <li>• The Crown has sovereignty over resources.</li> </ul>

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Land rights are an integral part of this conversation, as the loss of land that indigenous peoples suffer has become a key part of their history. In modern New Zealand, there are entire cities built upon Māori sacred land. I argue that the Declaration must inform the Treaty of Waitangi as a legal document, challenging the government to overturn and change laws that do not represent the spirit of the Treaty of Waitangi – especially in terms of land rights. This chapter will give a very brief overview of some key cases in which land was disputed<sup>40</sup> and will examine how the Declaration has and will inform similar cases in more modern times. In the next chapter I will look more closely at the right to self-determination.

<sup>39</sup> Iremonger, Catherine and Scrimgeour, Frank, “Maori, the Crown and the Governance and Management of Assets,” in *Papers Presented at the New Zealand Agricultural and Resource Economic Society: Seventh Annual Conference “Where From – Where to?”*, New Zealand Agricultural And Resource Economics Society (Inc.), 2001, 39.

<sup>40</sup> Some cases not thoroughly examined in this chapter but that are worth considering in a more in-depth conversation about Maori land rights are the Forests Act (1949), Maori Trust Board Act (1955), and the Maori Reservations Regulations (1994).

## 2 The Waitangi Tribunal

One important body in the protection of land rights is the Waitangi Tribunal, implemented with the Treaty of Waitangi Act 1975.<sup>41</sup> On its website, the Tribunal boasts registering 2,501 claims, fully or partly reporting on 1,028 claims, issuing 123 final reports and issuing district reports that cover 79 percent of New Zealand's land area.<sup>42</sup> However, in reality, "the Tribunal itself [has] no power of remedy; if it [considers] a claim to be well founded it could merely recommend that the Crown compensate for or remove the prejudice."<sup>43</sup> Additionally, Māori claims face several obstacles in coming to fruition and often demands a multi-generational effort before any suggestions are even made by the Tribunal.

Throughout the Treaty Settlement process, there are still several resources available to aid Māori in making their claims, especially claims about land. There is a Crown Forestry Rental Trust "that was set up to assist Māori to prepare, present and negotiate claims against the Crown, which involve or could involve Crown Forest Licensed Lands."<sup>44</sup> The Trust:

- Invests the rental proceeds and holds them in trust.
- Applies the interest earned on the rental proceeds to help Māori claimants prepare, present and negotiate claims that involve or could involve Crown Forest Licensed Lands.

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<sup>41</sup> Another interesting component to the Treaty of Waitangi Act 1975 is that it and its 1985 amendment were passed by Labour Governments.

<sup>42</sup> "Past, Present & Future of the Waitangi Tribunal | Waitangi Tribunal." Accessed May 8, 2019. <https://www.waitangitribunal.govt.nz/about-waitangi-tribunal/past-present-future-of-waitangi-tribunal/>.

<sup>43</sup> Sorrenson, M. P. K. *Ko Te Whenua Te Utu / Land Is the Price: Essays on Maori History, Land and Politics*. Auckland, UNITED STATES: Auckland University Press, 2014, 220. <http://ebookcentral.proquest.com/lib/lmu/detail.action?docID=1664992>.

<sup>44</sup> Feary, Sue, "Forestry for Indigenous Peoples: Learning From Experiences With Forest Industries," 16.

- The accumulated Annual Rental Fees for all Crown Forest Licensed Lands will eventually be returned to successful claimants, or to the Crown.<sup>45</sup>

The Resource Management Act 1991 (RMA) was implemented to provide direct and indirect support for “Māori participation in the preparation of policy statement and plans and decisions on resource consent applications made by local authorities.”<sup>46</sup> This Act is meant to uphold the Māori rights to land as they are outlined in the Treaty of Waitangi. It allows Māori individuals and communities to have input in the managements of “all resources,” not just the land that they directly own or manage.<sup>47</sup>

As a result of the Treaty claims, it is predicted that in 10-15 years Māori will own up to 41 percent of the land underlying New Zealand’s planted forests.<sup>48</sup> There is also an expected increase in Māori involvement and joint venture schemes as a result of high Māori land ownership.<sup>49</sup>

### **3 Te Ture Whenua Māori Act 1993**

Also known as the Māori Land Act, the Te Ture Whenua Māori Act in 1993 reaffirmed the “the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty

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<sup>45</sup> Miller, Robert; Dickinson, Yvette; and Reid, Alan, “Maori Connections to Forestry in New Zealand” in *Forestry for Indigenous Peoples: Learning From Experiences With Forest Industries*, Brisbane, Australia: The Fenner School of Environment and Society Anu College of Science, 2005, 16.

<sup>46</sup> Ibid, 16

<sup>47</sup> Ibid, 16.

<sup>48</sup> Ibid, 21.

<sup>49</sup> Ibid, 21.

of Waitangi.”<sup>50</sup> It also recognized “that land is a taonga tuku iho of special significance to Māori people.”<sup>51</sup> The Act also continued the Māori Land Court, with the general objectives of promoting and assisting in:

- a. the retention of Māori land and General land owned by Māori in the hands of the owners; and
- b. the effective use, management, and development, by or on behalf of the owners, of Māori land and General land owned by Māori.

The entire Act now includes 18 parts, with several provisions being made within the last decade. Under this Act, Māori Reservations can be set aside for Papakainga villages, site, marae, fishing ground, timber, urupa, reserves, places of cultural or historical interest and is then vested in Trustees, which are determined by Trust orders under the Te Ture Whenua Māori Land Act and the Māori Reservations Regulations 1994.<sup>52</sup>

An examination of the Te Ture Whenua Act shows that the “governance of Māori people and their resources have been less than adequate since the beginnings of colonization,” yet the government has been implementing policies over the last few decades to enact “social, economic, and cultural change” that affects “the governance and management of assets and Māori themselves.”<sup>53</sup> Yet, as is the case with the Waitangi Tribunal and the Treaty Settlement process, there are flaws of the Te Ture Whenua Act that continue to put Māori at a disadvantage. For example, it makes working with banks more difficult, because, under the act, Māori land

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<sup>50</sup> “Te Ture Whenua Maori Act 1993 No 4 (as at 12 November 2018), Public Act Preamble – New Zealand Legislation.” Accessed May 8, 2019. <http://www.legislation.govt.nz/act/public/1993/0004/latest/DLM289885.html>.

<sup>51</sup> Ibid.

<sup>52</sup> Iremonger, Catherine and Scrimgeour, Frank, “Maori, the Crown and the Governance and Management of Assets,” 9.

<sup>53</sup> Ibid., 15.

cannot be used as collateral. This shows once again the obstacles that are put in place, even in legislation that is meant to aid and protect the Māori right to its historical land.

#### **4 The Foreshore and Seabed Act**

In 2004, there was a controversial Foreshore and Seabed Act that essentially gave ownership of the contested foreshore and seabed to the Crown, which in turn stripped the Māori of their rights to seek customary title to the land by taking their cases to the courts. This decision was said to be motivated by the desire to grant public access to this land. The case was very controversial, however, and was seen by many as a racist move by the Labour government.<sup>54</sup> It was argued to have breached the Treaty of Waitangi and the rights the Treaty gives to the Māori people.

The Foreshore and Seabed Act was influential in New Zealand's 2007 opposition to UNDRIP. Andrew Erueti believes it was this case that led the country to take a conservative turn in its policies.<sup>55</sup> Erueti argues that as a result the Labour government was concerned with international intervention, wary about its impact.<sup>56</sup> This wariness was one factor that led to the government's vote in opposition to UNDRIP.

The Act was eventually repealed by the Marine and Coastal Area (Takutai Moana) Act in 2011, which replaced the Crown ownership with a principle of "no ownership." This new act worked to "recognise the mana tuku iho exercised in the marine and coastal area by iwi, hapū and whānau as tangata whenua" and "acknowledge the Treaty of Waitangi (te Tiriti o Waitangi)," but

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<sup>54</sup> Andrew Erueti and Claire Charters to the claim to the Racial Discrimination Committee in the UN and the UN condemned the legislation, saying it was discriminatory.

<sup>55</sup> Erueti, Andrew, 2018.

<sup>56</sup> Erueti, Andrew, 2018.

simultaneously ensured “the protection of the legitimate interests of all New Zealanders in the marine and coastal area of New Zealand.”<sup>57</sup>

In many ways, this case was indicative of New Zealand’s typical approach to Māori land rights. First and foremost, there is a desire to only grant rights in a way that works within the bounds of their existing laws and framework. This often leaves Māori at a disadvantage and does little to right the wrongs of the past. Second, their approach often includes the concerns of non-Māori citizens as almost superior to the concerns of Māori. Rather than taking years of discrimination into consideration, they tend to make the non-Māori citizens the victims who are losing something whenever Māori are granted the right to what was once already theirs.

## **5 UNDRIP and the expansion of Māori land rights**

For the remainder of the chapter, I would like to examine specifically the role that the Declaration has played in the nine years since New Zealand has adopted it and what room there is for future growth. From the time of its drafting, the New Zealand government was very clear that the rights to land that are protected in UNDRIP concerned them as a threat to their territorial integrity. These concerns, however, were overstated, which I will cover more in the fifth chapter. Despite New Zealand’s claims, the articles in the Declaration do not “appear ‘to require the recognition of indigenous rights to lands now lawfully owned by other citizens’ in the sense of ownership and control.”<sup>58</sup> In other words, they will not disrupt the lives of non-Māori citizens.

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<sup>57</sup> “Marine and Coastal Area (Takutai Moana) Act 2011 No 3 (as at 12 November 2018), Public Act – New Zealand Legislation.” Accessed May 8, 2019.

<http://www.legislation.govt.nz/act/public/2011/0003/latest/whole.html#DLM3597201>.

<sup>58</sup> Charters, Claire. “The Rights of Indigenous Peoples,” October 2006.

<http://www.converge.org.nz/pma/cc001006.pdf.s>

Indigenous people instead “have the right to ‘own, use, develop and control’” the lands they already own, and for the land they don’t own, “they are just given the right ‘to maintain and strengthen their ‘spiritual relationship.’”<sup>59</sup> Therefore, an important step for the government to take would be to, first, understand the true spirit of the Declaration, and, second, to work with Māori to figure out what each of these practices would look like for their communities in New Zealand.

A number of articles in the Declaration mention the right to land. These include Articles 8, 10, 11, 12, 25, 26, 27, 29 and 32. Each of these articles encompass three overarching themes: the right of groups to traditionally-owned land; to preserve their culture through land or historical sites; and to collaborate with state governments with regard to controlling, developing and conserving their land. These articles should each act as comprehensive protections of Māori rights, especially in the years since New Zealand adopted UNDRIP. The biggest obstacle that remains, however, is compliance from the government. When the National Party announced its support for UNDRIP in 2010, it made sure to undermine the Declaration, insisting that UNDRIP would only be implemented within the framework that was already in place within New Zealand’s government. As can be seen by the history of New Zealand, though, the existing framework does not include sufficient protections for Māori rights. Rather, there have been, and continue to be, consistent breaches of any protections that are meant to be in place. Even the legislation that has been implemented in more recent years has several quirks that end up benefitting the New Zealand government and making treaty settlement claims difficult for Māori.

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<sup>59</sup> Charters, Claire. “The Rights of Indigenous Peoples,” October 2006.  
<http://www.converge.org.nz/pma/cc001006.pdf.s>

The Government, then, has a responsibility to realign itself with the commitment to indigenous rights that it so often claims. In order to do this, it must check its current status with the rights outlined in the Declaration to see how it can expand the rights for Māori.

## CHAPTER THREE: INDIGENOUS PEOPLES AND THE RIGHT TO SELF-DETERMINATION

### 1 Introduction

The indigenous right to self-determination is another largely debated topic in international law. As mentioned in previous chapters, the right to self-determination that is granted in UNDRIP was a major reason that the four CANZUS countries (Canada, Australia, New Zealand, and the United States) voted against the Declaration. They feared that this right would give indigenous people the right to secede. In the next chapter, I argue that this fear was exaggerated given that the Declaration operates under international law, which has very specific requirements for the right to secede. Further, I pointed out that, regardless of UNDRIP, all individuals have a right to self-determination under existing international law.

This chapter will look specifically at how self-determination has been addressed in the years following New Zealand's adoption of the Declaration. I want to note, though, that in this chapter I am looking more specifically at self-determination as it means to Māori in New Zealand. A few decades ago, "Māori might have been less inclined to have any confidence in the courts or in Parliament," but now "with significant rulings on Treaty issues from the High Court and the Court of Appeal, and with the emergence of a bicultural jurisprudence, as well as a strategically placed presence in Parliament, Māori appear to be searching for a place within the nation state of Aotearoa New Zealand—rather than apart from it."<sup>60</sup> Māori self-determination is "about the realization of collective Māori aspirations."<sup>61</sup> I argue that the rights outlined in the Declaration

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<sup>60</sup> Durie, Mason, *Te Mana, Te Kawanatanga*.

<sup>61</sup> *Ibid.*, 220.

are not clear enough to promote policies that will protect the Māori right to self-determination, so the New Zealand government has the responsibility of adjusting their existing domestic framework in order to protect this right for their indigenous peoples.

## 2 UNDRIP, the Treaty, and the Right to Self-Determination

Self-determination as a right is a bit more difficult to locate than the right to land. For one, the concept of self-determination is highly debated at both the international and domestic level. This debate includes both the meaning and application of self-determination. There is, for example, no clear definition attributed to the right to self-determination in UNDRIP, which caused the CANZUS states, and New Zealand in particular, to speak out against the Declaration. One argument against self-determination in this context is that “indigenous peoples do not meet the criteria of ‘peoples’ but are ‘populations’ or ‘minorities’ within states.”<sup>62</sup> It is, though, “difficult to see how peoples who have governed themselves over their territories for millennia and have not surrendered under a few centuries of colonization can be denied the status of peoples by those who have colonized them.”<sup>63</sup> A more consequential argument is that “the rights of self-determination of colonized peoples is subordinate to the protection of the territorial integrity of existing nation states from disruption.”<sup>64</sup> And so it is in New Zealand.

For Māori in New Zealand, the “aims of self-determination are practical and intimately bound to the aspirations and hopes within which contemporary Māori live. ... It is not about living in the past.”<sup>65</sup> Advancement then encompasses three important dimensions,

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<sup>62</sup> Political Theory and the Rights of Indigenous Peoples

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Durie, Mason *Te Mana, Te Kawantaga* 4.

First, it signifies a commitment to strengthening economic standing, social well-being, and cultural identity, both individually and collectively. Second, it also touches on the dimension of power and control, again at individual and group levels. ... Third, advancement is also about change.<sup>66</sup>

As far as self-determination is now protected by UNDRIP for Māori people, it “captures a sense of Māori ownership and active control over the future and is less dependent on the narrow constructs of colonial assumptions.”<sup>67</sup> Yet, the concept and its application still have their problems. In the *Whaia te Mana Motuhake Report (2015)* released by the New Zealand government, the Ministry of Justice is reporting on a Māori Community Development Act Claim that “challenged the Crown’s right to conduct a review of the 1962 [Māori Community Development] Act, and alleged that its administration of the [Māori Wardens Project] was undermining the Māori self-government institutions protected by the 1962 Act.”<sup>68</sup> The Act “gave statutory recognition and powers to Māori self-government institutions” such as local Māori Committees and Regional Māori Executive Committees, and the claimants were concerned with the fact that the future governance arrangements for the Māori Wardens Project that was administered by the 1962 Act had not yet been transferred to Māori control.<sup>69</sup>

In the report, the Ministry compared different articles in UNDRIP to relevant Treaty principles to offer guidance on the future of the relationship between the two documents. To do so, they emphasized overlaps between the principles outlined in the Treaty, including *kawanatanga*, *rangatiratanga*, and partnership. They aligned these principles with Articles 19, 36, 38, and 46; Articles 3, 4, 5, 33, 34, and 45; and Articles 18 and 19, respectively. Although the report does

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<sup>66</sup> Durie, Mason, *Te Mana, Te Kawantaga*, 4.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Whaia te Mana Motuhake Report*, 2015, 1.

<sup>69</sup> *Ibid.*, 1.

not explicitly discuss the right of self-determination within the contexts of these principles, it does examine the Māori right to self-government and authority. Ultimately, though, this was a case largely concerned with Māori self-determination. The Report goes much further into the case's details than I will here, but it is an important component to understanding how self-determination is still being debated in years as recent as 2015. The general findings by the Ministry included that the 1962 Act (and its 1963 amendment) “reflect an important acknowledgement from the Crown that it must recognize and provide for Māori rangatiratanga or Māori autonomy and self-government at all levels ... as required by article 2 of the Treaty of Waitangi.”<sup>70</sup> This is an important progression in acknowledgement of not only the right to self-determination and autonomy but to the government's responsibility to uphold those rights.

In the future, the government has a responsibility to continue to hold itself to such a standard. However, it must be willing to listen to the Māori communities that are affected by discriminatory legislation in a way that it has not shown itself to be so far throughout its history, even with the creation of the Waitangi Tribunal. Māori claims still face many obstacles in coming to actualization and often are forced to work against the government, rather than with them.

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<sup>70</sup> Whaia te Mana Motuhake Report, 2015, 384.

## CHAPTER FOUR:

### THE TREATY OF WAITANGI

#### 1 The Treaty of Waitangi as a founding document

Despite its reputation as a global leader in indigenous rights, New Zealand has a history of colonization that has harmed the Māori peoples in several ways. It is a paradox that will resurface continually throughout this paper. What we expect from the New Zealand government in their commitment to indigenous rights is rarely what we get. At the foundation of this paradox is the government's relationship with the Treaty of Waitangi (Te Tiriti o Waitangi), which was signed in the 19th century and established New Zealand as a country. In this section, I will briefly outline the history of colonization in New Zealand – an outline that will, due to its generalizing nature, be substantially insufficient in marking all of the pain and discrimination the Māori community has endured since the time of colonization. I will also discuss some of the existing historical accounts of the signing of the Treaty of Waitangi, hoping to establish the understanding that this document is paramount in any and all conversations about indigenous rights in New Zealand. Finally, I will present the three ways that the Treaty and UNDRIP are understood to interact with one another: the first, that the Treaty is superior at the domestic level; the second, that the two documents mutually inform one another; and the third, that the Declaration informs the Treaty. Through analysis of these arguments, I will show how the indigenous rights movement benefits from the documents being held as mutually informative in order to best hold the New Zealand government accountable to the terms it agreed upon 180 years ago.

In order to understand New Zealand's relationship with UNDRIP, it is important to first understand the history of the Treaty of Waitangi, the founding document of modern-day New Zealand. Before being colonized, the land that is now known as New Zealand was home to "a loose collection of independent tribal communities."<sup>71</sup> Each of the tribes "was a separate entity whose relations with other tribes were basically diplomatic matters of alliance or enmity," so the tribe "was the sovereign body and Māori society as a whole was composed of numerous such sovereignties."<sup>72</sup> Around the 1820s, there was an incline in British interest in the land, and, as a result, there was a gradual increase in people who travelled to the two islands. This inevitably led to the meeting of those settlers and the indigenous Māori peoples, who occupied the land. The early European settlers, though, would often integrate themselves into Māori culture and enjoyed a mutually beneficial relationship with Māori tribes. Māori benefitted from "the acquisition of trade goods," while the Europeans "received natural resources ... and food."<sup>73</sup> As interest in the land increased and more Europeans began to settle, however, their relations with Māori became wrought with tension. These settlers described the indigenous peoples in many discriminatory terms, including 'beggars,' 'jews,' and the 'most interesting savages on the face of the earth' and grew increasingly critical of their way of life.<sup>74</sup> Eventually, the interactions between the colonists and the indigenous peoples became entangled with the same racism and violence that are so often perpetuated by the process of colonization. This evolution was not all that different from what indigenous peoples of other colonies experienced, like those in North America, who saw their relationship with the colonists move "from an initial phase of co-operation to increasing

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<sup>71</sup> Moon, Paul, *The Origins of the Treaty of Waitangi*, NZ: Birdwood Pub, 1994.

<sup>72</sup> Adams, Peter. *Fatal Necessity: British Intervention in New Zealand, 1830–1847*. Wellington, NZ: Bridget Williams Books, 2013. 30. <http://ebookcentral.proquest.com/lib/lmu/detail.action?docID=1772259>.

<sup>73</sup> Calman, Ross, *The Treaty of Waitangi*, Oratia Media, Auckland, NZ, 2012. 15.

<sup>74</sup> Moon, Paul, *The Origins of the Treaty of Waitangi*.

competition for land resources, escalation of conflict to the point of open squirmishes, and eventual withdrawal of the vanquished aboriginal sectors.”<sup>75</sup>

In 1835, thirty-five Māori tribes signed a Declaration of Independence, which recognized the individual tribes as their own sovereign nations. This Declaration used the Māori term *mana* to describe the different aspects of Māori sovereignty as it would be preserved in the state with the phrase:

‘Ko te Kingitanga, ko te mana i te wenua o te wakaminenga o Nu Tireni, ka meatia nei kei nga tino Rangatira anake i to matou huihuinga, ...’ ‘All sovereign power and authority within the territories of the United Tribes of New Zealand is hereby declared to reside entirely and exclusively in the hereditary chiefs and heads of tribes in their collective capacity,...’<sup>76</sup>

This state was both “recognised in Britain and acknowledged by King William IV.”<sup>77</sup> It was called Nu Tirene, which was meant to uphold *Tikanga*, which are “the customs and traditions that have been handed down through the passages of time,” and they come from the word ‘*tika*,’ meaning “things that are right.”<sup>78</sup> This was the first time that a written text indicated the intent to recognize Māori sovereignty. The second was five years later in the Treaty of Waitangi, but this treaty directly countered the previous Declaration and eliminated the possibility of a specifically Māori-led state.<sup>79</sup>

Since Britain recognized New Zealand as its own state under the Declaration of Independence, “they needed a treaty with Māori in order to take over the government of the country.”<sup>80</sup> There

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<sup>75</sup> Fleras, Augie and Elliott, Jean L., *The “Nations Within”: Aboriginal-State Relations in Canada, the United States, and New Zealand*, Oxford University Press, 1992.

<sup>76</sup> Durie, Mason, *Te Mana, Te Kawanatanga: The Politics of Māori Self-Determination*, Auckland, NZ: Oxford University Press, 1998. 2.

<sup>77</sup> *Ibid.*, 3.

<sup>78</sup> “*Tikanga Māori | Te Taura Whiri i Te Reo Māori.*” Accessed May 7, 2019. <http://www.tetaurawhiri.govt.nz/maori-language/tikanga-maori/>.

<sup>79</sup> Durie, Mason, *Te Mana, Te Kawanatanga*.

<sup>80</sup> Calman, Ross, *The Treaty of Waitangi*, 19.

was, in this process, a very intentional use of language to undermine Māori sovereignty that to this day remains a point of contention. I mentioned earlier that Māori used the term *mana* to outline their sovereignty in the Declaration of Independence. In the Treaty, however, the word *kawanatanga* (governance) was used — a term that has many shortcomings in describing sovereignty and holds much less weight than its English counterpart.<sup>81</sup> *Kawanatanga* was translated by the colonists to mean something much greater than what Māori were familiar with in terms of a central government.

Additionally, it is arguably unreasonable for the small number of Māori signatories to represent the entire collection of tribes at the time. In fact, several very important chiefs at the time did not sign the Treaty, including Te Wherowhero of Wakato, Taraia of Thames and Tupaea of Tauranga.<sup>82</sup> It is worth noting, though, that at Waitangi in 1840 the treaty was read aloud to all the signers and therefore was also considered a “spoken agreement,” meaning the Māori knew what they were agreeing to.<sup>83</sup> They did not, however, know the full intent of those with whom they were going into agreement with.

The first article of the Treaty, in English, “states that Māori ‘cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty’”; the second “states that the Queen guarantees Māori ‘the full exclusive and undisturbed possession of the Lands and Estates Forests Fisheries and other properties which they may collectively and individually possess’”; and the third “has the Queen extend to Māori ‘royal protection and

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<sup>81</sup> Durie, Mason. *Te Mana, Te Kawanatanga*.

<sup>82</sup> Calman, Ross. *The Treaty of Waitangi*.

<sup>83</sup> Moon, Paul, *The Origins of the Treaty of Waitangi*.

imparts to them all the Rights and Privileges of British Subjects.”<sup>84</sup> It is easy to see how these articles could mean something entirely different with the changing of just a few words. As there was not a Māori word for “government,” for example, the word they used in the Māori version of the text actually meant “governorship,” and the Māori version “said that Māori would let Britain take over the role of ‘governorship’ but would let Māori retain their role of ‘chieftainship.’”<sup>85</sup> This is complicated, however, by the fact that Māori had little concept of the role of a governor, but “were aware of the concept of ‘rangatiratanga’ or chieftainship.”<sup>86</sup> This is just another one of the many ways in which the colonists exploited the existing language barrier in order to grant themselves a higher degree of power. Therefore the sovereignty that the Crown claimed as a result of the Treaty was, and is to this day, highly debated. The pakeha (the settlers of European decent) most often refer to the English version of the Treaty despite the fact that the Māori version had the largest number of signatories in 1840.<sup>87</sup> As a result of these discrepancies within the Treaty and its interpretations, there were several misconceptions around the consequences of the Treaty. The Māori chiefs that signed the Treaty were under the impression that all they had ceded to the settlers was government. They believed that they still held “unqualified exercise of their chieftainship over their lands, villages and all their treasures.”<sup>88</sup> They hoped the Treaty would allow them to “self-govern while the Crown would be responsible ‘for the maintenance of peace and the control of unruly settlers.’”<sup>89</sup> In reality, though, the Treaty was a tool of the colonizers to displace the Māori legal system, which had few formal institutions of justice, and replace it with their Western alternative.

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<sup>84</sup> Moon, Paul, *The Origins of the Treaty of Waitangi*.

<sup>85</sup> Calman, Ross. *The Treaty of Waitangi*. 7.

<sup>86</sup> *Ibid.*, 7.

<sup>87</sup> *Ibid.*

<sup>88</sup> Moon, Paul, *The Origins of the Treaty of Waitangi*.

<sup>89</sup> *Ibid.*

In the Treaty, many parties also consider there to be an additional, unwritten article of the Treaty. Paul Moon, in *The Origins of the Treaty of Waitangi*, outlines this “4th Article” of the Treaty, of which he says incorporates issues like language, culture, airways, resources, etc.<sup>90</sup> This additional article is said to be the avenue through which the Treaty may be interpreted for its original intent on both ends of the agreement, rather than simply adhering to the colonists’ wants. In 1987, through the lens of this rhetorical article, the NZ court declared that “what matters is the spirit” of the Treaty.<sup>91</sup> In theory, then, the law is meant to be adjusted in order to account for the system of mutual sovereignty that was meant to be created by the signatories of the Treaty. This idea, of course, has been rarely upheld throughout the history of the Treaty. To this day there are Māori seeking redress for breaches by the Crown of the articles outlined in the Treaty.

## 2 The significance of the Treaty of Waitangi in modern times

Given the ongoing debate around the discrepancies between the Māori and English versions of the text, there has been a recent push to reground the government in the *principles* outlined in the Treaty, rather than “a strict adherence to the words of the Treaty.”<sup>92</sup> The document was meant to inform the indigenous-government relationship, but the spirit of the terms agreed upon have not been upheld and have consistently left Māori at a disadvantage. Existing literature suggests the need for a Treaty policy that could provide a sturdy foundation for claims policy and Māori policy that would contribute to the progression of Māori autonomy, but such a framework would need greater clarity on the advantages of using the principles of the Treaty over the precise

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<sup>90</sup> Moon, Paul, *The Origins of the Treaty of Waitangi*.

<sup>91</sup> Ibid.

<sup>92</sup> Durie, Mason, *Te Mana, Te Kawanatanga: The Politics of Māori Self-Determination*.

articles.<sup>93</sup> This Treaty policy might also be supported by UNDRIP, which would help create a climate for addressing the claims of Māori.

The following table, from Mason Durie's *Te Mana Te Kawanatanga: The Politics of Māori Self-Determination*, outlines the relationship between Māori and the Crown from the signing of the Treaty of Waitangi to 1997, when the book was written.<sup>94</sup>

	<i>Tribes</i>	<i>Parliament</i>	<i>Courts</i>
<i>1840-1859 Cooperation and mutual benefit</i>	Relative indifference to the Treaty did not prevent full participation in the economy.	No specific reference to Treaty and no Māori MPs. But high levels of interaction with Māori.	Symonds case affirm the importance of the Treaty and its binding implications on the Crown.
<i>1860-1974 Division and Disparity</i>	Loss of land and power led to an increasing emphasis on the Treaty as a source of rights.	Dismissive attitude to the Treaty and to Māori property rights.	Prendergast: 'Treaty is a simple nullity.' Privy Council: the Treaty recognisable only if it is in municipal law.
<i>1975-1997 Negotiation and restitution</i>	Treaty the basis for positive Māori development.	Variable recognition of relevance of the Treaty to modern New Zealand. Settlement claims commences.	Support for Treaty when incorporated in the law. Treaty also used as an aid to interpret the law.

We can see that as time went on, from 1840 to 1974, the increase of the Crown's power directly correlated with the loss of Māori autonomy. There were tangible effects of this correlation, with an irreversible loss of land a physical representation of all that the Crown took from the Māori peoples. Beginning in 1975, according to the table, the Treaty became an important foundation

<sup>93</sup> Durie, Mason, *Te Mana, Te Kawanatanga*.

<sup>94</sup> *Ibid*.

for the progression of Māori rights. This claim, however, largely ignores the reality of the simultaneous manipulation of Treaty policy by the Parliament and the Courts. If these two bodies are given the power to determine what “Māori development” looks like, then it is imperative to be critical of their hesitation in giving full recognition to the principles of the Treaty. Rather, they continued to support the Treaty only as they saw fit for their own benefit.

With that being said, there was, at the time, a new body created in order to help with the implementation of Treaty policy. New Zealand implemented the Waitangi Tribunal in 1975, which put in charge of a number of Treaty Settlements between the government and the Māori tribes and individuals. The Tribunal “was set up ... to hear claims about Crown breaches of the treaty,” and, ten years later, “could [even] hear claims relating to breaches dating back to 1840.”<sup>95</sup> Each of these claims could be brought to the Tribunal by Māori tribes and individuals. Prior to the Tribunal's creation, there was no effective way for Māori to make grievances against the government in their breaching of the Treaty of Waitangi. I will examine the Tribunal at greater detail in a later chapter, outlining both the intentions and the realities of this framework.

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<sup>95</sup> Taonga, New Zealand Ministry for Culture and Heritage Te Manatu. “Ngā Whakataunga Tiriti – Treaty of Waitangi Settlement Process – Te Ara Encyclopedia of New Zealand.” Web page. Accessed May 7, 2019. <https://teara.govt.nz/en/213092>.

## CHAPTER FIVE:

### THE COEXISTENCE OF UNDRIP AND THE TREATY OF WAITANGI

#### 1 Introduction

This chapter will examine the ways in which UNDRIP and the Treaty of Waitangi coexist in New Zealand politics. The Declaration itself is very upfront in its lack of legal influence and is therefore limited to a sort of moral and political influence, while the treaty is a great force within the legal framework of the state as it is the founding document of the country. Yet, both have been constantly undermined by the government throughout history and both seem to be stuck in a state of unfulfilled promises. In all cases, these unfulfilled promises result in the subordination of the Māori community. Therefore, it seems as though it would be futile to even consider the shared influence of the two documents. However, doing so is essential in the progress of indigenous rights and the protection and recognition of their goals. In the following sections, I will examine three approaches commonly taken to understanding the relationship between UNDRIP and the Treaty of Waitangi. To be more specific, I am examining this relationship through the lens of the protection of indigenous rights and the implications that each document has for upholding those rights. The first approach argues that the Treaty of Waitangi, as the founding document of the state, is the only text that holds tangible weight in New Zealand politics. The second believes that the two documents can and should be mutually informative, both working toward a common goal. The third states that the Declaration is in place as an enforcer of the terms agreed upon in the Treaty and can direct the country toward better implementation of those terms.

## **2 The Treaty of Waitangi as the exclusively influential document in upholding indigenous rights**

The Treaty of Waitangi has been the country's founding document since 1840. In its signing by Māori chiefs and European settlers, however, it directly undercut the sovereignty that was granted to Māori in their Declaration of Independence just five years earlier. To this day, though, the state stands on the foundation of that colonialist power structure, upheld by Western ideologies and government. Some scholars argue that, as a result, UNDRIP is less significant than the Treaty of Waitangi in New Zealand since the Treaty is domestic. Therefore, they argue that the Treaty holds more weight within the country and its government, especially given the nature of the Declaration. With the Treaty being a founding document that, in recent times, has begun to inform policies and laws within the state, and the Declaration being a text with only moral force at the international level, this argument places more power in the Treaty and its articles. Those who hold this opinion, like Paul Moon (2018) fail entirely to see the purpose of the Declaration, as they see it to be a highly deficient document given its ideological nature. Moon argues, in fact, that UNDRIP is not even about rights but rather about a performative commitment to ideals; so, the true pursuit of indigenous rights must necessarily be rooted in the Treaty of Waitangi.<sup>96</sup>

Certainly most members of the government took this stance as well, consistently reemphasizing the superiority of the Treaty of Waitangi. In explaining their vote against UNDRIP, some government officials insisted that the Declaration was unnecessary in a country that had a Treaty outlining agreements between the indigenous peoples and the state government. This undermined

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<sup>96</sup> Moon, Paul, 2018.

the intentions of the Declaration and all of the rights it outlined that would expand protection of Māori in New Zealand. Yet even after signing onto the Declaration three years later, the Crown announced that the UN Declaration will not influence New Zealand's Treaty settlements. Rather, they said that the existing domestic framework will define the ways in which the Declaration can be interpreted at the state level. This puts the Treaty of Waitangi at a hierarchical position above the Declaration and allows the state to implement the rights outlined in the Declaration within the bounds of their existing domestic laws, rather than broadening and adapting those laws to include the rights protected in the Declaration. Hon Nanaia Mahuta of the Labour Party contended that the aspirational aspect of the Declaration "should weigh heavily on the efforts of those people who wanted the declaration to be a strong platform for the continued assertion of indigenous rights," because, unlike the Treaty, it did not give tangible avenues for change.<sup>97</sup> This claim, however, is an attempt to cover the government's pursuit of self-interest in upholding the existing power structure. By refusing to give any weight to the Declaration after they voted to support it, Mahuta and those in agreement with him were prioritizing a system that allowed them to maintain power over the Māori individuals and tribes.

### **3 The Treaty of Waitangi and UNDRIP as mutually informative documents**

Other individuals, like Claire Charters, argue that the two documents stand together, each one mutually informing the other. Charters believes that the two documents are complementary to one another in that they both support greater Māori autonomy and self-determination.<sup>98</sup> Despite the flawed nature of both texts (or perhaps the flawed implementation of both texts), they can work together with both legal and moral force to uphold indigenous rights. Kiri Rangi Toki ()

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<sup>97</sup> Ministerial Statements. Hon Nanaia Mahuta. Labour Party.

<sup>98</sup> Interview with Claire Charters. 2018.

writes that while the Declaration “creates no new rights” and “imports no overt international or domestic obligations into the New Zealand legal system,” it still “creates moral obligations, and more notably, could become a mandatory relevant consideration in judicial review or an aid in statutory interpretation.”<sup>99</sup> In some way, this assessment of the two texts looks more toward the future and the potential they have to enact change down the line. At first this change might come in the form of moral pressure but will eventually have legal implications for the indigenous community.

#### **4 UNDRIP as a means to enforce the Treaty of Waitangi**

The third argument is that the Declaration can and should act as an enforcer of the Treaty. That is, UNDRIP can be used as a means to interpret the Treaty of Waitangi, as was stated collectively by the Supreme Court. Naomi Johnstone wrote about this in “Long-standing Implications: The UNDRIP and New Zealand,” saying that the Crown will be pressured to “engage with the UNDRIP on a number of fronts” by the Māori people.<sup>100</sup> Johnstone believes the principles of the Declaration are complementary of New Zealand’s Treaty of Waitangi while also challenging the existing concepts to evolve. Andrew Erueti argued that the Declaration is more intensive and can then provide more protection of domestic indigenous rights. He said in an interview that the Declaration has “the supranational standards to evaluate state conduct; [the] Treaty can’t do that.”<sup>101</sup> He also pointed out that while the Treaty only has three articles, the Declaration has 46, and is thus more detailed and explanatory. Naida Glavish, in “Whanau, hapu and iwi,” wrote, “What I do know is this: consistency and repetition support change. The

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<sup>99</sup> Toki, Kiri Rangi. “What a Difference a ‘Drip’ Makes: The Implication of Officially Endorsing the United Nations Declaration on the Rights of Indigenous Peoples

<sup>100</sup> Johnstone, Naomi, “Long-standing Implications: The UNDRIP and New Zealand,” 1.

<sup>101</sup> Interview with Andrew Erueti. 2018.

Declaration supports Te Tiriti o Waitangi (The Treaty of Waitangi). So the more that the rights of the Indigenous people are on the radar and are acknowledged, the more a groundswell of support can occur.”<sup>102</sup> Additionally, at the time of adoption in 2007, Victoria Tauli-Corpuz, the Chairperson of the UN Permanent Forum for Indigenous Issues at the time, stated that “existing and future laws, policies, and programs on indigenous peoples will have to be redesigned and shaped to be consistent with this standard.”<sup>103</sup> This casts the Declaration as the standard, rather than the Treaty, which would imply that the Treaty, and the policies that enforce the Treaty, must be updated even beyond the terms agreed upon in 1840 in order to best protect the rights of indigenous peoples as they are described in UNDRIP. In *Conversations About Indigenous Rights: The UN Declaration on the Rights of Indigenous Peoples in Aotearoa New Zealand*, authors Selwyn Katene and Rawiri Taonui assert that the Declaration can assist with the “interpretation and application of the articles of the Treaty” and can reaffirm the “principles of partnership, protection and participation.”<sup>104</sup>

## 5 A new approach

The Treaty has resulted in a complicated and unique history for the indigenous people of New Zealand. Almost 200 years ago they signed a document that, in theory, acknowledged their sovereignty and would allow them to live in unison with the settlers. In actuality, however, the terms that were agreed upon were largely neglected at the cost of the Māori tribes and individuals. Today, the Treaty is being pulled back to the surface through the work of Māori

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<sup>102</sup> Glavish, Naida. “Whanau, hapu and iwi.”

<sup>103</sup> Message of Victoria Tauli-Corpuz, Chairperson of the UN Permanent Forum for Indigenous Issues on the Occasion of the Adoption by the General Assembly of the Declaration on the Rights of Indigenous Peoples.

<sup>104</sup> *Conversations About Indigenous Rights: The UN Declaration on the Rights of Indigenous Peoples in Aotearoa New Zealand*

activists and the Māori political party. The result of this work has been the creation and use of the Treaty Settlements processes and the more recent signing of UNDRIP.

In this paper I challenge the existing analyses of the Declaration for a lack of acknowledgement of the symbolic politics at play. Namely, the larger conversation lacks acknowledgement of the ways in which New Zealand had to navigate symbolic politics to constantly appease their own self-interests. As long as the government is able to evade engaging in a useful discourse on the negative effects of symbolic politics, the Māori people will see no real protection of their rights. I argue that we need to fully confront these effects in order to best utilize the Declaration as a tool for indigenous rights. Johnstone (2011) writes, “[UNDRIP] outlines principles that are supportive and complementary of much of New Zealand’s current Treaty architecture, while at the same time it injects a number of new and challenging concepts, doing both against the backdrop of a dynamic global discourse.”<sup>105</sup>

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<sup>105</sup> Johnstone, Naomi, “Long-standing Implications: The UNDRIP and New Zealand,” 2.

## **CHAPTER SIX:**

### **AN EXPLANATION OF NEW ZEALAND'S VOTE AGAINST UNDRIP**

#### **1 Introduction**

New Zealand's initial vote against UNDRIP in 2007 was highly controversial within both the public and political spheres at the time, such that the Labour Party, which was the majority party from 1999 to 2008, was criticized by some and applauded by others. Some argued that the document would enforce greater division in the country by granting rights to one group and not another,<sup>106</sup> while others believed UNDRIP could be the driving force behind a greater movement toward indigenous rights.<sup>107</sup>

In this section, I will begin by briefly outlining public reaction to New Zealand's vote against the Declaration in 2007. I will examine both criticisms of the vote and criticisms of UNDRIP in the hopes of offering a well-rounded presentation of scholarly discourse on the subject. It is important to note, given the complicated nature of the debate at hand, that nearly every piece of existing literature on the subject can at least understand some aspects of the other side. In this regard, I am no exception. The Declaration is both flawed and historical; insufficient and a broad protection of rights. Therefore, it would be impossible to discuss the Declaration without acknowledging both sides of the argument, as both hold a certain amount of validity. With that being said, however, I believe that the discussion of New Zealand's vote does not require the

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<sup>106</sup> Hide, HON Rodney, "Ministerial Statements – UN Declaration on the Rights of Indigenous Peoples— Government Support," New Zealand, April 20, 2010.

<sup>107</sup> Katene, HON Rahui, "Ministerial Statements – UN Declaration on the Rights of Indigenous Peoples— Government Support," New Zealand, April 20, 2010.

same neutrality. Criticism of the Declaration can and should be approached separately from any criticism directed at the New Zealand government. That is to say, despite the flaws that I have and will acknowledge within the Declaration, I argue that those flaws are not sufficient enough to excuse New Zealand from compliance with the goals of the document.

## 2 Criticism and praise for UNDRIP

Throughout the drafting process of the Declaration, there was concern from many activists and scholars that the Declaration was simply an inefficient document. Historian Paul Moon (2018) sees this inefficiency in the text's underlying mis-definition of indigeneity, its lumping together of all indigenous groups across the globe and its lack of specifics.<sup>108</sup> In its most basic sense, it is true that the document, to some extent, assumes monolithic goals for all indigenous peoples worldwide. Existing literature states that there is a problem with the presumption that Māori are homogenous, "even though they share many physical and cultural characteristics."<sup>109</sup> Moon notes that such a summation of goals would be hard to do even for tribes within the Māori community in New Zealand, and, therefore, is an unreasonable task to undertake on behalf of all of the tribes of the world.<sup>110</sup> Indigenous peoples comprise "5,000 distinct cultural groups speaking 4,000 of the world's 7,000 languages" while Indigenous nations "encompass up to 90 per cent of the world's cultural diversity."<sup>111</sup> This issue, however, is inherently undermined by his claim that the document is too vague to be implementable. This "lack of specifics," as Moon describes it, is the very thing that allows UNDRIP to be adaptable across the world. UNDRIP is a broad framework that allows for a state's domestic framework to exist inside of its terms, not

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<sup>108</sup> Moon, Paul, 2018.

<sup>109</sup> Durie, Mason, *Te Mana, Te Kawanatanga*, 59.

<sup>110</sup> Moon, Paul, 2018.

<sup>111</sup> Taonui, Rawiri. "The rise of Indigenous Peoples."

the other way around. Furthermore, much of the ambiguity left unresolved in the Declaration at this time was the result of consistent pushback from the states throughout the entire drafting process. Many of the states involved in the process, and particularly the CANZUS states, pushed for many of the articles in the Declaration to be removed or watered down. In the case of the CANZUS states, when they were not able to do this to their satisfaction, they opted to vote against the Declaration entirely.

There is also, as previously mentioned, a general lack of enforcement power that a UN declaration provides. UNDRIP is not a legally binding document. States can (and have) sign(ed) onto the Declaration without making any tangible changes at the domestic level. I went in to this more thoroughly in Chapter Two and the problems it causes in the global attempt to protect human rights. While it can be argued that UNDRIP holds some force in the way it pressures states to make changes on moral grounds, they will not see any legal repercussion for lack of enforcement. This is a reality that, in the eyes of many, entirely undermines the need for such a document. In response to this, however, others argued that

the Declaration remains significant as a reflection of evolving customary international law on Indigenous peoples' rights, as a potential guide to the interpretation of legal norms relevant to Indigenous peoples domestically and internationally by institutions such as the human rights treaty bodies, and to set benchmarks below which State behaviour should not fall.<sup>112</sup>

From this perspective, there is a hope that UNDRIP will follow in the steps of the Universal Declaration of Human Rights, developing into customary international law that will then become binding to each of its signatories.

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<sup>112</sup> Charters, Claire, "The Road to the Adoption."

As I stated before, I believe that there is some merit to the existing criticism of the Declaration, but I argue that it is not to be paralleled with direct support for New Zealand's vote against UNRIP. The flaws of the Declaration can and should be pursued as opportunities for improvement in the protection of indigenous rights, rather than a reason to abandon the pursuit altogether. In fact, much of the existing literature is critical of the government for their blatant pursuit of self-interest. Andrew Erueti (2018) described the decision to vote against the Declaration as a move to uphold the existing asymmetrical power structure that allowed the state to control Government-Māori relations.<sup>113</sup>

### **3 The Labour Party and indigenous rights**

The Labour Party's vote against UNDRIP seems at once fundamentally contradictory to what one would expect from a country that is widely known to engage in the rhetoric of human rights.<sup>114</sup> It was also, in theory, an unexpected vote from the Party that historically won more Māori votes than any other major party and often aligned itself with Māori policy.<sup>115</sup> In fact, in 1984, a fourth Labour government came to power, having "campaign[ed] diligently in defence of Māori interests, stressing the need to renew Māori relations with the state through improved consultation, power-sharing, and local self-determination."<sup>116</sup> Yet, twenty years later, they argued against the elementary right to self-determination on an international stage.

Therefore, in order to explain away the contradiction between reality and expectations, the government strategically justified their vote by claiming widespread concern for the legal

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<sup>113</sup> Erueti, Andrew. Interview by Olivia Round. Personal interview. Auckland, NZ, 2018.

<sup>114</sup> Charters, Claire, *The rights of indigenous peoples*.

<sup>115</sup> Durie, Mason, *Te mana, Te Kawanatanga: The Politics of Māori Self-Determination*.

<sup>116</sup> Fleras, Augie and Elliott, Jean L., "Devolving Maori-State Relations," chapter in *The "Nations Within,"* 186.

implications of the Declaration. More seriously, they raised concern that voting in support of the Declaration would directly result in a threat to their state sovereignty.

Further, because of recent condemnation from the Racial Discrimination Committee in the UN for the Foreshore and Seabed Case, the government was particularly sensitive to the idea of signing on to a Declaration that might welcome additional international criticism.<sup>117</sup> The Labour Party was ultimately given two options: protect their ego and their sovereignty or humbly take a step towards righting the wrongs of their past. They chose the former. In the following pages, I will outline the three main arguments given by government officials as to why the Labour Party chose to vote against UNDRIP. The first argument was that UNDRIP was intrinsically *incompatible* with New Zealand's existing framework, the second was that UNDRIP was *unimplementable* if it would give indigenous peoples the right to secede, and, third, that it was *unnecessary* given New Zealand's existing system of redress for Māori. I will then go on to argue against each of these three arguments in order to highlight the way the government wrongfully cited legal concerns to support their political agendas and did so not without consequences. Namely, this strategy, while a navigation of symbolic politics, resulted in the placing of the Declaration on a more consequential level of legal politics.

#### **4 Labour Party's claim of incompatibility**

The Labour Party in 2007 argued incessantly that the Declaration, as it was adopted by the UN General Assembly, was inherently incompatible with New Zealand's domestic framework, and

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<sup>117</sup> Fleras, Augie and Elliott, Jean L., *The "Nations Within."*

therefore, the two could not properly coexist without undermining one another.<sup>118</sup> Or, more specifically, without UNDRIP undermining the domestic framework. The government cited the existence of the Treaty of Waitangi as a superior document, stating that indigenous and non-indigenous folks alike were satisfied with the current situation. Many government officials in the Labour Party pushed this point as one of finality, meaning this point alone was enough to stop the government from signing the document, despite their claimed commitment to “international human rights and international human rights obligations.”<sup>119</sup> In the explanation of their vote to the UN, Rosemary Banks explained that the government “[shared] the belief that a Declaration on the rights of indigenous peoples is long overdue, and the concern that, in many parts of the world, indigenous peoples continue to be deprived of basic human rights.”<sup>120</sup> The New Zealand government voiced a desire for international reform, but only within the scope of their existing domestic structure. This is, again, a fundamental flaw of the UN approach to human rights in which reform exists at an intangible level, something to be done within the existing structures of oppression.

In their official statements, the Labour Government in 2007 expressed their specific concerns with “article 26 on lands and resources, article 28 on redress, [and] articles 19 and 32 on a right of veto over the State,” stating that these principles in the Declaration were “fundamentally incompatible with New Zealand’s constitutional and legal arrangements, the Treaty of Waitangi,

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<sup>118</sup> See Rosemary Banks explanation of vote.

<sup>119</sup> “NZ Votes against Indigenous Peoples’ Rights at the UN as Declaration on the Rights of Indigenous Peoples Is Adopted by Overwhelming Majority,” September 14, 2007. <http://www.converge.org.nz/pma/in140907.htm>.

<sup>120</sup> “Declaration on the Rights of Indigenous Peoples: Explanation of Vote by HE Rosemary Banks, New Zealand Permanent Representative to the United Nations,” September 13, 2007. <http://www.apc.org.nz/pma/in140907.htm>

and the principle of governing for the good of all its citizens.”<sup>121</sup> The table below shows each of these articles as they are written in the Declaration.<sup>122</sup>

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### UN Declaration on the Rights of Indigenous Peoples

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Article 26	<p>1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.</p> <p>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.</p> <p>3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.</p>
Article 28	<p>1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a 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.</p> <p>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.</p>
Article 19	<p>States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.</p>
Article 32	<p>1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.</p> <p>2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.</p>

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<sup>121</sup> “NZ Votes against Indigenous Peoples’ Rights at the UN as Declaration on the Rights of Indigenous Peoples Is Adopted by Overwhelming Majority,” September 14, 2007. <http://www.converge.org.nz/pma/in140907.htm>.

<sup>122</sup> United Nations, 2011, Preamble.

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

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Banks stated specific concern that the entire country might be caught within the scope of Article 26, which, she said,

appears to require recognition of rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous, and does not take into account the customs, traditions, and land tenure systems of the indigenous peoples concerned.<sup>123</sup>

These statements were a clear attempt to invoke a sort of fear that this Declaration would have the potential to entirely uproot the country's current state.

These fears that the government cited were then perpetuated by the ambiguous nature of the Declaration. There was ambiguity specifically in the terms "indigenous" and "self-determination" as they were used in the Declaration. The United States, for one, "criticised the absence of a working definition of 'Indigenous peoples.'<sup>124</sup> And self-determination, as a concept, remained unclear both in definition and implication. It is possible then, Fleur Te Aho (2018) notes in retrospect, that these fears, as they were presented by the state government, at least felt legitimate to them at the time.<sup>125</sup> In fact, Andrew Erueti (2018) explains that it seems to be a natural inclination to oppose international intervention as there is an existing idea that signing onto an international declaration might result in the loss of state sovereignty.<sup>126</sup> So if a state felt that rights were being given to their citizens that might undermine their sovereignty, it is

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<sup>123</sup> "Declaration on the Rights of Indigenous Peoples: Explanation of Vote by HE Rosemary Banks, New Zealand Permanent Representative to the United Nations," September 13, 2007. <http://www.apc.org.nz/pma/in140907.htm>

<sup>124</sup> Taonui, Rawiri, "The rise of Indigenous Peoples."

<sup>125</sup> Te Aho, Dr. Fleur, 2018.

<sup>126</sup> Erueti, Andrew, 2018.

understandable that they might at least push for protection of state control. This further evidenced their claim of incompatibility as the Labour Party insisted that they could not implement the Articles of the Declaration that would directly disrupt the current systems within their state.

## 5 New Zealand's concern with the right to self-determination

Additionally, there was well-known concern from New Zealand with the concept of self-determination and free, prior, and informed consent. The Labour Party claimed that this right, outlined in Article 3 of the Declaration, played a large role in the incompatibility of the Declaration with the state's existing structure. In fact, New Zealand's "first and most consistent objection [was] to an indigenous peoples' right to self-determination, which it fear[ed] could give indigenous peoples an unqualified right to secede."<sup>127</sup> This statement was greatly supported by each of the four CANZUS states, which all

"objected to a proposed Indigenous right to self-determination, which they perceived as a threat to the territorial integrity of nation states; collective versus individual rights, which they argued were discriminatory; and the requirement to obtain consent from Indigenous peoples on matters concerning Indigenous land and natural resources, and intended standards for the restitution or compensation of lost lands and culture."<sup>128</sup>

Self-determination was a tense matter of debate in negotiations of the text, and the CANZUS states pushed for the Declaration to include an article that, "as a minimum, preserves and recognizes the territorial integrity of States and their constitutional frameworks."<sup>129</sup> But even after debating these principles of the Declaration for over two decades, these governments still harbored concerns for their state sovereignty, and self-determination remained a point of

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<sup>127</sup> Charters, Claire, *The rights of indigenous peoples*.

<sup>128</sup> Taonui, Rawiri, "The rise of Indigenous Peoples."

<sup>129</sup> Erueti, Andrew Kaponga Clifford. "The UN Declaration on the Rights of Indigenous Peoples: A Mixed-Model Interpretative Approach," 2016, 242.

contention to the date of its adoption. In her explanation of the country's vote, Rosemary Banks stated that New Zealand was "proud, in particular, of [their] role in improving the text over the past three years with the objective of turning the draft declaration text into one that States would be able to uphold, implement and promote."<sup>130</sup> The government felt that, because of the existence of Article 3, the text never reached that point, and thus it was not a document that they felt "comfortable" supporting.

## **6 New Zealand's Treaty Settlements as a claimed sufficient system for redress**

The government's third argument in opposition to UNDRIP was that, despite its groundbreaking protections of global indigenous rights, the signing of such a Declaration was unnecessary in a country that already had in place a sufficient "system for redress" that was "accepted by both indigenous and non-indigenous citizens alike."<sup>131</sup> This statement highlights an interesting and important theme that was woven into each of these arguments from the Labour Party, and that is that the decisions that the government made in regards to the country's indigenous peoples needed to satisfy the non-indigenous folks as much as they might satisfy the indigenous. Their concern for the rights of the non-indigenous community was consistently cited in their discussion of indigenous rights. Perhaps this is why they claimed that the country was wholly satisfied with their existing system of redress – because they view it as a zero-sum game of rights. If they are granting rights to one group, they must also be taking rights away from another.

One important component of this existing system of redress was the Waitangi Tribunal, which sought to:

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<sup>130</sup> "Declaration on the Rights of Indigenous Peoples: Explanation of Vote by HE Rosemary Banks, New Zealand Permanent Representative to the United Nations," September 13, 2007. <http://www.apc.org.nz/pma/in140907.htm>

<sup>131</sup> Ibid.

- identify treaty breaches
- identify those affected by them
- find their spokespeople
- negotiate a deed of settlement which outlined the settlement, often including land, money and an apology.<sup>132</sup>

Ultimately, the Tribunal was set up in order to provide recommendations for reparations for the government's past breaches of the terms agreed upon in the Treaty of Waitangi. It is not, however the only avenue through which a Treaty of Waitangi claim might be settled. The following table shows the four ways this may be accomplished and the agencies that would be involved.<sup>133</sup>

<i>Process</i>	<i>Agencies with responsibility</i>	<i>Requirements</i>
Litigation	High Court Appeal Court Privy Council	Treaty or Māori values incorporated into domestic law
Formal Inquiry	Waitangi Tribunal	Claim must conform to Treaty of Waitangi Act 1975
Mediation	Waitangi Tribunal	Issues delineated and agreement as to the facts
Direct negotiation	Minister in Charge Of Treaty Negotiations Office of Treaty Settlements	Acceptance onto the Negotiations Work Program

<sup>132</sup> Taonga, New Zealand Ministry for Culture and Heritage Te Manatu. "Ngā Whakataunga Tiriti – Treaty of Waitangi Settlement Process – Te Ara Encyclopedia of New Zealand." Web page. Accessed May 9, 2019. <https://teara.govt.nz/en/213092>.

<sup>133</sup> Durie, Mason, *Te Mana, Te Kawanatanga*, 179.

Each of these forms of redress heavily involve the government and require a lot of work from the Māori individuals and communities making the claims. The Waitangi Tribunal in particular faces a lot of criticism from Māori. Therefore, this argument highlighting the success of the Treaty Settlement processes necessarily prioritized the domestic Treaty of Waitangi, upon which the country's Waitangi Tribunal was founded, over the international Declaration. But it is important to note that it is prioritizing the *English* version of the Treaty, the one, correspondingly, that grants enormous power to the Crown and the domestic governments. This, consequently, left little to no room for UNDRIP or the protections it offered for global indigenous rights. There was a firm belief within the Labour Party that the existing legislation in New Zealand was sufficient for the preservation of indigenous rights. Therefore, not only is the Declaration incompatible with their existing legislation, it is not even needed, given the unprecedented sophistication of said legislation. The Labour Party of 2007 implied that all of the rights outlined in the Declaration were already being pursued at the domestic level, in a way that satisfied all of the country's people.

## **7 The effect of New Zealand's navigation of symbolic politics**

In this section, I want to offer a new analysis of New Zealand's vote against the Declaration that is founded on existing literature but goes beyond the explanations that this literature offers. I believe that just understanding *why* the government voted the way it did is insufficient if we do not also understand what effect the vote had. I will argue that the Labour Party was elementarily concerned with maintaining the control that their existing legislation granted but disguised this concern with the legal concerns and justifications that I outlined above. In this section, though, I

would like to go more in depth into my argument that those legal claims resulted in an important shift of power within the Declaration itself.

These arguments on behalf of the New Zealand government, I will argue, had an unintentional consequence that have the potential to greatly affect the future of the Declaration within the country. In their citing of these seemingly legitimate legal concerns, the government actually gave more weight to the Declaration than it inherently held on its own. In other words, the government itself allowed the Declaration to surpass its symbolic nature by claiming that their support alone might give it the ability to entirely uproot their existing legal system. I have already established that UNDRIP holds no legal force, and, further, that there is no body capable of enforcing its terms at the domestic level. Yet, somehow, New Zealand feared that the Declaration might allow the disruption of what might be the most basic concerns of statehood – the secession of its people, the disruption of political unity and the undermining of its territorial integrity.<sup>134</sup> Of course, a Declaration that elementally holds no legal force could not have such an effect on an established state, but the government's claims necessarily gave it the possibility of having such legal force. But, to be clear, I am not arguing that the government intended to do so. Rather, this was a result of the Labour Party's concern for public relations. With the admission that support of the Declaration would hold zero legal implications, the government would simultaneously admit that they have no reason not to support the groundbreaking document.

In light of all of this, it seems uncontroversial to grant the Labour Party a certain amount of understanding on the basis of their concerns. Any threat to state sovereignty is, of course, a legitimate threat. This Declaration, however, was not such a threat. In claiming that it was, then,

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<sup>134</sup> Charters, Claire, *The rights of indigenous peoples*.

the government effectively granted the text a stronger foundation than that which it was truly built upon. In announcing their decision, Rosemary Banks noted that the Declaration's supporters are content with a text that is meant to inspire its signatories, rather than have a legal effect.<sup>135</sup> She stated that New Zealand, however, did not "accept that a State can responsibly take such a stance towards a document that purports to declare the contents of the rights of indigenous people."<sup>136</sup> In these statements we see that the government intended to support the document only on the grounds that it would have a legal effect in their country, and, furthermore, a legal effect that they would be willing to directly implement. Hon Nanaia Mahuta of the Labour Party stated three years later that Labour didn't sign the Declaration in 2007 because they knew they wouldn't have been able to truly implement its principles into their domestic framework. "Many of the 144 countries that originally signed the declaration had no intention of implementing it," she said. "In Labour we are proud to say what we mean and to do what we say."<sup>137</sup> This argument, however, collapses upon itself in light of New Zealand's self-proclamation of commitment to indigenous rights. It is fundamentally incompatible to uphold the claim that you are committed to the pursuit of indigenous rights while being unable to sign a document that protects those very rights. I will elaborate on the effects of this stance at the end of this chapter.

Furthermore, I hope to show that each aspect of this argument is fundamentally flawed both at the symbolic and legal level. New Zealand's concerns were, first, largely exaggerated<sup>138</sup> and, second, elementarily unfounded.<sup>139</sup> Article 3 of the Declaration explicitly grants indigenous

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<sup>135</sup> "Declaration on the Rights of Indigenous Peoples: Explanation of Vote by HE Rosemary Banks, New Zealand Permanent Representative to the United Nations," September 13, 2007. <http://www.apc.org.nz/pma/in140907.htm>

<sup>136</sup> Ibid.

<sup>137</sup> See ministerial statements.

<sup>138</sup> Te Aho, Dr. Fleur, 2018.

<sup>139</sup> Charters, Claire, *The rights of indigenous peoples*.

peoples the right of self-determination; Article 4, however, defines the scope of that right as “the right to autonomy or self-government in matters relating to their internal and local affairs.”<sup>140</sup>

The direct right to secede, then, would have been stated as such. Further, the right to secede is explicitly prohibited by Article 46(1) of UNDRIP that states, “nothing in this Declaration may be interpreted as implying for any state, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations,” because the Charter “guarantees states’ territorial integrity and political unity.”<sup>141</sup> Therefore, as the Declaration is subject to existing international law, UNDRIP did not grant indigenous peoples any right to secede beyond what is already established under international law.<sup>142</sup>

Finally, there is an unspoken caveat in New Zealand’s defense of their vote that New Zealand’s commitment to indigenous rights can and should only exist within the realm of the Treaty of Waitangi. They claim, subsequently, that the Waitangi Tribunal and the Treaty Settlements process are sufficient frameworks for Māori citizens to file complaints. I argue, though, that while the claims brought before the Waitangi Tribunal, the courts, or the Office of Treaty Settlements may be minutely beneficial to Māori, they are not nearly enough to establish the thorough protection of Māori human rights. The truth of the matter is that, despite the Labour Party’s voiced concern for the protection of human rights, they were more concerned with upholding the system already in place, a system that directly benefits them to the detriment of an entire community. Even the steps taken within the Waitangi Tribunal and Treaty Settlements were not enough to erase the discrimination that the Māori peoples faced for decades. The

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<sup>140</sup> United Nations, 2011, Art 46.

<sup>141</sup> Charters, Claire. *The rights of indigenous peoples*.

<sup>142</sup> Ibid.

government should, in light of their claimed desire to right the wrongs of their past, have been more than willing to sign on to a document that moves even beyond the steps they had already taken up to that point in their Treaty Settlement process. But, instead, they again cited legal evidence to explain why they could not sign in support of the Declaration. Although in arguing that their existing framework was sufficient, we did not see them cite legal concerns, they did use legal justifications, and the latter held the same consequence as the former. The New Zealand government, by comparing the Declaration to their existing legal framework, effectively put the two on an equal playing field. Again, this was the unintended result of their navigation of symbolic politics, as they said what needed to be said to justify a decision that directly went against what they claimed to stand for.

This all begs the question of how a country that is regarded so highly in terms of indigenous rights could get away with a history of harming their indigenous population. The answer comes, however, when you look at the way the government explained away their vote against UNDRIP. In order to excuse their actions that so clearly go against their named commitment to indigenous rights, the government had to find problems in the document that would take the spotlight away from the state and put it back on the flaws of the document. Claire Charters (2018) argued that the government exaggerated their concerns with the Declaration in order to disguise their pursuit of self-interest over human rights.<sup>143</sup> I argue further that they necessarily fabricated concerns that would seem grave enough to legitimize their decision to vote against the Declaration. For example, their concern with the right to self-determination was largely misaligned with the actual goals of the indigenous groups working on the drafting of the Declaration. The governments of

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<sup>143</sup> Interview with Claire Charters. 2018.

the CANZUS states “objected to a proposed Indigenous right to self-determination, which they perceived as a threat to the territorial integrity of nation states.”<sup>144</sup> This, of course, was an inaccurate use of fear-mongering that swayed people to fear the Declaration and the rights it outlined in order to prioritize their own sovereignty above all else. Self-determination, in reality, holds different meanings for different indigenous groups,<sup>145</sup> but for many it means the ability to choose, being given a collective right to determine for themselves how they operate, with calls for a greater recognition of separate structures, like a separate criminal justice system.<sup>146</sup> Further, a number of international bodies like the Human Rights Committee “have already accepted that indigenous peoples have the right to self-determination,” so “New Zealand’s objections go against existing international jurisprudence.”<sup>147</sup> Ultimately, the right of indigenous peoples to self-determination “does not entail the disruption of the territorial integrity of existing nation states,”<sup>148</sup> and, thus, the concerns of New Zealand are moot.

This is all to say that a country’s refusal to vote in favor of the Declaration has no footing in reality. Each justification of New Zealand’s vote against the Declaration is rooted in false information. But that is not to say that this paper is arguing that the Declaration, had it not faced opposition, would have fixed all of the problems the Māori people face in New Zealand. Nor is it to say that the Declaration isn’t an inherently flawed document. Rather, the goal of this section is to attempt to ground this conversation in reality. The truth of the matter is that we are looking at a document that has no legal force. To argue that signing this document that outlines the right to

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<sup>144</sup> Taonui, Rawiri. “The rise of Indigenous Peoples.”

<sup>145</sup> Charters, Clair, 2018.

<sup>146</sup> Te Aho, Dr. Fleur 2018.

<sup>147</sup> Charters, Claire. “The rights of indigenous peoples.”

<sup>148</sup> Tully, James, “The Struggles For and Of Freedom,” In *Political Theory and the Rights of Indigenous Peoples*, Edited by Duncan Ivison, Paul Patton, and Will Saunders, Cambridge University Press, 2000, 55.

self-determination would force you to allow a portion of your population to secede would be to grant it more legal holding than it really has. So, by not signing the Declaration, New Zealand and the other three CANZUS states actually gave the Declaration more power than it held on its own. In the next chapter I will outline the consequences of these claims made by the Labour Party when, three years later, the National Party signed on to UNDRIP.

## CHAPTER SEVEN: NEW ZEALAND'S REVERSAL IN SUPPORT OF UNDRIP

### 1 Introduction

In 2010, New Zealand was the second of the four CANZUS countries to reverse their initial vote of rejection against UNDRIP. The announcement was made by Hon Dr Pita Sharples MP, Minister of Māori affairs in the General Assembly of the Ninth session of the United Nations Permanent Forum on Indigenous Issues (UNPFII). Simultaneously, Hon Simon Power MP, Minister of Justice, made the announcement in the New Zealand Parliament.<sup>149</sup> The seemingly secretive delivery of the announcement was seen as problematic by some,<sup>150</sup> but “for Māori, it was the resolution for which many had been waiting.”<sup>151</sup>

At the time of the announcement, there were two key reactions to the decision. One group of individuals, like Rahui Katene of the Māori Party, saw this as a historical day for the indigenous rights movement that would “finally right the wrong that was done on 14 September 2007.”<sup>152</sup> This group that supported the government’s decision believed the document to be essential in the protection of indigenous rights both at the domestic and international levels and applauded Sharples for doing what needed to be done in order to get the Declaration supported by the New Zealand government.<sup>153</sup> Others, however, argued that the government’s support for UNDRIP was

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<sup>149</sup> Toki, Kiri Rangī. “What a Difference a ‘Drip’ Makes: The Implications of Officially Endorsing the United Nations Declaration on the Rights of Indigenous Peoples,” 243.

<sup>150</sup> “NZ Does U-Turn on Rights Charter | Stuff.Co.Nz.” Accessed May 10, 2019. <http://www.stuff.co.nz/national/3599153/NZ-does-U-turn-on-rights-charter>.

<sup>151</sup> Toki, Kiri Rangī. “What a Difference a ‘Drip’ Makes,” 250.

<sup>152</sup> Katene, Rahui. Māori Party. Ministerial Statements. 2010.

<sup>153</sup> Mead, Aroha. Interview by Olivia Round. Phone interview. Auckland, NZ, 2019.

unnecessary, or even problematic. Jim Anderton, Leader of the Progressive Party, argued that “New Zealand has done more for the indigenous people than all [the other countries] have done put together twice over,”<sup>154</sup> and therefore did not need to support the Declaration in order to prove their commitment to human rights. Individuals in this group were in opposition to the Declaration as a body of text and were disappointed by the announcement.

What is interesting is that nearly every party leader noted the non-binding nature of the Declaration at the time of the announcement, whether or not they supported the decision.<sup>155</sup> What differed among them, then, was whether they thought its lack of legal enforcement capabilities rendered the Declaration useless or universally applicable. Anderton and several other party leaders, like Nanaia Mahuta from the Labour Party, were of the opinion that it was not a document worth signing given its aspirational nature.<sup>156</sup> These individuals preferred instead a Declaration whose articles suited their existing domestic framework. Mahuta stated that the Labour Party would continue to fight for a “real and meaningful” way to protect the rights of indigenous peoples, beyond the aspirational nature of the Declaration. On the other hand, Katene and Peter Dunne, leader of the United Future Party, believed that the Declaration was useful despite its lack of enforcement capabilities.<sup>157</sup> This was, of course, the rhetoric used by Prime Minister John Key, the leader of the National Party at the time, who stated that the Declaration “both affirms accepted rights and establishes future aspirations.”<sup>158</sup>

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<sup>154</sup> Anderton, Jim. Progressive Party. Ministerial Statements. 2010.

<sup>155</sup> The only person who did not note the non-binding nature of UNDRIP in their statement was Rodney Hide of the ACT Party who was only concerned with what he claimed was the divisive nature of the document.

<sup>156</sup> See Ministerial statements.

<sup>157</sup> See Ministerial statements.

<sup>158</sup> “National Govt to Support UN Rights Declaration.” The Beehive. Accessed May 10, 2019. <http://www.beehive.govt.nz/release/national-govt-support-un-rights-declaration>.

What I hope to make clear in the following section, however, is that despite any criticisms that one might still hold for the Declaration, it is vital that we consider whether the government officials were honest in their actions. I specifically want to examine the intentions of the National Party, which had gone into coalition with the Māori Party, agreeing to sign on to the Declaration in exchange for support from Māori. But the National Party were unwilling partners, only supporting the Declaration because of political obligations.<sup>159</sup> Even in the party's statement of support for UNDRIP, it is important to recognize the intentional language the government uses to undermine the very aspirations that they point to. A public release from the government states that the government's support for UNDRIP "acknowledges these areas are difficult and challenging but notes the aspirational spirit of the Declaration and affirms to continually progress these, alongside Māori, within the current legal and constitutional frameworks of New Zealand."<sup>160</sup> In other words, the rights protected in UNDRIP will be considered inferior to the country's existing laws, to be implemented only where the framework already allows. To emphasize this ideology, the government also outlined the articles of the Declaration that were *already* implemented in New Zealand, stating that the rights had been enjoyed for years already. These included the rights of indigenous peoples to:

- full enjoyment of all human rights and fundamental freedoms without discrimination (Articles 1 and 2);
- live in freedom, peace and security as distinct peoples (Article 7);
- practise and revitalise their cultural traditions and customs (Article 11);

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<sup>159</sup> Mead, Aroha, 2019.

<sup>160</sup> "National Govt to Support UN Rights Declaration." The Beehive. Accessed May 10, 2019. <http://www.beehive.govt.nz/release/national-govt-support-un-rights-declaration>.

- practise and teach their spiritual and religious traditions (Article 12);
- participate in decisions in matters that affect their rights (Article 18);
- improvement of economic and social conditions without discrimination (Article 21).<sup>161</sup>

The National Party is forced to undermine the very claims made by the Labour Party three years earlier, in order to deconstruct the idea that the Declaration might have the power to wreak legal havoc on the country. They did this by stressing the lack of legal capabilities that the Declaration holds and highlighting the sovereignty of the domestic framework over an international declaration. Yet, it is important to emphasize that they did this all through a strategic navigation of symbolic politics. It was vital that the National Party steer clear of any possible legal implications of the Declaration so as to also steer clear of giving it any of the same power that the Labour Party had given it in its own claims three years earlier. The symbolic work that the government did over the span of those three years, or maybe just in their statement of support, had a major effect on the way indigenous rights could be examined academically, politically, and socially.

I'd like to stress again that looking specifically at New Zealand's decision to reverse their vote over the span of three years is important for two reasons. The first is that the New Zealand government, with its Treaty of Waitangi, has a very unique relationship with the indigenous Māori community. Much of the work of this thesis is concerned with the influence of this Treaty, alongside UNDRIP, on the modern understanding of indigenous rights within this country. The second is that New Zealand regards itself as a global leader in indigenous rights and often

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<sup>161</sup> "National Govt to Support UN Rights Declaration." The Beehive. Accessed May 10, 2019. <http://www.beehive.govt.nz/release/national-govt-support-un-rights-declaration>.

engages with human rights rhetoric.<sup>162</sup> In light of these two details, it is puzzling that New Zealand would not sign on to the Declaration in 2007, but even more so that they would change that decision three years later, especially in light of the claims they made at the time of adoption. This section will work through this confusion in order to pinpoint exactly what strategies the government had to employ in order to accomplish this reversal. The end of the chapter will conclude that the government officials had to navigate a field of symbolic politics that the Labour Party created in 2007, and again, that this navigation was not without consequences.

## **2 An analysis of National’s official statements of support**

In the above paragraphs I briefly examined the National Party’s official statement of support for the UN Declaration. I think it would be beneficial, however, to dive deeper into the statements given both by Hon Simon Power and Hon Dr Pita Sharples. Hon Sharples made the announcement to the UN, supporting the Declaration “both as an affirmation of fundamental rights and in its expression of new and widely supported aspirations.”<sup>163</sup> Immediately, though, Sharples begins to move the focus away from UNDRIP and onto the Treaty of Waitangi, stating the importance of the Treaty and the country’s Treaty Settlements and highlighting the principles of the Declaration that are already present in the Treaty.

On the same day, Hon Power announced the decision to the New Zealand Parliament, stating that the National Party was “pleased to express [their] support for the Declaration” and recognizing

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<sup>162</sup> Charters. Claire. “The rights of indigenous peoples.”

<sup>163</sup> “Ministerial Statements — UN Declaration on the Rights of Indigenous Peoples—Government Support - New Zealand Parliament.” Accessed May 10, 2019. [https://www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansD\\_20100420\\_00000071/ministerial-statements-un-declaration-on-the-rights-of](https://www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansD_20100420_00000071/ministerial-statements-un-declaration-on-the-rights-of).

the 22 years of negotiations that went into the drafting of the text.<sup>164</sup> Almost immediately, again, the statement became a reaffirmation of the government's Treaty Settlement process rather than an affirmation of their commitment to the Declaration. Hon Power described the Treaty of Waitangi as the country's founding document that established a foundation "of partnership, mutual respect, co-operation, and good faith between Māori and the Crown," stating that it "holds great importance for [their] laws, constitutional arrangements and the work of successive governments."<sup>165</sup> Any mention of policy or laws, in fact, revolved entirely around the Treaty of Waitangi. If the Declaration was mentioned, it was only to underpin its aspirational nature. This shift in narrative from 2007 to 2010 was very intentional and vital to the government's ability to maintain power. Despite it seeming like an issue of National Party vs. Labour Party, both governments ultimately did whatever they could to maintain control over the situation. In response to Power's statement, Hon Nanaia Mahuta, on behalf of the Labour party, stated that the Party believed in 2010, as they had in 2007, that "there has to be a genuine attempt to implement the articles that build the spirit, rights, and interest of indigenous peoples" if the government is to sign on to the Declaration.<sup>166</sup> This statement, however, is directly undermined by the fact that, according to both parties, the country had already begun a legitimate attempt to implement the articles of the Declaration through their Treaty Settlement processes. Hon Mahuta's claim is ignorant of the realities of the Declaration, holding stubbornly on to the idea that the Declaration could not coexist with the Treaty of Waitangi. Further, Hon Mahuta claimed that the Declaration was signed under a veil of secrecy and without the involvement of the New

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<sup>164</sup> "Ministerial Statements — UN Declaration on the Rights of Indigenous Peoples—Government Support - New Zealand Parliament." Accessed May 10, 2019. [https://www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansD\\_20100420\\_00000071/ministerial-statements-un-declaration-on-the-rights-of](https://www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansD_20100420_00000071/ministerial-statements-un-declaration-on-the-rights-of).

<sup>165</sup> Ibid.

<sup>166</sup> Ibid,

Zealand citizens. This, of course, is ignorant of the fact that indigenous peoples had been heavily involved in the drafting of the Declaration as a whole and Māori had pushed for its support for years. And, as the document directly affects Māori, their input should be the only ones considered. Of course, though, Hon Mahuta is not concerned with the consideration of their goals considering he is speaking on behalf of the party that tirelessly undercut the goals of the Declaration by making them out to be unfair and destructive. His claim that the aspirational interpretation of UNDRIP “should weigh heavily on the efforts of those people who wanted the declaration to be a strong platform for the continued assertion of indigenous rights”<sup>167</sup> is in complete contradiction with the fact that his Party refused to sign the Declaration because it held too strong of a platform for indigenous rights. This is a blatant move of symbolism that detracts that attention from his own Party by pointing at problems in a dozen other directions. One moment, he pretends to be an advocate for the indigenous platform and the second he is claiming that granting the rights requested by the indigenous peoples would directly result in the destruction of his country. This begs the question of the morality of a system that falls apart when it begins to grant rights to all of its members.

There were arguably a number of factors at play when the National Party announced their support for UNDRIP in 2010. In the following section, I will examine two of the factors that played a large role in the Party’s decision. The first of these factors is the influence of the Māori community at the time. The international indigenous community was heavily involved in the drafting of the Declaration and Māori continued this work at the domestic level by pushing their

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<sup>167</sup> “Ministerial Statements — UN Declaration on the Rights of Indigenous Peoples—Government Support - New Zealand Parliament.” Accessed May 10, 2019. [https://www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansD\\_20100420\\_00000071/ministerial-statements-un-declaration-on-the-rights-of](https://www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansD_20100420_00000071/ministerial-statements-un-declaration-on-the-rights-of).

government to support the text in the years following their vote against UNDRIP in 2007. The National Party had also joined in a coalition with the Māori Party, and this had a large effect on the vote. The second factor at play in this decision was a fundamental concern for their international reputation as leaders of indigenous rights. New Zealand held a lot of pride in its role as a global leader in this field and was greatly influenced by the other countries that had signed the Declaration.

### **3 The influence of the Māori political party**

As mentioned in an earlier chapter, there was a conservative turn in New Zealand's opinion on the right to self-determination in the two years before the initial vote on UNDRIP in 2007.<sup>168</sup> This turn came as the result of the Foreshore and Seabed Act and a recent critique from the Convention on the Elimination of Racial Discrimination (CERD) for the country's treatment of the indigenous minority.<sup>169</sup> In the wake of these events, the goals and needs of the Māori community were arguably brushed aside for the sake of the country's ego. It is hard to argue, however, that this was an isolated incident. Historically, the rights of the indigenous peoples in New Zealand consistently took a back seat to the greed of the Crown. From the asymmetrical interpretation of the Treaty of Waitangi in the 19th century, to the refusal to sign on to the Declaration in 2007, Māori rights were both literally and ideologically taken away from them by the hands of the government.

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<sup>168</sup> Charters, Claire, 2018.

<sup>169</sup> Charters, Claire. "The rights of indigenous peoples."

Throughout all of those years, however, Māori were resilient in their fight for their rights. In response to Hon Power's announcement of support, Hon Metiria Turei of the Green Party acknowledged Māori individuals who "fought long and hard and [had] been very active on this issue," including Moana Jackson, Aroha Mead, and Nganeko Minhinnick.<sup>170</sup> In "A personal reflection on the drafting of the United Nations Declaration on the Rights of Indigenous Peoples," Moana Jackson wrote,

"What we did was to successfully convince the ministers that the Declaration and our constitutional and legal systems can live together, and that the key principle is about working together to restore Māori rights that were taken away in the process of being colonised."<sup>171</sup>

Māori activists played a big part in pressuring the government to show support for the Declaration's comprehensive list of rights. Activist groups like Peace Movement Aotearoa also applied pressure on the government to support UNDRIP.

The goals of the indigenous rights movement, however, continued to take the backseat to the interests of the state, even after the government announced their support for UNDRIP. Turei, co-leader of the Green Party, argued that the National Party, under John Key in 2010, was only willing to support UNDRIP because it persistently asserted that the Declaration would remain inferior to domestic law.<sup>172</sup> In other words, the rights outlined in UNDRIP will themselves remain inferior to the interests of the state. So, even after New Zealand announced its support for UNDRIP, Māori still did not have the autonomy that they sought. We see consistent evidence

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<sup>170</sup> "Ministerial Statements — UN Declaration on the Rights of Indigenous Peoples—Government Support - New Zealand Parliament." Accessed May 10, 2019. [https://www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansD\\_20100420\\_00000071/ministerial-statements-un-declaration-on-the-rights-of](https://www.parliament.nz/en/pb/hansard-debates/rhr/document/49HansD_20100420_00000071/ministerial-statements-un-declaration-on-the-rights-of).

<sup>171</sup> Jackson, Moana. "A personal reflection on the drafting of the United Nations Declaration on the Rights of Indigenous Peoples." *Conversations About Indigenous Rights: The UN Declaration on the Rights of Indigenous Peoples in Aotearoa New Zealand*.

<sup>172</sup> See Ministerial Statements.

that the work and demands of Māori communities were seen only as loose aspirations that the government may work towards, rather than rights that ought to be legally implemented and upheld.

Ultimately, though, it was the coalition between the Māori Party and the National Party that swayed the government to support the Declaration. New Zealand government requires a certain number of seats to become the majority so the Māori Party agreed to go into a coalition with National. In exchange for other things, the National Party agreed to sign onto UNDRIP, but were there not a coalition agreement, it is highly unlikely that the government would have changed their position.<sup>173</sup>

The influence of this coalition between the National Party and the Māori Party would, at most, be a symbolic influence, such that this influence might result in symbolic support of their rights, i.e. publicly supporting UNDRIP. But what good, if any at all, does influence do at the symbolic level? I must conclude that while signing the Declaration was a step in the right direction and a progressive victory for the Māori community, it was not enough to wholly right all of the wrongs of the country's past. Māori activists, politicians and scholars, of course, are well aware of this truth, but they argue that there is power in progress. Naida Glavish (2018) writes, "What I do know is this: consistency and repetition support change. The Declaration supports Te Tiriti or Waitangi. So the more that the rights of the Indigenous people are on the radar and are acknowledged, the more a groundswell of support can occur."<sup>174</sup> There is still hope that each step in the protection of Māori rights at any level is one made in the right direction. "These are the

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<sup>173</sup> Mead, Aroha, 2019.

<sup>174</sup> Glavish, Naida, "Whanau, hapu and iwi."

sorts of things we need to do,” writes Moana Jackson (2018). “The UN Declaration on the Rights of Indigenous Peoples complements Te Tiriti o Waitangi, enabling us to take control of our lives and our destiny and to ensure our survival as Māori.”<sup>175</sup> Activist Aroha Mead (2019) states that the government will, by nature, make either the glass half full or half empty comments, but at the end of the day you get the same results. While it may not immediately result in radical change in policy, it is still an important step that acknowledges Māori rights.<sup>176</sup>

#### **4 New Zealand’s concern for their international reputation**

As a self-proclaimed global leader in the implementation and protection of human rights, New Zealand naturally received some criticism for its hypocritical position against a document that aims to protect human rights. This criticism certainly had some influence on the government’s decision. Dr. Fleur Te Aho (2018) argues that if the government’s decision to vote against the Declaration had not affected it, New Zealand would not have changed its stance.<sup>177</sup> The ways in which their original vote in opposition to UNDRIP may have affected the government, however, were abstract. Any pressure to support UNDRIP would have come from a purely symbolic level. Te Aho argues that the government, while not largely concerned with pressure from human rights bodies, was swayed by the endorsement of the Declaration by the other CANZUS countries. More specifically, New Zealand was affected by an unspoken, but ever-present neighborly rivalry with Australia, whose government signed the Declaration in 2009. With their support of the text, New Zealand remained one of just three countries standing against UNDRIP. Te Aho says there is an idea in New Zealand that they treat indigenous peoples better than in

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<sup>175</sup> Jackson, Moana, “A Personal reflection.”

<sup>176</sup> Mead, Aroha, 2018.

<sup>177</sup> Te Aho, Dr. Fleur, 2018.

they do in Australia, so when their neighbor signed there was a feeling that New Zealand needed to sign also.<sup>178</sup>

This is once again essential to our analysis of the government's decisions because it means that the government was swayed not by the needs of its people but by its own image on the international stage. Thus, if their reversal was the solution to the injury to their reputation, it was a symbolic act with symbolic outcomes. I stress this point heavily because anything done on the symbolic level, while it might eventually lead to important changes, is not in and of itself a change. And, given the history of oppression that Māori suffered in New Zealand, the country needed, and still needs, to see real change in its legislation.

## **5 A new approach to examining New Zealand's support of UNDRIP**

The examination of the above factors were fairly brief so that I can spend the remainder of this chapter focusing on why an independent analysis of these factors is insufficient in explaining both the causes and effects of the government's decisions. Namely, I will argue that despite the political reasons New Zealand may have had for their change in vote, the analysis must necessarily include their navigation of symbolic politics in, first, justifying their decision to not sign the document in 2007, and, second, their ability to change their stance in the span of just three years. This means that my examination of their vote of support in 2010 will be reliant on my argument that the initial vote three years earlier moved the Declaration from its inherent place in symbolic politics to a higher level of legal politics, albeit through a strategic navigation of symbolic politics. “[It] would be a mistake to believe that the [UN] system understands the Declaration and that its agencies and specialized bodies are capable of, or want to, implement the

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<sup>178</sup> Te Aho, Dr. Fleur, 2018.

Declaration,” writes Elvira Pulitano in *Indigenous Rights in the Age of the UN Declaration*. In fact, Pulitano said, “[only] a few agencies have adopted policies to address indigenous rights and integrate the Declaration into their work,” while many still remain unaware of the Declaration.<sup>179</sup> To reiterate my argument, the choices made by the government were necessary because they allowed the government to justify their decision not to support the document. Such a justification required them to show how the Declaration would cause legal upheaval within their domestic framework, because only if they could prove a threat to their existing sovereignty could they justify a vote that fundamentally went against what one would expect from a government committed to indigenous rights. Therefore, in order to then sign on to UNDRIP in 2010, the New Zealand government had to backtrack on their previously cited legal concerns. In other words, the government had to move the Declaration back down to the symbolic level of politics. Only at this level could the government provide a rationale for signing on to the Declaration without directly implementing (legal) changes. I argue that it does not work to analyze these two events independent of one another, because it is in the maze of symbolic politics that connects one to the other that we will find true understanding of New Zealand’s – and, consequently, the developed world’s – ability to keep indigenous rights at an arm’s length.

Perhaps a product of the two arguments examined above, some group of politicians, activists, and scholar see New Zealand’s decision to support UNDRIP as a decision made only to stifle concerns directed at their government. In simpler terms, it was the least they could do, given their history of negligence and discrimination toward the Māori community. The individuals that hold this opinion, while seeing UNDRIP as a fundamental document, still believe that signing

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<sup>179</sup> Pulitano, Elvira. *Indigenous Rights in the Age of the UN Declaration*, 332.

the Declaration was a step in the right direction. Turei said in response to New Zealand's support of the Declaration that "at least" they are showing support for what should be considered "the minimum international standard for the protection of indigenous communities around the globe." Rahui Katene of the Māori party, who also described the Declaration as setting a minimum standard, saw the move as righting the country's wrong from three years earlier. In sum, there are many people that see the document's flaws, and see the flaw in New Zealand's original vote, but believe that this reversal could at least, on some level, move New Zealand in the right direction towards pursuit of more protections of indigenous rights.

The issue, however, is that this analysis fails to discern exactly which level this vote operates on. I argue it is a merely symbolic level that requires an understanding of the implications of each vote. As I argued earlier, New Zealand's 2007 vote gave more teeth to the Declaration than it held on its own. So, at the time, New Zealand brought the Declaration up from the symbolic level and planted it in the legal level. They were required to do so, of course, to legitimize their defense for their vote against UNDRIP. To be more precise, they had to make the Declaration's terms, like self-determination, a legal concern in order to justify their opposition to the document. But, as they existed at the time of adoption, they were not of legal concern due to the very nature of a UN document. With no policing body, the UN has no enforcing capabilities, and, therefore, neither do their Declarations. New Zealand knew this, but yet still claimed that their support of UNDRIP would give a minority in their population the *right to secede*.

It is worth reestablishing here that there was a group of people who remained unsatisfied with the Declaration for a variety of reasons, and thus the government's decision in 2010 faced a certain amount of backlash. This group was mainly concerned with the contents of the document, from

the rights given to the terms used. Rodney Hide, leader of the ACT Party, said on behalf of the Party that it was “shocked and appalled” by the Government’s endorsement of UNDRIP, saying the Declaration asserts that the Māori people have access to rights and privileges that others do not. Hide accused the Declaration of being divisive.<sup>180</sup> This is, of course, not the true nature of the Declaration and is therefore should not be considered a legitimate concern. Rather, the Declaration provides a climate in which human rights abuses can be addressed, it provides countries “a global common framework with which to highlight human rights abuses in the international sector, in formal settings such as the UN Permanent Forum on Indigenous Issues or across social media platforms.”<sup>181</sup>

Paul Moon (2018), a New Zealand historian, argues that the Declaration is another form of colonization, with a major flaw of the text being its assumption that there is a common global indigeneity – an assumption that is almost racist in its monolithic tendencies. Moon argues that the term “indigenous” is code for non-white people, which holds an inherently discriminatory element.<sup>182</sup> While the idea of global indigeneity has potential to be ignorant of more specific tribal and national goals, Moon’s concerns can be put to rest by the fact that many indigenous individual played a hand in the drafting of UNDRIP. In fact, something that is notably unique about UNDRIP is that much of the progress of the text from the 1980s to 2007 can be credited to the participation of indigenous peoples. Those who got involved in the UNDRIP negotiations were given “the same status as states.”<sup>183</sup> So, although certain parties would argue that the

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<sup>180</sup> See Ministerial statements.

<sup>181</sup> Larkin, Steve and Butler, Kathleen. “Aspiration, not binding.” *Conversations About Indigenous Rights: The UN Declaration on the Rights of Indigenous Peoples in Aotearoa New Zealand*.

<sup>182</sup> Moon, Paul, 2018.

<sup>183</sup> Erueti, Andrew. *Mixed-Model Approach*, 1.

Declaration itself held too many flaws to be considered an influential document, the fact is that UNDRIP was largely accepted in the international community as a step forward in the right direction. Therefore, it does not serve the purpose of this paper to spend too long debating these exact concerns. I do believe, however, that there is a space for that discussion within academia and it is one that should be had sooner rather than later.

## CONCLUSION

Since its adoption, the Declaration on the Rights of Indigenous Peoples has informed the conversation around indigenous rights in many ways. For New Zealand specifically, the country's relationship with the Declaration highlights the subordination of the Māori people that began in the 19<sup>th</sup> century the moment that the settlers breached the principles of the Treaty of Waitangi. It is important now for the government to reconcile with all of its past wrongs in a way that prioritizes the rights of the Māori community above all else. International law thoroughly protects the rights of the state but still does not thoroughly protect the rights of indigenous peoples. As long as countries like New Zealand can sign the Declaration, claim a commitment to indigenous rights, and still actively uphold legislation that discriminates against indigenous peoples, there is a lot of work to be done.

Fortunately, perhaps to uphold their international reputation or perhaps the result of a genuine willingness to pay reparations to its indigenous people, New Zealand is still taking steps to implement policies that will protect the rights that were promised to its people back in 1840. In March 2019, Nanai Mahuta, Māori Development Minister, “announced that the Government will develop a plan of action to drive and measure New Zealand’s progress towards the aspirations of the United Nations Declaration on the Rights of Indigenous Peoples.”<sup>184</sup> The plan is set to be developed throughout the following year and will “include engagement with Māori in the second

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<sup>184</sup> “UN Declaration on the Rights of Indigenous Peoples.” Accessed May 10, 2019.  
<https://www.tpk.govt.nz/en/whakamahia/un-declaration-on-the-rights-of-indigenous-peoples/>.

half of the year.”<sup>185</sup> First, Mahuta is set to work with her colleagues to appoint a working group that will help provide advice for the process. The planned actions are those that:

- come from the intersect between government priorities, Māori aspirations and international indigenous rights discourse
- contribute to enhancing the self-determination of Māori as the indigenous peoples of Aotearoa / New Zealand
- contribute to improving intergenerational Māori wellbeing
- demonstrate ambitious actions as opposed to business as usual<sup>186</sup>

Moving forward, it is important for literature on this topic to remain critical and to hold New Zealand to the high standard that they claim in calling themselves a leader in indigenous rights.<sup>187</sup> It is important to question why the participation by Māori is withheld to the second half of the year, for example. In the above bullet points, we can assume that “the business as usual” is the ritualism that I critique in this paper, the navigation of symbolic politics that has, for so long, left Māori empty-handed. This criticism must continue and expand in the near future so that the government is no longer the sole narrator of these stories. The Labour Party in 2007 wanted to see a Declaration that they could legally implement. The Labour Party in 2010 said they hoped the National Party was ready to legally implement the Declaration they signed. And now, in 2019, the Labour Party is saying that they will be the ones to do it after all. It is important, though, that the Declaration truly transcends the symbolic politics that have so long dictated the rhetoric around indigenous rights. The Treaty of Waitangi has had almost 200 years to create a country that uphold the rights of sovereignty and autonomy for its indigenous peoples, but it has been unable to do so. There is hope now that the Declaration can bring such a state to fruition.

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<sup>185</sup> “UN Declaration on the Rights of Indigenous Peoples.” Accessed May 10, 2019. [https://www.tpk.govt.nz/en/whakamahia/un-declaration-on-the-rights-of-indigenous-peoples/.](https://www.tpk.govt.nz/en/whakamahia/un-declaration-on-the-rights-of-indigenous-peoples/)

<sup>186</sup> Ibid.

<sup>187</sup> Ibid.