

ARTICLE

The United Nations Declaration on the Rights of Indigenous Peoples: A Step Forward or Two Back?

LAURA MACKAY*

Mixed reactions abound when it comes to the United Nations Declaration on the Rights of Indigenous Peoples and its implementation in New Zealand and Australia. It is a multi-faceted document whose apparent legal frailty conceals layers of political, moral and judicial force. Although the courts of New Zealand and Australia have not whole-heartedly embraced the Declaration as a legal tool, and the political motivations of the national governments for its eventual implementation can be viewed as self-interested, the moral force of the Declaration should not be underestimated. Its only recent accession in Australia and New Zealand indicates that we should not immediately dismiss it. Instead, we should give it time to absorb into national cultures before then making worthwhile change.

I Introduction

The United Nations Declaration on the Rights of Indigenous Peoples¹ has been described as “[p]erhaps the most important international instrument ever for Māori people”² and a “watershed moment” in Australian race relations.³ It has also been criticised as “fanfare and fine words” that will only be ignored.⁴ Such criticism has legitimate basis in both

* Laura MacKay is currently in her fourth year of a BA, LLB conjoint degree at the University of Otago. In her BA, she is majoring in Politics and minoring in Art History.

1 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007) [UNDRIP].

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

3 Australian Human Rights Commission “2009 Media Release: United we stand — Support for United Nations Indigenous Rights Declaration a watershed moment for Australia” (press release, 3 April 2009).

4 DJ Round “UN Declaration on the Rights of Indigenous Peoples” [2009] NZLJ 392 at 395.

Australia and New Zealand due to their delayed affirmation of the Declaration and their strident criticism when it was officially adopted in the United Nations General Assembly.

The genesis of such criticism is the Declaration's legal standing as an aspirational document with no binding force. The political reaction to the Declaration in each country indicates that this is the decisive factor determining the status of the Declaration. Compounded by a mixed response from the courts, it seems the Declaration may be relegated to the back-pile of international treaties that Australia and New Zealand feel they have every right to ignore. However, taking this view implies a lack of will to move beyond a superficial first impression. The Declaration's potential to crystallise into international customary law, plus the momentum that it is generating both within the courts and beyond, means that simply dismissing the Declaration as an aspirational, non-binding document is unjustified.

II The Declaration

A *Evolution*

The Declaration was adopted by the United Nations General Assembly on 13 September 2007, following "more than 20 years [of] negotiation".⁵ These negotiations were held in an environment of "mutual mistrust between governments and indigenous people".⁶

143 members voted in favour, four against (Australia, New Zealand, Canada and the United States), and there were 11 abstentions.⁷ Australia adopted the Declaration in April 2009, and a year later in April 2010 New Zealand followed suit.

B *The text*

The Declaration is comprised of 23 preambular paragraphs, which set the stage for the following 46 articles. The most important of the articles cover:⁸

- The right to "all human rights and fundamental freedoms".
- The "right to be free from any kind of discrimination".
- The "right to self-determination".
- The "right to autonomy or self-government in ... internal and local affairs".
- The right to redress for the taking of physical property such as land and also "cultural, intellectual, religious and spiritual property".
- Cultural rights in political, social and economic areas.
- State duties to respect treaties and agreements.

5 Claire Charters "The rights of indigenous peoples" [2006] NZLJ 335 at 335.

6 John B Henriksen "The UN Declaration on the Rights of Indigenous Peoples: Some Key Issues and Events in the Process" in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, Copenhagen, 2009) 78 at 81.

7 Augusto Willemsen Diaz "How Indigenous Peoples' Rights Reached the UN" in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, Copenhagen, 2009) 16 at 28–29.

8 UNDRIP, arts 1–4, 11(2), 20 and 37.

According to the Declaration, the most important goal “is to encourage ‘harmonious and cooperative relations between States and indigenous peoples based on principles of justice, democracy, respect for human rights, non-discrimination and good faith’”.⁹

C *The legal status of the declaration*

A declaration is a non-binding international legal instrument, which states have no legal obligation to follow. Rather, “it provide[s] a set of internationally endorsed objective standards to guide the relationship with Indigenous peoples, and to promote actions that respected and protected Indigenous cultures”.¹⁰ New Zealand must amend its domestic law to incorporate any declaration before it can become legally binding.¹¹

The non-binding nature of the Declaration was emphasised by many states during its adoption in the UN General Assembly.¹² All states, including New Zealand and Australia, stressed that it was “an aspirational declaration with political and moral force but not legal force ... [and] is not intended itself to be legally binding or reflective of international law”.¹³

III Political Responses in New Zealand and Australia

In a statement made on behalf of Australia, New Zealand and the United States to the General Assembly in 2006, the Declaration was generally criticised for failing to be “clear, transparent and capable of implementation”.¹⁴ It was also argued to conflict with the “universality of human rights”.¹⁵ Other objections were raised in regards to specific provisions. Article 3, the right to self-determination, potentially conferred a right to secede, “threatening the political unity, territorial integrity and the stability of existing UN Member States”.¹⁶ Article 19, which prescribes consultation, could allow indigenous peoples a veto over domestic law. The provision for redress, under art 28, was also described as “unworkable and contradictory”.¹⁷

9 UNDRIP at 3 as cited in Adelfo Regino Montes and Gustavo Torres Cisneros “The United Nations Declaration on the Rights of Indigenous Peoples: The Foundation of a New Relationship Between Indigenous Peoples, States and Societies” in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, Copenhagen, 2009) 138 at 151–152.

10 Australian Human Rights Commission, above n 3.

11 Māmari Stephens “‘Free and equal to all other peoples’: some implications of New Zealand’s support for the Declaration on the Rights of Indigenous Peoples” Post Treaty Settlements <www.posttreatysettlements.org.nz>.

12 Luis Rodríguez-Piñero Royo “‘Where Appropriate’: Monitoring/Implementing of Indigenous Peoples’ Rights Under the Declaration” in Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, Copenhagen, 2009) 314 at 315.

13 *107th Plenary Meeting* GA Res 61/PV107, A/61/PV107 (2007) at 12.

14 Rosemary Banks, Permanent Representative of New Zealand to the United Nations in New York “United Nations General Assembly 61st session Third Committee: Item 64(a) The Declaration on the Rights of Indigenous Peoples” (New York, 16 October 2006).

15 Banks, above n 14.

16 Banks, above n 14.

17 Banks, above n 14.

A *New Zealand*

Dr Pita Sharples, the Minister of Māori Affairs, finally accepted the Declaration on behalf of New Zealand in 2010.¹⁸ However, there was a catch: the Declaration would only be affirmed so far as it was consistent with New Zealand's domestic law. Dr Sharples made this clear, stating:¹⁹

Those existing frameworks, while they will continue to evolve in accordance with New Zealand's domestic circumstances, define the bounds of New Zealand's engagement with the aspirational elements of the Declaration.

In effect, the Declaration was to have no impact on the law of New Zealand; New Zealand would maintain its existing law as it related to indigenous affairs. This includes the current redress system of Treaty of Waitangi claims and provisions for indigenous involvement in decision-making and ownership of land and resources.

This effect was reinforced by Prime Minister John Key's response to Opposition leader Phil Goff, who raised the issue of why Parliament affirmed the Declaration if it had no plans to implement it. Key stated:²⁰

It is not a treaty, it is not a covenant, and one does not actually sign up to it. It is an expression of aspiration; it will have no impact on New Zealand law and no impact on the constitutional framework.

Why then, did New Zealand bother to sign the Declaration, having no intent to comply with any of its standards? It seems inconsistent at best, and highly disingenuous at worst. One practical incentive for the National Government may have been domestic support. The Māori population is estimated at 682,200,²¹ which is approximately 15.3 per cent of New Zealand's total population. By publicly affirming the Declaration, with statements such as "[m]y objective is to build better relationships between Māori and the Crown, and I believe that supporting the declaration is a small but significant step in that direction",²² Key may have been angling for an increased voter base. Furthermore, with a wafer-thin majority in the 2008 election, the National Party is dependent on the Māori Party for a coalition Government. Dr Sharples acknowledged that indigenous affairs had been a source of pressure between the parties,²³ and as some New Zealand commentators have pointed out, affirming the Declaration gives the Māori Party a tangible result in return for their support.²⁴ Meanwhile, its non-binding and caveated nature means the government is making almost no political compromise.²⁵

18 Pita Sharples, Minister of Māori Affairs "Ninth session of the United Nations Permanent Forum on Indigenous Issues, 19–30 April 2010" (19 April 2010).

19 Sharples, above n 18.

20 (20 April 2010) 662 NZPD 10238.

21 "Maori Population Estimates" (2012) Statistics New Zealand <www.stats.govt.nz>.

22 John Key "National Govt to support UN rights declaration" (press release, 20 April 2010).

23 Tracy Watkins "Hide: Indigenous declaration breaches deal" (20 April 2010) Stuff <www.stuff.co.nz>.

24 Andrew Geddis "With nary a whisper of drama, signifying much" (21 April 2010) Pundit <www.pundit.co.nz>.

25 Geddis, above n 24.

Internationally, the New Zealand Government may have been looking to preserve its reputation as a leader in human rights. This can be seen in John Key's statement:²⁶

That really is the point about New Zealand affirming the United Nations Declaration on the Rights of Indigenous Peoples. ... I cannot see why New Zealand would not want to be there affirming on the world stage that we care about the rights of indigenous people.

International concern was certainly raised about New Zealand's lack of participation in the Declaration, visible in the Universal Periodic Review of New Zealand, where support for the Declaration was strongly recommended.²⁷

Claire Charters argues that New Zealand's objections to the Declaration were nothing more than "a self-interested attempt to make it consistent with New Zealand domestic law".²⁸ However, she argues that because of its size, New Zealand "cannot afford to be as ideologically isolated as it is geographically".²⁹ It must uphold a reputation for human rights that is consistent with the prevailing liberal world order, a pressure that Key may have felt.

It could be contended that New Zealand's adoption of the Declaration influenced the subsequent replacement of the decidedly discriminatory Foreshore and Seabed Act 2004 with the Marine and Coastal Area (Takutai Moana) Act 2011. However, these changes may have been merely an effect of the environment of pressure that led to the affirmation of the Declaration, not an effect of the Declaration itself.

This raises some questions. Was the affirmation of the Declaration in New Zealand purely a political move? Was there any intention to improve indigenous rights? Coming on board with the Declaration may have simply been an attempt to placate domestic and international pressure to ensure New Zealand did not fall behind while countries with poor human rights records affirmed the Declaration.³⁰

B *Australia*

Under Prime Minister John Howard, the Australian Government in 2007 expressed particular dissatisfaction with the elements of self-determination in the Declaration. This was based on the belief that it could impact upon Australia's territorial and political integrity and their democratic representation system.³¹ There was also concern that the Declaration would elevate Aboriginal customary law above Australian law.³²

However, as in New Zealand, a change of government heralded a change in attitude. Under Kevin Rudd, Australia formally affirmed the Declaration in 2009, with Indigenous

26 (20 April 2010) 662 NZPD 10240.

27 *Report of the Working Group on the Universal Periodic Review: New Zealand* A/HRC/12/8 (2009) at [81].

28 Charters, above n 5, at 337.

29 At 337.

30 "PM: No Practical Effect in UN Rights Declaration" (20 April 2010) 3News <www.3news.co.nz>.

31 Kanchana Kariyawasam "The Significance of the UN Declaration on the Rights of Indigenous Peoples: the Australian Perspectives" (2010) 11(2) *Asia-Pacific Journal on Human Rights and the Law* 1 at 5.

32 "PM defends refusal to sign UN Indigenous bill" (15 September 2007) ABC News <www.abc.net.au>.

Affairs Minister Jenny Macklin stating the affirmation was “in the spirit of rethinking the relationship between indigenous and non-indigenous Australians and building trust”.³³

Australia, unlike New Zealand, lacked the immediate domestic political pressure that the Māori Party was able to place on the National Government. However, there was evidence of a grassroots movement that made its presence known in the fight to affirm the Declaration. On 16 May 2008, over 100 organisations sent a letter, officiated by the Indigenous Law Centre and Human Rights Law Resource Centre, to the Rudd Government, urging affirmation of the Declaration, a clear indication of domestic influence.³⁴

The Declaration’s acceptance in 2009 was met with support by some and scepticism by others. Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma described the Declaration “as a watershed moment in Australia’s relationship with Aboriginal and Torres Strait Islander peoples”,³⁵ while Australian of the Year, Professor Mick Dodson, also a senior Aboriginal leader, stated that “the government had taken another significant step towards true reconciliation”.³⁶

Criticism was also prevalent, both that the affirmation went too far and, alternatively, that it did not go far enough to remedy existing problems. The “shadow Attorney-General George Brandis raises concerns that the Declaration could crystallise into customary international law ... ‘and thus may help to create a jurisprudence that is fundamentally out of step with an ongoing legal dialogue within Australia’”.³⁷

Meanwhile, anti-interventionists accused the government of “absolute hypocrisy”.³⁸ In 2007, the Australian Government introduced the Northern Territory National Emergency Response Act. It aimed to protect child welfare in Aboriginal communities—but did so by imposing highly prohibitive measures.³⁹ These included community bans on alcohol and pornography, external management of income, linking welfare benefits to school attendance and compulsory five-year leases, with the ostensible aim of redevelopment.⁴⁰ The Northern Territory Emergency Response Act specified “that acts done under or for the purposes of those Acts were: ... ‘special measures’” and therefore effectively suspended the Racial Discrimination Act.⁴¹ While these measures were in place, many people considered the affirmation of the Declaration as “nothing less than a tokenistic gesture”.⁴² This view was given international credibility when James Anaya commented that the

33 “Fed govt endorses UN declaration on indigenous people” (3 April 2009) Australian Associated Press Newswire <www.aap.com.au>.

34 Letter from Philip Lynch (Director of the Human Rights Law Resource Centre) and Megan Davis (Director of the Indigenous Law Centre) to Kevin Rudd (Prime Minister of Australia) and others regarding the UN Declaration on the Rights of Indigenous Peoples (16 May 2008).

35 Australian Human Rights Commission, above n 3.

36 “Australia backs UN on indigenous rights” *The Sydney Morning Herald* (online ed, Sydney, 3 April 2009).

37 Megan Davis “Indigenous Struggles in Standard-Setting: the United Nations Declaration on the Rights of Indigenous Peoples” (2008) 9 *Melbourne Journal of International Law* 439 at 469.

38 “Australia backs UN on indigenous rights”, above n 36.

39 See Northern Territory National Emergency Response Act 2007 (AU), s 5; and Department of Families, Housing, Community Services and Indigenous Affairs *Northern Territory Emergency Response* (20 June 2008) at 3.

40 Department of Families, Housing, Community Services and Indigenous Affairs, above n 39, at 5; Northern Territory National Emergency Response Act 2007 (AU), ss 6A and 31; and Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007, s 123TA.

41 Australian Human Rights Commission *The Suspension and Reinstatement of the RDA and Special Measures in the NTER* (2 November 2011) at 6.

42 According to Monique Wiseman from Stop The Intervention Collective: “Australia backs UN on indigenous rights”, above n 36.

Northern Territory Emergency Response “overtly discriminate[s] against Aboriginal peoples, infringe[s] their right of self-determination and stigmatise[s] already stigmatised communities”.⁴³ He also stated the “Emergency Response is incompatible with Australia’s obligations under the ... [Declaration]”.⁴⁴

Some commentators such as Megan Davis, Director of the Indigenous Law Centre at the University of New South Wales, have also proposed that the Declaration was signed for reasons reflecting those of New Zealand: to ensure Australia was conforming internationally.⁴⁵ Davis suggested that Australia was “getting their human rights house in order”, and the affirmation of the Declaration was simply part of their aim “for a temporary seat on the UN Security Council”.⁴⁶

However, even if Australia’s affirmation was a buckling to international pressure, the Australian Government—unlike New Zealand’s—has shown some signs of compliance. One substantive response to the Declaration was the promise to establish a national representative body in order to afford Aboriginal peoples a say in federal government affairs.⁴⁷ The National Congress of Australia’s First Peoples,⁴⁸ established in April 2010, is independent of the Government and acts as an advocate for improved indigenous rights in economic, political and social areas, as well as creating and maintaining relationships with the government and other bodies.⁴⁹

The Australian Government also replaced the Emergency Response with the Stronger Futures in the Northern Territory Act 2012, which under s 99A lifts the suspension of the Racial Discrimination Act. However, the 2012 Act has been criticised for changing none of the key provisions of the Emergency Response, and failing to consult with Aboriginal peoples.⁵⁰ Consequently, it remains contentious whether the legislation complies with Australia’s obligations under the Declaration.

Therefore, in both Australia and New Zealand, doubt can be cast on the political motivations underlying affirmation of the Declaration. Whether the governments affirmed the Declaration as a matter of political expediency, due to domestic and international pressure, or because of genuine commitment to improving indigenous rights is disputed. It remains to be seen whether the governments will begin to take the Declaration as more than an aspirational standard they have no obligation to adhere to. The beginnings of this change are evident in Australia, in the establishment of the National Congress and the repeal of the Emergency Response. However, this may be because Australia still trails behind New Zealand in its treatment of indigenous peoples. When New Zealand affirmed the Declaration it did not have an intervention policy in place, and the Māori seats and the Waitangi Tribunal were already established methods through which Māori could make their voices heard. Therefore, although Australia did not caveat its acceptance of the Declaration, this may have been because it had no existing framework to protect.

43 James Anaya “Statement of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People” (2009) 7(14) ILB 20 at 20.

44 At 21.

45 Julian Drape “‘Charter won’t elevate Aboriginal law’” *The Sydney Morning Herald* (online ed, Sydney, 2 April 2009).

46 Drape, above n 45.

47 “Australia Government endorses UN Declaration on the Rights of Indigenous Peoples” (3 April 2009) Indigenous Portal <www.indigenousportal.com>.

48 Australian Human Rights Commission “New Congress to Represent Aboriginal and Torres Strait Islanders” (2010) 7(18) ILB 3 at 3.

49 “About Us” National Congress of Australia’s First Peoples <www.nationalcongress.com.au>.

50 “UN concerned about intervention program” (1 August 2012) Australian Associated Press Newswire <www.aap.com.au>.

IV Judicial Reaction of New Zealand and Australia to the Declaration

Beyond the political response of the legislatures and the governments, the courts play a hugely important role in the implementation of international law, whether it is legally binding or not. Any denial of this fails to take into account the wide range of resources that the judiciary engages with in their reasoning process. The reaction of the courts in both countries has neither been a complete rejection of the Declaration as non-binding, nor a wholehearted embrace. However, it must be noted that the Declaration has only recently, in both nations, become an available tool in judicial reasoning, as the prior rejection of the Declaration by both Australia and New Zealand limited its possible use.

A *New Zealand*

In 2012, when the Declaration first began to appear in legal argument, mixed results emerged from the New Zealand courts. In *Greenpeace of New Zealand Inc v The Minister of Energy and Resources*, the High Court rejected the argument that the Declaration could have any impact on a Minister when performing his statutory obligations, as it is not legally binding.⁵¹ However, in *Taueki v Horowhenua District Council*, the Māori Land Court utilised the Declaration's emphasis on self-determination as a valid justification for finding in favour of the Māori applicant.⁵² Considering self-determination was one element of the Declaration that the New Zealand government made clear it would not implement, this was a bold move by Harvey J.

The Court of Appeal in *Takamore v Clarke* made a positive start to judicial utilisation of the Declaration. It held that a more modern approach is needed regarding customary law, and that the common law should be developed with recognition of "the collective nature of the culture of indigenous peoples and the value of their diversity (as recognised in particular by the United Nations Declaration on the Rights of Indigenous Peoples)".⁵³ However, in the appeal to the Supreme Court, the Declaration was barely mentioned, apart from a brief reference by Elias CJ who made it clear that a lack of respect for the Declaration did not contribute to her conclusion.⁵⁴

The Supreme Court's position was clarified in *New Zealand Maori Council v Attorney-General* in 2013.⁵⁵ It indicated that the Declaration is to be judicially interpreted with consideration for the caveats the New Zealand government placed on it. Therefore, the Court did not see it as "add[ing] significantly to the principles of the Treaty [of Waitangi]".⁵⁶ However, the door was left slightly ajar on this position, with the Court accepting that the Declaration supported a wide reading of the principles.⁵⁷

The clearest demonstration of support for the Declaration comes from Waitangi Tribunal reports. The *Ko Aotearoa Tēnei Report* from 2011 states that:⁵⁸

51 *Greenpeace of New Zealand Inc v The Minister of Energy and Resources* [2012] NZHC 1422 at [141].

52 *Taueki v Horowhenua District Council – Horowhenua (11) Lake* (2012) 294 Aotea MB 236 (294 AOT 236) at [29]-[30].

53 *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [254].

54 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [12].

55 *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31.

56 At [92].

57 At [92].

58 Waitangi Tribunal, above n 2, at 43.

The Declaration also addresses indigenous peoples' individual and collective rights in respect of their culture, identity, language, employment, health, education and other issues. ... They provide valuable guidance ... and reflect in many ways the spirit of the principles of the Treaty of Waitangi.

In 2012, the Waitangi Tribunal also referred to the Declaration in *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, supporting their reasoning with reference to specific articles including article 26(2) and 20(1).⁵⁹ The Tribunal also noted that the Declaration “articulate[s] base standards for all States who have affirmed it”,⁶⁰ a resounding statement which moves the Declaration from an aspirational benchmark to a standard which would be an international embarrassment not to achieve.

B *Australia*

As in New Zealand, the judicial reaction in Australia has not consistently demonstrated a defined attitude towards the Declaration. *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* in 2010 acknowledged that the Declaration is a legitimate influence on the development of common law, but only when a statute is ambiguous.⁶¹

Nevertheless, a year later in *Thompson v Dean*, the Declaration was used as a substantial support mechanism for the Family Court's decision to leave Aboriginal children with their mother.⁶² Further, in a similar situation in *Knightley v Brandon*, decided in 2013, the Federal Magistrates Court of Australia ensured its decision was consistent with the Declaration, stating that while the rights the Declaration enshrines “may not be enacted within the *Family Law Act*” they are “relevant to interpretation and application of the *Family Law Act*”.⁶³ This Court, therefore, went beyond the ambiguity limitation laid down in *Cheedy*. Finally, in *R v Maloney*, decided in 2012, the Court of Appeal of Queensland explicitly stated that the Declaration did not affect any argument as “this country's accession to the Declaration [does not] give rise to enforceable rights or obligations”.⁶⁴

Therefore, courts in both countries have failed to provide a clear indication as to what they will make of the Declaration. This is entirely understandable given its only recent affirmation in both nations, and especially in New Zealand, where the caveated nature of its acceptance makes it difficult to clarify what parts of the Declaration are legally applicable.

It is important to recognise, however, that the courts have demonstrated a willingness to make use of the Declaration in their judgments. Although this was predominantly in the opinion of the Waitangi Tribunal in New Zealand and the Family Court in Australia, it provides a basis for utilising the Declaration.

59 Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at 140.

60 At 140.

61 *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* [2010] FCA 690 at [106].

62 *Thompson v Dean* [2011] FMCAfam 1074 at [96]–[98].

63 *Knightley v Brandon* [2013] FMCAfam 148, (2013) 272 FLR 332 at [117].

64 *R v Maloney* [2012] QCA 105, (2012) 262 FLR 172 at [118].

V The Declaration as International Customary Law and as a Normative Standard

Despite the widespread assertions that the Declaration has no formal power in domestic and international law, its normative power in creating standards of behaviour amongst states should not be overlooked.⁶⁵

A *As a normative standard*

While agreeing that the Declaration is non-binding on states in international law, Claire Charters believes its lack of legal force is compensated for by its moral persuasion.⁶⁶ It seems it was partially this moral persuasion, internationally and domestically, that influenced New Zealand and Australia to affirm the Declaration in the first place and thus it should not be underestimated in its capacity to induce compliance.

The Declaration is also significant to the domestic law of signatories, more so than the alternative, the ILO Convention Concerning Indigenous and Tribal Peoples, which “is not widely ratified”.⁶⁷ The Declaration provides a preferable source for domestic law as it is more “widely applicable” and provides a broader recognition of the rights of indigenous peoples.⁶⁸

B *International customary law*

This normative behaviour can become binding if the Declaration reaches the point of international customary law. International customary law is defined under art 38(1)(b) of the Statute of the International Court of Justice “as evidence of a general practice accepted as law”. If the Declaration is seen as international customary law, then the obligations it promulgates are binding on countries regardless of incorporation into domestic law.⁶⁹ Although there is evidence the Declaration may eventually reach this status, given the emphasis put on its character as an aspirational, non-binding document, it is unlikely to be currently accepted as international customary law.

However, such a transition is entirely possible. As predicted by the Waitangi Tribunal, the “moral and political force [of the Declaration], ... will in time ... form the basis of a new body of customary international law on the subject of indigenous rights”.⁷⁰

Professor Bartolomé Clavero argues that the Declaration is already a legally binding instrument, based on the wording of art 42 which proclaims that all states and bodies of the United Nations, including the Permanent Forum on Indigenous Issues are to promote the full application of the Declaration.⁷¹ His argument is threefold:⁷²

- (1) The wording of art 42 “uses the strong expression of *full application*” as opposed to other similar instruments.

65 Rodríguez-Piñero Royo, above n 12, at 315–318.

66 Charters, above n 5, at 335.

67 At 336.

68 At 336.

69 Stephens, above n 11.

70 Waitangi Tribunal, above n 2, at 233 (footnotes omitted).

71 Rodríguez-Piñero Royo, above n 12, at 316.

72 At 317.

- (2) Article 42 also singles out the Permanent Forum on Indigenous Issues. “It is thus the first declaration that assigns its application to a body not created by treaty, ‘and hence without the mediation of State ratification’.”
- (3) The Declaration was created by working with indigenous peoples.

VI Conclusion

The question remains: what is the Declaration worth? If it is a purely aspirational standard and only affirmed as a useful political tool, how can it possibly promote indigenous rights? However, contemplating the Declaration in this light is to take it only at face value. Perhaps Australia and New Zealand only affirmed it because it was in their own political interests, but this does not have to diminish the fact that it was affirmed. Norms of human rights can become active domestically either voluntarily, through a gradual absorption into the national psyche, or through international pressure to conform to the prevailing world order. Either way, they are present where they were formerly non-existent.

It may be argued, in the case of an aspirational document, that this difference is critical, given a country can surrender to pressure to affirm and subsequently take no further action. I would argue otherwise. This initial pressure is only an indication of what is to come; if New Zealand and Australia capitulated to international persuasion to adopt the Declaration, there is no reason why they would resist pressure to adhere to its standards.

It is at this point that the Declaration could be seen as crystallising into international customary law. Such a possibility is not indistinct, with some observers of the opinion that some articles have already done so.⁷³

Furthermore, there is potential within the judicial branches of each country to continue to utilise the Declaration: while legally it is non-binding, the courts may still use it as an important resource in their decision-making. Furthermore, if the Declaration solidifies into international customary law, the courts will have a powerful tool to enable the promotion of indigenous rights.

Beyond these political and judicial implications, the Declaration also has repercussions for the Aboriginal and Māori peoples in the way it provides a framework of rights upon which they can leverage their claims. Not only does the Declaration educate indigenous peoples on what their rights actually are,⁷⁴ it gives them hope that persistence in their ongoing battles with historically unresponsive governments and courts can bring about change.

The final point is that we cannot assume too much, too fast about the Declaration. Its journey into Australian and New Zealand was a slow and reluctant one, and now that it has arrived, we must give it time. As Eddie Durie, former Waitangi Tribunal chairman, stated:⁷⁵

Important statements of principle established through international negotiation and acclamation filter into the law in time, through both governments and the courts, which look constantly for universal statements of principles in developing policy of deciding cases.

73 Davis, above n 37, at 465.

74 At 468.

75 Tracy Watkins “Judge hails big advance for Maori” (24 April 2010) Stuff <www.stuff.co.nz>.

Therefore, a dismissal of the Declaration as non-binding and subsequently worthless is rash and superficial, disrespecting centuries of hardship, violence, struggle, and injustice. The Declaration is a breakthrough of momentous proportions, and we must remind ourselves that all great things take time.