

The Treaty of Waitangi some international law aspects

Benedict Kingsbury

A remarkable upswell in international activity concerning the position of indigenous peoples has occurred since the beginning of the 1980s. The contemporary New Zealand debate concerning the meaning and significance of the Treaty of Waitangi increasingly draws on international and comparative material, not least in the work of the Waitangi Tribunal. The New Zealand Government is now often called upon to discuss the position of the Māori people in international forums. The Chairman-Rapporteur of the United Nations Working Group on Indigenous Populations paid a fact-finding visit to New Zealand in 1988, and Māori representatives addressed the United Nations Commission on Human Rights and the UN Working Group on Indigenous Populations for the first time, later that year. The purpose of this chapter is to survey briefly some of the relevant international legal material which may have a bearing on issues related to the Treaty of Waitangi.¹

The chapter is in three sections. The first briefly examines the status of the Treaty of Waitangi in international law as a treaty of cession. The second discusses the international law principles of good faith, estoppel, and treaty interpretation in relation to Treaty issues. The third section alludes to a few of the many other areas of international law which may be relevant to Māori concerns, focusing specifically on international law aspects of rights to land, to development, and to cultural identity.

Section I: The Treaty of Waitangi as an International Treaty of Cession

The proposition that the Treaty of Waitangi was a nullity and of no international legal significance was asserted in Pākehā political debate in New Zealand and in England as early as the 1840s,² and appeared to secure judicial endorsement in *Hī Parata v The Bishop of Wellington and the Attorney-General*.³

As a matter of international law, this proposition is clearly untenable. The Treaty was a valid international treaty of cession, and the parties in 1840 were recognized as having the necessary legal capacity to enter into such a treaty.⁴ This is clear from an examination of the general context of British policy towards indigenous peoples in the 1830s and 1840s, the specific instructions given by the British Government to her

emissaries to New Zealand, the attitude taken by France and the United States as the third party States directly interested, and subsequent international arbitral decisions.

British Colonial Policy Towards Indigenous Peoples in the 1830s and 1840s

Treaty-making with indigenous peoples in regions of colonial activity was a standard feature of British and French policy in the period.⁵ The purport and significance of these treaties varied greatly, but in most cases they were treated as documents of international significance and published in official treaty series.⁶ The place of the Treaty of Waitangi in the constitutional pattern of British treaty-making to secure indigenous consent to the erection of British sovereign authority in new colonies has been extensively studied.⁷ Although the 1837 *Report of the Select Committee on Aborigines in British Settlements* had urged the British Government not to conclude treaties with native rulers (because of the experience of adverse consequences for the native parties),⁸ the British Government appears to have thought the Treaty necessary for legal⁹ and moral¹⁰ reasons, and perhaps military ones,¹¹ if orderly colonization was to proceed.

The British Government's Position on New Zealand in 1840

There is considerable evidence to show that the British Government had resolved both in public and in private to treat the native chiefs and tribes of New Zealand as sovereign. The instructions issued by the Marquis of Normanby to Captain Hobson on 14 August 1839 stated:

we acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with Her Majesty's immediate predecessor, disclaims, for herself and for her subjects, every pretension to seize on the islands of New Zealand, or to govern them as a part of the dominion of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established usages, shall be first obtained.¹²

Lord John Russell's 'Despatch' to Governor Hobson of 9 December 1840 confirms the understanding that a cession had been effected:

[the Māori tribes] are not mere wanderers over an extended surface, in search of a precarious subsistence; nor tribes of hunters, or of herdsmen;

but a people among whom the arts of government have made some progress; . . . In addition to this, they have been formerly recognized by Great Britain as an independent state; and even in assuming the dominion of the country, this principle was acknowledged, for it is on the deliberate act and cession of the chiefs, on behalf of the people at large, that our title rests.¹³

The doctrine that the property rights of inhabitants are not *ipso facto* affected by a change of sovereignty on cession was a standard doctrine of international law at the time. Its application in the Charter for erecting the Colony of New Zealand of 16 November 1840 bears out the British view that a cession had occurred:

Provided always, that nothing in these our letters patent contained shall affect or be construed to affect the rights of any aboriginal natives of the said colony of New Zealand, to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any lands in the said colony now actually occupied or enjoyed by such natives.¹⁴

The mass of evidence, including such public documents, indicates a clear British intention to enter formally into an effectual treaty of cession. Māori presumably acted in reliance on this recognition of their sovereignty in entering into the Treaty and accepting the promises made therein, which may in itself be sufficient to found an estoppel in international law.¹⁵ The British statements alone may now be seen as having constituted internationally binding unilateral undertakings by analogy with the approach taken by the International Court of Justice towards the French unilateral undertaking to cease atmospheric testing in the *Nuclear Tests* cases.¹⁶

The Views of France and the United States

The European State, other than Britain, most interested in New Zealand around the time of the Treaty of Waitangi was France. The Nanto-Bordelaise Company had launched a colonizing venture (which eventually foundered in Akaroa), and France was anxious to obtain a naval and shipping base, and perhaps a penal colony, in the South Pacific.

Although French policy towards British activity in New Zealand may have been somewhat incoherent in 1840, the legal position taken by France was clearly expounded by the distinguished Minister of Foreign Affairs, Guizot, in a statement to the French Chamber of Deputies in 1844. Guizot noted that over the period 1815-1838 the British Government consistently refused to assert sovereignty over New Zealand on the basis of 'discovery', and on the contrary that the British had 'by several public acts, by several acts of government, formally recognized the independence of New Zealand as forming a State under

its native chiefs.¹⁷ By Guizot's account, Hobson was sent to New Zealand charged with the duty of negotiating with the native chiefs for the cession of their sovereignty. He first obtained the cession of sovereignty by North Island chiefs through adherences to the Treaty of Waitangi. According to Guizot, Hobson subsequently obtained sovereignty over the South Island by securing the same cession from a number of chiefs there. When pressed by Messrs Billaut and Berryer, Guizot indicated that the French recognition of British rights in the South Island was necessitated by the Proclamations of 21 May and 17 June. He placed particular emphasis on the latter, which itself rested on South Island Māori signatures to the Treaty of Waitangi secured by Major Bunbury.¹⁸

The United States evinced no interest at any stage in obtaining sovereignty over New Zealand, but was concerned to maintain private claims of United States citizens after Britain proclaimed its sovereignty in 1840. Amongst the most juridically important of these claims was that pursued by the United States on behalf of William Webster, an American national whose heirs alleged that the British authorities in New Zealand had deprived him of large tracts of land he had obtained from Māori, without adequately compensating him. The American view on the validity and efficacy of the Treaty of Waitangi appears clearly from the documents appended to the United States *Memorial* in the *Webster* case. The Senate Committee on Foreign Relations, for instance, reported in 1892, mainly apropos the North Island, that

Up to the year 1840 no foreign government had acquired any territory or pretended to exercise any sovereignty over New Zealand. The [North] island was under the dominion of the native tribes, and these were to a great extent confederated.

This confederation was entered into October 28, 1835, by a convention of chieftains who declared their independence under the name of the United Tribes of New Zealand. . . .

The tenure of the soil was tribal. The boundaries of the territory of each tribe were definitely determined. The mode of transfer by which Mr Webster obtained his titles was perfectly valid under the usages of the tribe in that respect, and the validity of estates, obtained as Mr Webster obtained his, . . . was repeatedly recognized by Great Britain after that Government had established its sovereignty over the islands. Not only had no foreign government ever asserted or claimed any sovereignty over New Zealand, but Great Britain had repeatedly recognized it as an independent state long before that most conclusive act of recognition, the treaty of February 6, 1840, by which that power acquired by a national act of cession all of its sovereign and proprietary rights to New Zealand.

Lord John Russell, of the colonial office, expressed his opinion that 'New Zealand was by solemn acts of Parliament and of the King recognized as a sovereign and independent state.'¹⁹

The Committee noted that by the Treaty of Waitangi,

Great Britain confirmed and guaranteed to the chiefs and tribes and to the respective families and individuals thereof the exclusive and undisturbed possession of all of their lands and estates, which they may collectively or individually possess so long as they may desire to retain the same. . . .

Concerning this treaty, and its violation in this respect, your committee have heretofore observed:

'It would be difficult to select language that would more clearly import a perfect ownership in all the soil of New Zealand, in the chiefs, the people as tribes, and as private owners, than that which is guaranteed in the treaty itself.'²⁰

Decisions of International Arbitral Tribunals

International arbitral tribunals have twice indicated that the Treaty of Waitangi was a valid and effectual international treaty of cession. In *Rogers & Co*, an arbitral decision under the Convention between Great Britain and the United States of 8 February 1853, the British Commissioner, Hornby, held:

On the 6th of February, 1840, the Treaty of Waitangi was concluded, by which the Islands of New Zealand were ceded to Great Britain. . . .²¹

He added that 'the cession was accepted by Governor Hobson and Sir G. Gipps'.²²

The same conclusion was reached in still clearer terms by the Anglo-American arbitral tribunal in the *William Webster* case in 1925.²³

This evidence points overwhelmingly to the validity and efficacy of the Treaty as an international treaty of cession. As to Māori treaty-making capacity in European eyes, the evidence appears certainly to encompass, and probably to go beyond, the conclusion reached by the late D.P. O'Connell in respect of various treaties involving indigenous peoples:

In *Hoani Te Heu Tikino v Aotea District Maori Land Board* . . . the Treaty of Waitangi, by which the Maoris ceded New Zealand to the Crown, was in dispute, but far from holding that it was a legally irrelevant document the Privy Council merely held that it had no jurisdiction to enforce its provisions.

There seems little doubt that the cessions made by Indian and South East Asian potentates to the British Crown were the bases of title and it is profitless any longer to speculate on the degree of civilisation which would qualify a ruler for international legal personality.²⁴

This acceptance of the international juridical capacity of indigenous peoples for such purposes as entering treaties of cession is strongly

supported by the Advisory Opinion of the International Court of Justice in the *Western Sahara* case.²⁵

What is the significance of a finding that the Treaty of Waitangi was a valid international treaty of cession? In an opinion given on the Treaty of Waitangi in 1848, the noted jurist Joseph Phillimore stated,

Of the validity of this Treaty no one at all versed in the science of public law can entertain a doubt. It possesses all the ingredients which Writers on the Law of Nations deem essential to establish the validity of such a compact. . . .²⁶

He went on to analyse the proper construction of Article 2. Shirley Woolmer likewise concluded that:

the treaty of Waitangi must form the basis from which the rights and interests both of the Crown of England, and of the Natives of New Zealand must be ascertained.²⁷

These opinions point to promises in such a treaty being cognizable in the international law of the mid-nineteenth century, even if forums in which to enforce them were not available. There do not, however, seem to be any authorities explicitly upholding the direct international enforceability of promises made in a purely bilateral treaty of cession to a party which lost its sovereign status by that treaty.²⁸ Even while this question remains open, international law continues to bear on the Treaty of Waitangi in several other ways.

Clearly the fact of the conclusion of such a treaty, and the nature of promises made in it, may be relevant to other international law issues. For example, such a treaty might be evidence of the nature of property rights protected by the international law 'right to property'. The fact that legislative or administrative measures are taken to fulfil obligations under such a treaty may potentially justify conduct which otherwise would appear discriminatory against persons not beneficiaries under the treaty. The terms of the treaty may establish the expected relationship between the indigenous people and the Government, so that failure by the Government to honour the terms of the treaty may be seen as a denial of the international law obligation to ensure treatment which is equal in fact as well as in law.²⁹ The Treaty of Waitangi and the modern understanding of its principles represents part of the 'public law' by which the relationship between Māori and the Crown is legally expressed.³⁰ International law, including norms relating to indigenous peoples and to human rights, is imported into this public law to a limited but significant extent.³¹

The nature and international significance of the Treaty adds weight to arguments that international law principles should be applied as appropriate in its interpretation. This issue will now be addressed.

Section II: Honouring and Interpreting the Treaty

The Doctrine of Good Faith

Obligations arising from promises in treaties of cession, including the Treaty of Waitangi, should also be interpreted in light of the international law doctrine of good faith. The principle that States or other subjects of international law must conduct themselves in good faith is a fundamental tenet of the law governing international relations.³² It underlies many other principles of international law, including *pacta sunt servanda*.³³ It qualifies discretions which otherwise appear unfettered: thus the Arbitral Tribunal in the *North Atlantic Coast Fisheries* case held that under the treaty granting fishing rights to American fishermen, Great Britain retained the sovereign power to make regulations, but this was 'limited to such regulations as are made in good faith'.³⁴ As Michel Virally observes, good faith

furnishes a measure — or pattern — for determining the extent of the legal obligations assumed by states or other subjects of international law. . . good faith protects those who trust, reasonably, the appearances created by the behavior of other international legal actors (who have confidence in the good faith of those actors), or who have truly fallen into error: the innocent victims, in all good faith, of appearances.³⁵

The principle of good faith has an important application in international commercial arbitrations:

The prevailing view is that it would be contrary to fundamental principles of good faith for a State party to an international contract, having freely accepted an arbitration clause, later to invoke its own legislation as grounds for contesting the validity of its agreement to arbitrate.³⁶

A doctrine flowing from that of good faith, although less deeply rooted in international jurisprudence, is that concerning abuse of rights. One formulation is that 'international law prohibits the evasion of treaty obligations under the guise of the alleged exercise of a right'.³⁷ Abuse of rights exists as a doctrine in a number of civil law countries, but the specific precepts it embraces are so widely recognized that several judges and academic writers have propounded it as a general principle of the law of nations.³⁸ It encompasses exercise of rights in a way which injuriously prevents others enjoying their rights (the maxim *sic utere jure tuo ut alienum non laedas*), exercise of rights in a manner injuriously at variance with the purpose for which the right was created (*le tournement de pouvoir*), and exercise of rights in a way detrimental to a purpose or interest felt by the whole community to be greater in importance (the social function of rights).³⁹ Several difficult theoretical questions remain unresolved, including whether there can meaningfully be a right to act

in a manner prohibited by the abuse of rights doctrine. Whether or not abuse of rights is a direct source of liability in international law, the principle that an apparent right is subject to reasonable limitations of the sort suggested undoubtedly carries great weight.

The international law doctrine of good faith has parallels in the municipal law on treaties with indigenous peoples found in several jurisdictions in the colonial and modern periods.⁴⁰ In *New Zealand Maori Council v Attorney-General*, Richardson J expressed the view that the Treaty of Waitangi was a solemn compact in which for its part 'the Crown sought legitimacy from the indigenous people for its acquisition of sovereignty and in return it gave certain guarantees. That basis of compact requires each party to act reasonably and in good faith towards the other.'⁴¹ In the context of Government action under the Treaty, he found that 'The concept of the honour of the Crown also has continuing expression... in the international law doctrine of good faith'.⁴²

Estoppel and Preclusion

As Richardson J indicated in the *New Zealand Maori Council* case, the obligation of good faith is tied to the expectation on each side that the other will honour the Treaty. Indigenous peoples have certainly been expected to honour their parts in such engagements. The point was put clearly in 1828 by the United States Attorney-General in his opinion in the matter of Georgia and the Treaty of Indian Spring:

[Since] the Indians are independent to the purpose of treating, their independence is, *to that purpose*, as *absolute* as that of any other nation. Being competent to bind *themselves* by a treaty, they are equally competent to bind *the party who treats with them*. Such party cannot take the full benefit of the treaty with the Indians, and then deny them the reciprocal benefits of the treaty, on the ground that they are not an independent nation to all intents and purposes. It would require no technicality to perceive and to expose the injustice of such an attempt. It would lie open to the reprehension of the plainest understanding.⁴³

A number of treaties provide for recognition and protection of certain rights of the indigenous party subject to the terms of national laws in force from time to time. Depending upon the proper construction of such provisions (see *infra*), they may leave a substantial margin of discretion to the Government, but this must nevertheless be exercised in conformity with the principle of good faith. More broadly, international law may not permit a State which induced an indigenous people to enter into a solemn treaty by express or implied representations as to its validity to deny subsequently that substantive legal obligations were created for both sides.

There are some links between this proposition and the international law doctrine of estoppel (and the probable procedural analogue of

estoppel, preclusion).⁴⁴ One difference, however, is that the element of reliance is a central requirement in some formulations of the doctrine of estoppel. Broadly put, the doctrine of estoppel applies to preclude one party to a dispute from denying the truth of its earlier representations if the other party has already relied on these representations to its detriment. In such cases it might be contended that fault in the sense of errant conduct, rather than deliberate bad faith, is the foundation for the estoppel. In the *Gulf of Maine* case, Canada conceded that the doctrine of estoppel was still developing in international law, and the court rejected the estoppel argument on the facts 'without prejudice to the problems that the application of this concept in international law might raise generally'.⁴⁵ The court had already appeared to countenance estoppel in a narrow form with its reference in the *North Sea Continental Shelf* cases to a hypothetical situation where the Federal Republic of Germany was 'now precluded from denying the applicability of the conventional regime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that past regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice'.⁴⁶ In the *Gulf of Maine* case the court accepted that, apart from the question of detriment (or, perhaps more accurately, detrimental reliance), estoppel was closely related to acquiescence and recognition, each flowing from the fundamental principles of good faith and equity.

There are indeed substantial areas of overlap and harmony between the different doctrines and principles. The doctrines of recognition and estoppel may be of particular relevance to the issue of the international legal significance of the Treaty of Waitangi. Recognition of the validity of an Arbitral Award was held to preclude Nicaragua from later denying such validity in the *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906*.⁴⁷ Similar arguments have been adduced to preclude a State party to a 'gentleman's agreement' from asserting its non-binding nature against another party which has acted in reliance on the representation that the agreement will be honoured, even where breach of the agreement does not otherwise entail State responsibility.⁴⁸ An analogous approach has been advocated to preclude a State from denying the obligation flowing from a resolution for which it voted in an international organization.⁴⁹ A pertinent illustration of the application of these principles is the *Temple of Preah Vihear* case. The ICJ stated:

Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She

has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map. Since neither side can plead error, it is immaterial whether or not this reliance was based on a belief that the map was correct. It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it.⁵⁰

The possible application of such principles to the Treaty of Waitangi is clear. Britain had recognized that New Zealand was not within British jurisdiction in several statutes prior to 1840.⁵¹ In 1835 it had accepted the 'Declaration of Independence of the United Tribes of New Zealand', and recognized a New Zealand flag. Despite the anxieties of the Select Committee on Aborigines in British Settlements,⁵² the British Government felt it had little choice but to conclude such a treaty if it wished to acquire sovereignty in New Zealand, because of these previous pronouncements.⁵³ The Treaty of Waitangi was concluded on this basis. As indicated above, the legal independence of the Māori prior to 1840, and the validity of the Treaty, were expressly recognized by the power most interested, France.

The possibility that the statements before 1840 by ministers of Great Britain that New Zealand was a sovereign and independent State might estop Britain from denying rights to an American citizen who had relied on them in dealing with Māori was considered by Sir Robert Stout, former Chief Justice of New Zealand, in 1890 in the context of the Webster claim. He discounted the argument on the facts, asserting an absence of reliance.⁵⁴ It nevertheless appears likely that arguments based on recognition and preclusion could with some justice be advanced by Māori if New Zealand ever sought to deny the validity of the Treaty of Waitangi.

Interpretation of the Treaty of Waitangi

The Waitangi Tribunal has referred to international law principles of treaty interpretation on several occasions in formulating its approach to interpretation of the Treaty. In the *Motunui Report*, for instance, the Tribunal quoted extensively from a Memorandum by the Department of Māori Affairs on principles of international treaty interpretation in English courts, the international law rules concerning interpretation of treaties with texts in two languages, and the principles of construction applied to Indian Treaties by United States courts.⁵⁵ In the *Orakei Report* the Tribunal drew upon Lord McNair's work on *The Law of Treaties*, and on judicial construction of treaties with indigenous peoples in the United States and Canada, in finding that the Treaty of Waitangi should be interpreted in the sense in which it would have been understood by the Māori signatories, and taking substantial account of the surrounding

circumstances and of any declared or apparent objects and purposes of the Treaty.⁵⁶

Remarks by the Tribunal in the *Motunui Report* suggest that it was inclined to distinguish a Māori approach to interpretation of the Treaty from 'the English legal approach'. In the Māori approach, 'The spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place.'⁵⁷ In the *Manukau* and *Orakei Reports*, however, the Tribunal appeared satisfied that there was a concordance between this Māori approach and a Pākehā approach based on international law and on United States and English judicial practice.⁵⁸ A new note was struck in the *Muriwhenua Report*, the Tribunal saying:

The rules of treaty interpretation were fully debated by counsel, but much of what was said is of little relevance to our situation. The Treaty of Waitangi may be unique in international experience in that it is comprised of two texts, one not a precise translation of the other and each carrying its own cultural expectations, history and tradition.⁵⁹

The Treaty of Waitangi Act 1975 directs the Tribunal to have regard not ultimately to the terms of the Treaty but to 'the principles of the Treaty of Waitangi'. This formulation was used also in the State-Owned Enterprises Act 1986, the Environment Act 1986, and the Conservation Act 1987. The object of the inquiry is thus at one remove from an investigation of the exact meaning of the Treaty.⁶⁰ The principles of the Treaty are, however, closely linked to the texts of the Treaty, to the beliefs and understandings of the parties to it (including the spirit of the Treaty), and to the whole context of its conclusion. All of these are embraced within the international law principles relevant to the interpretation of bilingual treaties involving indigenous peoples. In practice the Tribunal has drawn close connections between the 'principles' of the Treaty and its meaning. Public confidence in the work of the Tribunal may well depend upon the perception that this nexus is being maintained.

Reference to international law principles of treaty interpretation, including those applicable to treaties involving indigenous peoples, may be justified on several grounds. Firstly, such principles are appropriate to the interpretation of an international treaty of cession. Secondly, the international law principles have evolved from long international experience in dealing with difficult issues of treaty interpretation, and provide a rich source for which New Zealand has no domestic parallel. Thirdly, these principles have developed in litigation before national and international tribunals over a long period, and were not invented in the heat of the moment to deal with contentious political disputes about a single treaty.

The principle of sovereign equality leads to a general assumption of

equality between the parties in treaty interpretation in international law. This is broadly represented by Article 31 of the 1969 Vienna Convention, which lays stress on the ordinary meaning of the words in the light of the context (defined somewhat narrowly) and the object and purpose of the treaty. It appears, however, that international law places a gloss on this principle as regards many treaties involving indigenous peoples.

The general approach to construction of treaties involving indigenous peoples in the United States is exemplified by a dictum (albeit in the language prevalent in the late nineteenth century) from *Jones v Meehan*:

In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by Indians.⁶¹

This approach also applies in Canada,⁶² but in conjunction with the principle that:

An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law.⁶³

The apparent differences between the Article 31 approach and that of *Jones v Meehan* do not necessarily make the latter irreconcilable with the international law of treaty interpretation. International tribunals have in several cases applied a *contra proferentem* rule in construing bilateral treaties⁶⁴ and international contracts.⁶⁵ In the *Cayuga Indians* case the tribunal invoked 'general and universally admitted principles of justice and right dealing, as against . . . the harsh operation of the legal terminology of a covenant which the covenantees had no part in framing and no capacity to understand',⁶⁶ and cited *Jones v Meehan* in construing the reservation clause in the Treaty of 1789 between the Cayuga Nation and New York.⁶⁷ The International Court of Justice has also implied that a special approach is to be taken to the interpretation of mandate agreements, paying particular regard to the function of the

mandate system: 'The Mandate was created, in the interests of the inhabitants of the territory, and of humanity in general, as an international institution with an international object — a sacred trust of civilization.'⁶⁸ Several national courts have held that the Government is in a trustee-type position in relation to the indigenous peoples.⁶⁹ Whether the existence of treaties, the doctrine of guardianship, or other considerations cause this trust to operate on the international plane is too large a question to be dealt with here. In so far as treaties involving indigenous peoples fall to be interpreted by reference to international law principles, an approach analogous to *Jones v Meehan* appears entirely supportable.

Where a treaty between States has been authenticated in two or more languages, Article 33 of the Vienna Convention on the Law of Treaties 1969 provides that, in the absence of agreement to the contrary, the text is equally authoritative in each language. The terms of the treaty are presumed to have the same meaning in each authentic text.⁷⁰ While most of the treaties between indigenous peoples and other powers concluded in written form exist only in the language of the dominant power, a number were concluded exclusively in the language of the indigenous people.⁷¹ Others, including the Treaty of Waitangi, were concluded with written texts in the languages of both parties.⁷²

In such cases of bilingual treaties it is presumed that the Article 33 rule applies, in tandem with the *contra proferentem* rule, except if one party knew (or had constructive knowledge) that the text in the language understood by the other party differed materially from the alternative text. In such a case an estoppel could be founded. The text or other documents written in the language of the dominant party will usually give an indication of that party's understanding of the meaning of the treaty. It will, however, be necessary to ascertain what the indigenous party in fact understood the treaty to mean. This involves analysis of the indigenous text(s), recourse to *travaux préparatoires* (if any exist), and examination of other materials such as interpreters' notes, contemporary accounts, and the interpretation assumed or contended for by the disadvantaged party in its subsequent practice.⁷³ An oral agreement collateral to the treaty may affect its interpretation,⁷⁴ and in exceptional cases the oral agreement may in fact be the treaty, if it can be convincingly shown that the oral agreement rather than the written document reflected the understanding of the parties.⁷⁵

An example of the importance of looking beyond the official Government versions of treaties is furnished by Ratkoff-Rojnoff's study of the treaty between Her Majesty's Government in Canada and the Salteaux Ojibway of 3 October 1873. Officially this exists in only one version (in highly technical English), and is known as Treaty No. 3 or the North-West Angle Treaty. None of the Indians involved in the negotiations knew English, and the Métis recruited as interpreters into

Ojibway knew little English. The Indians retained Joseph Nolin to take notes in English of what was said; these notes include a draft treaty couched in vernacular English, which differs substantially from the official version. A bilingual English-Ojibway speaker recently asked to translate the official version of the treaty gave up on the first line: 'We just don't have words like this: the year of our Lord, Her Most Gracious Majesty, Commission, of one part, hereinafter defined and described, etc.' He had no problem, however, in translating the Nolin version of the treaty. The evidence is that the Nolin version was the one translated into Ojibway for the chiefs to agree to, and that the Government negotiators knew this and had seen the Nolin text.⁷⁶

The methods of interpretation employed by the Waitangi Tribunal to date appear to be consistent with the international approaches outlined here. As the Treaty of Waitangi Act 1975 requires, the Tribunal does not confine itself simply to interpreting the Treaty. Its duty is to distil the principles of the Treaty, and to make recommendations intended to give modern effect to these principles. The discharge of this duty takes it into areas where other principles and approaches found in international and comparative law are relevant. A brief survey of some of these areas will be undertaken in the next section.

III. International Law and Indigenous Peoples: Some Illustrative Examples

Many established and developing areas of international law are relevant to questions concerning indigenous peoples.⁷⁷ The limited aim here is merely to provide a brief introduction to some of the particular areas which have already figured in debates concerning the Treaty, to illustrate ways in which international and comparative law material may be germane to some of these issues in New Zealand. Many areas must be omitted, including, for instance, material bearing on the current discussions about self-determination and about fisheries. The focus will be on land rights and the right to property, the right to development, and cultural rights as they relate to rights to land and resources.

Land Rights and the Right to Property

A distinct body of international law concerning the land rights of indigenous peoples is in the process of crystallization. It draws substantially on established areas of international law, but is heavily influenced by the development of international human rights law and by the increased national and international legal activity concerning indigenous peoples.

Article 11 of ILO Convention 107 on Indigenous and Tribal Populations (1957) provides:

The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.

This provision is binding on the twenty-seven parties to Convention 107,⁷⁸ and will remain in force until all twenty-seven of these States have either ratified the new ILO Convention 169 or denounced Convention 107. Although State practice is still notably inconsistent on the point,⁷⁹ and problems of interpretation arise, the Article 11 standard is the norm around which new customary international law appears to be coalescing.⁸⁰

International implementation of ILO Convention 107, as of the new Convention 169, is primarily through the ILO's Committee of Experts on the Application of Conventions and Recommendations. Each State party to ILO Convention 107 is required to submit a detailed report on its implementation of the Convention every four years. The Committee frequently addresses comments or requests for further information to the States concerned. In cases of particular difficulty, it publishes its observations and transmits them to the International Labour Conference for discussion. The Committee thus exerts pressure on States to comply with the Convention, and by its practice develops interpretations of provision in the Convention which become part of the evidence of its international law meaning. In its 1981 report, for instance, the Committee observed in response to Ecuador's report, that

It appears that no special measures have been adopted for the allocation of land to indigenous populations and its administration. As in most other countries with indigenous populations, there is a pressing need to protect the lands already held by these populations under traditional or other title, and to undertake measures to restore to them the lands they have lost or to provide lands adequate to enable them to survive as a distinct segment of the national population.⁸¹

ILO Convention 107 was used by the Supreme Court of India as one of the bases for an order under the fundamental rights provisions of the Constitution requiring land-for-land compensation (and in any event employment) to be arranged for members of Scheduled Tribes threatened with displacement by a coal refinery development. The Court quoted virtually verbatim from Convention 107 in stating:

It should also be remembered that Indigenous and Tribal Population Convention, 1957 which is Convention No. 107 of the International Labour Organisation and which has been ratified by India, provides in Article 12 that when tribal populations are removed without their free consent from their habitual territories they should be provided with land of quality at least equal to the land previously held by them, suitable to

provide for their present needs and future development, and in cases where chances of alternative employment exist and where they prefer to have compensation in money or in kind, they shall be so compensated. The tribals who are uprooted as a result of development projects have therefore to be provided with land of quality at least equal to that of the land occupied by them, suitable to provide for their present needs and future development and in any event, they must be given alternative employment.⁸²

The Meeting of Experts on the Revision of Convention 107 in 1986 showed little disposition to weaken the Article 11 standard, and favoured strengthening the rights of indigenous peoples in relation to economic development affecting their territories, to water rights, and to forced removals of indigenous peoples to other territories. One point of apparent consensus was that a revised Convention should include, in some form, 'Restrictions on the transfer of rights over indigenous and tribal territories to non-indigenous or non-tribal persons and institutions.'⁸³ On the question of restitution of territories, the possible future direction of international legal development was indicated by paragraph 81 of the report:

In addition to providing for the security of lands currently occupied by indigenous and tribal peoples, a number of experts and observers stressed the importance of restitution to these peoples of lands of which they had been dispossessed. In some countries they had rights, which were not given the respect they deserved, based on treaty rights, on grants or on immemorial possession, but these lands had been taken from them over the centuries. They now occupied lands which were greatly reduced from their earlier holdings, and which in many cases was insufficient to provide for their present needs and future development. One expert described in some detail that the principle of restitution had been recognised in the constitution or legislation in several Latin American Countries, and stated that it should be included in the revised Convention.⁸⁴

Negotiations leading to the revision of Convention 107 point to a considerable body of support for an international standard on land rights similar to Article 11, although many States were anxious to ensure that some qualifications or exceptions to this general standard were also included in the revised Convention.

Right to Property

The 'right to property' is a protection for individuals and groups against various acts of the State which may deprive them of property. The right to property is guaranteed in Article 17 of the Universal Declaration of Human Rights 1948:

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

Article 1 of Protocol 1 to the European Convention on Human Rights is a more intricate formulation of the same right, and has generated a considerable body of case law.

There are, however, sharp differences among States about the nature of the right to property. One difference is between those propounding the sanctity of ownership and those contending for the social function of property. An overlapping division is between capital exporters and capital importers concerning protection of foreign investments. A third is between those favouring the primacy of communal property and those who see property ownership as primarily individual. The influence of these different views is evident in Article 21 of the OAS American Convention on Human Rights 1969, which provides:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

A different formulation is adopted in the African Charter of Human and Peoples' Rights 1981 (which entered into force in 1986), in Article 13:

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

These and other disputes prevented the inclusion of any article on the right to property in the 1966 Covenants. The Commission on Human Rights reported in 1954:

No member of the Commission expressed opposition in principle to the inclusion of an article on the right of property. However, the Commission failed to adopt a unified text. Realising the difficulty of drafting an article that would command the majority, the Commission adjourned consideration of the question *sine die*.⁸⁵

This impasse continued for a long period, but the UN began to focus again on the right to property from the mid-1980s. On 4 December 1986 the UN General Assembly passed Resolution 41/32, expressing the conviction that the full enjoyment by everyone of the right to own property alone as well as in association with others, as set forth in article 17 of the Universal Declaration of Human Rights (UDHR), is of particular significance in fostering widespread enjoyment of other basic

human rights. Acknowledging this, the UN Commission on Human Rights adopted, by thirty votes to none with eleven abstentions, Resolution 1987/17 on 10 March 1987. In this resolution the Commission,

2. Considers that further measures may be appropriate at the national level to ensure respect for the right of everyone to own property alone as well as in association with others and the right not to be arbitrarily deprived of one's property, as set forth in article 17 of the Universal Declaration of Human Rights;

3. Urges States, therefore, in accordance with their respective constitutional systems, and in accordance with the Universal Declaration of Human Rights, to provide, where they have not done so, adequate constitutional and legal provisions to protect the right of everyone to own property alone as well as in association with others and the right not to be arbitrarily deprived of one's property. . . .⁸⁶

It appears that Article 17 of the UDHR may express a norm of customary international law binding at least on those States, including New Zealand, which voted for the UDHR in the General Assembly and have consistently regarded its provisions as important guides to international legal behaviour. There is considerable uncertainty, however, about the nature of a State's obligations regarding the property of its own nationals in customary international law.⁸⁷ As regards treaty law, Article 17(1) is confirmed in virtually identical terms by the International Convention on the Elimination of All Forms of Racial Discrimination 1966, Article 5(d)(v), which provides:

Article 5. In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . .

(d) Other civil rights, in particular: . . .

(v) The right to own property alone as well as in association with others. . . .⁸⁸

It is well established that 'property' bears a wide meaning in the context of provisions guaranteeing the right to property in general terms. In *Sporrong and Lönnvåg v Sweden* the European Court of Human Rights held that the maintenance in force for long periods of permits enabling the expropriation of a particular piece of land, and of prohibitions of construction of buildings on the land, was an infringement of the right even though the permits and prohibitions were eventually lifted and no expropriation in fact eventuated.⁸⁹ In *Attorney-General of The Gambia v Jobe* the Privy Council, construing a right to property provision in the Constitution of The Gambia, indicated that

'property' included *choses in action*, such as a debt owed by a bank to its customer.⁹⁰

Many issues concerning the right to property for indigenous peoples remain unsettled in international law. To the extent that the right to expect the Government to adhere to the principles of the Treaty of Waitangi is a right of the Māori people recognized in various ways under international law, it would appear possible for other States to take the view that arbitrary infringement of this right is a violation of the international law right to property. Given that failure on the part of the Government to adhere to the principles of the Treaty of Waitangi, if this occurred, has deleterious effects primarily for one racial group, it is also conceivable that the Committee on the Elimination of Racial Discrimination might regard this as an infringement of the Racial Discrimination Convention.

Indigenous Peoples and the 'Right to Development'

International law concerning indigenous peoples and development has several facets. These include the general international law on development;⁹¹ specific rules concerning the development policies of multilateral financial institutions (such as the World Bank's Operational Manual Statement on Tribal People in Bank-Financed Projects), international law relating to the environment;⁹² the emerging concept of a 'right to development' in international law, and specific principles concerning indigenous peoples' development (sometimes called 'ethnodevelopment'). These last two facets, in particular, may have a bearing on issues concerning the rights of Māori tribes or the Māori people. They were weighed by the Waitangi Tribunal in its 1988 report on the Muriwhemua Fisheries claim. In finding that the Māori fisheries claim was not limited to the technology or markets utilized in 1840, and that access to new technology and markets was part of the *quid pro quo* of the Waitangi settlement, the Tribunal noted 'That all peoples have a right to development is an emerging concept in international law following the Declaration on the Right to Development,' and referred to its possible application to indigenous peoples.⁹³

The impetus for the articulation of a 'right to development' at the international level dates from initiatives taken by various Government representatives in the UN Commission on Human Rights in the late 1970s. These were given an analytical structure by the UN Secretary-General in his Report on the International Dimensions of the Right to Development.⁹⁴ What was envisaged was broadly a synthesis of the 'civil liberties' variety of human rights and domestic and international concepts of economic, social, and cultural development. These latter concepts were eventually expressed as human rights and as rights of peoples, although both categorizations have been criticized.⁹⁵

The normative outcome was the Declaration on the Right to Development, adopted by the United Nations General Assembly on 4 December 1986 by Resolution 41/128. A total of 146 States (including New Zealand) voted in favour, one (the United States) voted against, and eight (mainly Western countries) abstained. This Declaration should not itself be thought of as embodying new customary law — it is rather a mixture of established principles of law and of desiderata. It may none the less point to eventual developments in international law of importance to indigenous peoples, whether or not these are ultimately characterized as collectively constituting a 'right to development'.⁹⁶

Relevant provisions of the Declaration include:

Article 1(1) 'The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. [...]

Article 3(1) 'States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development. [...]

Article 10 'Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.'

United Nations bodies are now examining the specific implications of the 'right to development', including those relating to indigenous peoples.

A written statement of some significance was made by Professor Danilo Türk, former representative of Yugoslavia in the UN Commission on Human Rights and one of the five members of the UN Working Group on Indigenous Populations, at the 1987 session of the Working Group.⁹⁷ He stated:

According to the Declaration (Art. 1, para. 1) the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized. According to Article 3 (para. 1) of the Declaration, states have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development. In other words, states should adopt special measures in favour of groups in order to create conditions favourable for their development. If a group claims that the realization of its right to development requires a certain type of autonomy, such a claim should be considered legitimate. [...] The usefulness of the idea of the right to development in the context of the rights of such groups

as minorities and peoples is in that it places the accent of their claim on development rather than on political status as such: autonomy is not an end in itself or a first step to political independence but rather an instrument necessary for their development and the development of their members, as well as the state as a whole. Such development-oriented interpretation of rights of groups could be helpful in the present efforts for further elaboration of international standards relating to these groups. As shown by the example of autonomy the concept of the right to development could be useful in the elaboration of 'indigenous rights'.⁹⁸

In its 1987 report on Indigenous Peoples, the Independent Commission on International Humanitarian Issues said:

at the conceptual level, the Working Group [on Indigenous Populations] should help clarify specific details relevant to the indigenous in the application of the 'right to development' as elaborated in the specific General Assembly resolution. We believe that, in the case of the indigenous, the 'right to development' has a special historical and substantive significance.⁹⁹

'Ethnodevelopment'

In parallel with the international efforts to articulate a 'right to development', there have been more specific efforts to formulate standards concerning indigenous peoples' participation in and control over their own development within the State.

Unesco convened a series of regional 'Meetings of Experts on Ethnodevelopment and Ethnocide' over the period 1981-1983. The Latin American meeting adopted the Declaration of San José on 11 December 1981, which includes the following:

2. We affirm that ethno-development is an inalienable right of Indian groups.

3. By ethno-development we mean the extension and consolidation of the range of its own culture, through strengthening the independent decision-making capacity of a culturally distinct society to direct its own development and exercise self-determination, at whatever level, which implies an equitable and independent share of power. This means that the ethnic group is a political and administrative unit, with authority over its own territory and decision-making powers within the confines of its development project, in a process of increasing autonomy and self-management. [...]

7. The Indian peoples have a natural and inalienable right to the territories they possess as well as the right to recover the land taken away from them. This implies the right to the natural and cultural heritage that this territory contains and the right to determine freely how it will be used and exploited.¹⁰⁰

Unesco also sponsored an 'International Symposium of Experts on Rights of Peoples and Solidarity Rights' in San Marino in 1982. This meeting concluded:

13. On account of the importance some peoples attach to land, which for many is not a mere possession or a means of production but the basis of their physical and spiritual existence, peoples have a natural and inalienable right over their territory. The land, which may not be confiscated for the benefit of a minority group, is an integral part of their heritage. They must retain the right to determine freely its use and exploitation. [...]

38. The right to development is one of the most fundamental rights to which peoples are entitled, for its realization is the source of respect for most of the fundamental rights and freedoms of peoples. The international community has already widely enshrined this concept in universal and regional instruments. [...]

40. Each people has the right to determine its own development by drawing on the fundamental values of its cultural traditions and on those aspirations which it considers to be its own. This right to authentic development is, in fact, three-pronged: economic, social and cultural.¹⁰¹

The Meeting of Experts convened by the ILO in 1986 to begin the revision of ILO Convention 107 on Indigenous and Tribal Populations concluded:

2. Indigenous and tribal peoples should enjoy as much control as possible over their own economic, social and cultural development.¹⁰²

The International Labour Office proposed that a provision in these terms be included in the revised Convention,¹⁰³ and the Committee on Convention 107 of the International Labour Conference in 1988 added that,

The [indigenous and tribal peoples] concerned should have the right to decide their own priorities for the process of development as it affects their lives, beliefs, territories, institutions and spiritual well-being...¹⁰⁴

Indigenous peoples have placed considerable emphasis on their right to instigate and control their own development. A Preparatory Meeting of Indigenous Peoples held in Geneva prior to the 1987 session of the UN Working Group on Indigenous Populations adopted a Declaration of Principles, in which is included:

4. Indigenous nations and peoples are entitled to the permanent control and enjoyment of their aboriginal ancestral-historical territories. This includes air space, surface and subsurface rights, inland and coastal waters, sea ice, renewable and non-renewable resources, and the economies based

on these resources.¹⁰⁵

As the New Zealand Government and Māori enter a new phase of claims settlement, and as Māori Tribal Trust Boards, Incorporations, and Iwi authorities increasingly secure control of the economic development of their own peoples,¹⁰⁶ the experiences and policies of other indigenous peoples, of other Governments, and of international organizations, will be a significant source.¹⁰⁷

Cultural Rights

International efforts to define (and eventually to implement) various cultural rights are of considerable importance to indigenous peoples, and may bear on Treaty issues in many different ways. The focus in this section will be primarily on cultural rights as they relate to land and natural resources. It is jurisprudentially difficult to identify and formulate a single generalized 'right to culture', with individual and group dimensions, in international law as it stands at present. However, a number of constituent elements of such a right are provided for in various international instruments.

The International Covenant on Economic, Social and Cultural Rights 1966 provides, in Article 15(1):

The States Parties to the present Covenant recognize the right of everyone:
(a) To take part in cultural life.

This is very similar to Article 27(1) of the Universal Declaration of Human Rights:

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

Other rights conducive to the realization of this right are the rights to:

- Freedom of expression, of association, and of religion (UDHR, Articles 18, 19, and 20; ICCPR, Articles 18, 19, 21, 22; and all major regional human rights treaties)
- Education (UDHR, Article 26; ICESCR, Article 13(1); European Convention on Human Rights, Protocol I, Article 2; etc.)
- Communicate in, and educate children to the extent of fluency in, ones own language (ICCPR, Article 27; Unesco Convention Against Discrimination in Education, Article 5(1)(c).)¹⁰⁸

These stipulations relating to the right to culture do not deal specifically with the question of the right of ethnic or racial groups to maintain and develop their own cultures. This subject is addressed by

Article 27 of the International Covenant on Civil and Political Rights, which provides:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Although international legal opinion is clearly moving towards recognition of human rights for groups, it is not finally determined in international law whether Article 27 confers rights on minority communities as groups. The article refers to 'persons belonging to such minorities', but the reports of States parties to the Covenant, including New Zealand, have not generally drawn a distinction under Article 27 between rights of members as individuals and the collective rights of the whole group. The United Nations Human Rights Committee has similarly tended to treat Article 27 as covering both categories in its discussion of these reports. It has upheld the claim of a Canadian Indian, and given favourable consideration to a claim by a Swedish Sami, under Article 27 in complaints brought by them as individuals under the Optional Protocol, but it has not had an opportunity to pronounce on the collective rights aspect of Article 27 in complaints under the Optional Protocol or under the inter-state complaints procedure in Article 41 of the Covenant.¹⁰⁹ In 1985 the Inter-American Commission on Human Rights held that Article 27:

recognizes the right of ethnic groups to special protection on their use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity.¹¹⁰

It is well recognized that international law does protect the separate identity of racial or ethnic groups as groups in certain contexts. The best examples are the International Convention on the Prevention and Punishment of the Crime of Genocide 1948, and the International Convention on the Elimination of All Forms of Racial Discrimination 1966. These Conventions, which also represent customary international law in these fields, both expressly protect racial and other groups from certain abuses. The Racial Discrimination Convention also requires the taking of certain positive measures — these will be referred to below.

Almost all the international treaty norms concerning rights to culture were drafted at a time when it was generally expected that minority cultures, especially those of indigenous peoples, would gradually be assimilated into the dominant culture in each State. This attitude is illustrated by remarks of members of the UN Sub-Commission on the

Prevention of Discrimination and the Protection of Minorities in 1953, during the drafting of what became the ICCPR. The delegate of the United Kingdom, Mr Hoare, supported the view that it would be undesirable if the Covenant were to delay the 'inevitable historical process' of assimilation of 'backward groups'.¹¹¹ Australia's delegate stated that,

there were no minority problems in Australia, no matter which was the correct meaning to be attached to the word 'minority'. . . There were, of course, the aborigines, but they had no separate competing culture of their own. . .¹¹²

The dominant attitude in the international community has changed markedly since that time. An illustration is the UNESCO Declaration on Race and Racial Prejudice, adopted by consensus (in which the New Zealand Government participated) at the 20th General Conference on 27 November 1978. Its provisions include:

Article 1(2): All individuals and groups have the right to be different, to consider themselves as different and to be regarded as such. . .

Article 5(1): [Education and culture enable men and women] to recognize that they should respect the right of all groups to their own cultural identity and the development of their distinctive cultural life within the national and international context, it being understood that it rests with each group to decide in complete freedom on the maintenance and, if appropriate, the adaptation or enrichment of the values which it regards as essential to its identity.

Article 6(1): The State has prime responsibility for ensuring human rights and fundamental freedoms on an entirely equal footing. . . for all individuals and all groups.¹¹³

[The text is reprinted in Lerner, Nathan, *The UN Convention for the Elimination of All Forms of Racial Discrimination*, 2nd ed., (Leiden, 1980).]

The IXth Inter-American Indian Congress (comprising the Governments of States members of the Organisation of American States) held in Santa Fe, New Mexico, in 1985, by Resolution No. 4 called upon member States:

to ensure the organised participation of these peoples in taking decisions on development; to recognise the multi-ethnic and pluricultural nature of national societies; to stimulate bilingual education; and to replace integrationist concepts by a policy of respect and autonomous development based on the values, objectives and aspirations of these peoples, in order to achieve equality within diversity.¹¹⁴

The importance of land, including rivers, mountains, lakes, forests and other features, to the cultures of indigenous peoples is an

overwhelming theme of the relationships between indigenous peoples and national Governments in many countries. The United Nations Special Rapporteur on the Problem of Discrimination Against Indigenous Populations, after an exhaustive ten-year study covering thirty-seven countries (including New Zealand), concluded:

509. It must be understood that, for indigenous populations, land does not represent simply a possession or means of production. It is not a commodity that can be appropriated, but a physical element that must be enjoyed freely. It is also essential to understand the special and profoundly spiritual relationship of indigenous peoples with Mother Earth as basic to their existence and to all their beliefs, customs, traditions and culture. . .

510. It is also essential to increase understanding of the profound sense of deprivation experienced by indigenous populations when the land to which they, as peoples, have been bound for thousands of years is taken away from them. No one should be permitted to destroy that bond. Systematic violations of the rights of indigenous peoples to land and its resources should cease.¹¹⁵

A common conception of land among indigenous peoples is that quoted by C.K. Meek, attributed to a Nigerian chief:

I conceive that land belongs to a vast family of which many are dead, few are living, and countless members are still unborn.¹¹⁶

Several studies of the relationship between the Aboriginal people and the land in Australia have reached conclusions similar to that of Elkin, who says:

It is true, at least from our point of view, that members of such a local [kinship] group owned their 'country'. But that is only one aspect of the situation. A more significant aspect is that they belonged to their 'country' — that it owned them. . . The relationship between individuals and groups with their churinga and Dreamings generally, while having an aspect of ownership, is rather one of identification.¹¹⁷

Thus one aim of the Woodward Commission in drafting what became the Aboriginal Land Rights (Northern Territory) Act 1976 (Commonwealth) was,

the preservation, where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity and which lies at the heart of his spiritual beliefs.¹¹⁸

The significance of land to Māori culture does not appear to depart from the general relationship between indigenous peoples and the land noted

so frequently at the international level. Thus, to take one example, the Māori concept of land ownership described by the Waitangi Tribunal in the Manukau claim report is entirely consistent with that on which the developing norms are predicated:

Others referred to the Maori concept of ownership. They own no more than a right to use and enjoy the fruits of the land and water. They hold them in trust for their children, and their children's children after them. They cannot sell or destroy the rights of future beneficiaries, but have a duty to pass them on in at least as good a condition as they received them.¹¹⁹

In the light of this understanding of the importance of land to the cultures of indigenous peoples, a number of specific texts concerning the right to culture for indigenous peoples have been adopted at the international level since 1978. Most important are the Draft Principles adopted by the United Nations Working Group on Indigenous Populations:

4. The right to manifest, teach, practice and observe their own religious traditions and ceremonies, and to maintain, protect, and have access to sites for these purposes.

6. The right to preserve their cultural identity and traditions and to pursue their own cultural development.¹²⁰

Other relevant resolutions of governmental and non-governmental conferences include,

The Conference endorses the right of indigenous peoples to maintain their traditional structure of economy and culture, including their own language. . .¹²¹

The Conference urges States to recognize the following rights of indigenous peoples. . .

(c) To carry on within their areas of settlement their traditional structure of economy and way of life; this should in no way affect their right to participate freely on an equal basis in the economic, social, and political development of the country. . .¹²²

With respect to indigenous populations, Governments should recognise and respect the basic rights of such populations: . . .

(c) To maintain within the areas where they live their traditional economic structure and way of life; this should in no way affect their right to participate freely on an equal basis in the economic, social, and political development of the country. . .¹²³

We, the participants in this Conference, Indians and other specialists, thus:

Declare that ethnocide, i.e. cultural genocide, is a crime against international law, as is genocide, the subject of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948. We affirm that ethnodevelopment is an inalienable right of Indian groups.

By ethnodevelopment we mean strengthening and consolidating a culturally distinct society's own culture, by increasing its independent decision-making capacity to govern its own development and the exercise of self-determination, at any level, considered and implying an equitable and just power structure. This means that the ethnic group forms a political and administrative entity, with authority over its own territory and decision-making powers in areas constituting its own development from within processes of expanding autonomy and self-management.¹²⁴

The cultures of the indigenous peoples are part of the cultural heritage of mankind. The shared beliefs of indigenous peoples in co-operation and harmonious relations are recognized as a fundamental source of international law.¹²⁵

State and judicial practice has begun to come into line with these normative statements. In its Resolution No. 12/85 of 1985, dealing with a complaint made against Brazil in respect of its treatment of the Yanomami Indians, the Inter-American Commission on Human Rights formally took account of the fact:

That the Organization of American States has established, as an action of priority for the member states, the preservation and strengthening of the cultural heritage of these ethnic groups and the struggle against the discrimination that invalidates their members' potential as human beings through the destruction of their cultural identity and individuality as indigenous peoples.¹²⁶

The Commission went on to find:

by reason of the failure of the Government of Brazil to take timely and effective measures in behalf of the Yanomami Indians, a situation has been produced that has resulted in the violation... of the following rights recognized in the American Declaration of the Rights and Duties of Man: the right to life, liberty, and personal security (Article I); the right to residence and movement (Article VIII); and the right to the preservation of health and to well-being (Article XI).¹²⁷

In summary, elements of a 'right to culture' are already guaranteed in a number of legally binding international instruments. A new body of international practice is developing whereby this right is recognized as providing specific protection for lands, sites, or artefacts of indigenous peoples, where these are of particular significance for the cultures of the peoples concerned. This protection increasingly includes a right to

have access to, and to control conflicting uses of, such sites or artefacts.

Ko te Rito tangata koe
Ko te poho marae
Ko te hinengaro rarau
Nou te ao.

Notes

- 1 This chapter is written as an introductory overview. Citations have been confined to material of particular relevance to the topics discussed. A much more detailed and specialized treatment is contained in the writer's Oxford D. Phil thesis, 'Indigenous Peoples and International Law' (forthcoming).
- 2 For instance, the letters of Joseph Somes, Governor of the New Zealand Company, to Lord Stanley, dated 24 January 1843 and 15 February 1843. In the latter Somes said that 'no judge could regard it [the Treaty] as altering the character of the savage tribes who were made to play the part of contracting parties, or as entitled to be ranked with those grave diplomatic acts which are recognized by the tribunals of Europe as having the force of law among Christian nations.' GBPP, 1844, vol. 13, at p. 327, p. 318 (Appendix no. 2 to the *Report from the Select Committee on New Zealand* at p. 39 and p. 30).
- 3 (1877) 3 NZ Jur (NS) 72, 78 per Prendergast CJ. The impact of this view is evident, for instance, in the work of N.A. Foden — see his *New Zealand Legal History (1642 to 1842)* (Wellington: Sweet and Maxwell, 1965).
- 4 This is also the view reached by the late W.A. McKean in probably the most detailed modern paper on this aspect of the Treaty: 'The Treaty of Waitangi Revisited', in Wood, G.A., and O'Connor, P.S., (eds), *W.P. Morrell: A Tribute* (Dunedin: University of Otago Press, 1973), pp. 237-49. A slightly earlier version appeared in *The Treaty of Waitangi: Its Origins and Significance* (Wellington: VUW, 1972), pp. 35-48. This section takes McKean's paper as covering much of the established ground, and does not seek to reiterate many of the points he makes. See also Keith, K.J., 'International Law and New Zealand Municipal Law', in Northey, J.F., (ed.), *The A.G. Davis Essays in Law* (London: Butterworths, 1965; and McHugh, Paul, 'The Aboriginal Rights of the New Zealand Maori at Common Law' Ph.D. Thesis, Cambridge University, 1987, pp. 97-103.
- 5 See generally Brownlie, Ian, 'The Expansion of International Society: The Consequences for the Law of Nations' in Hull and Watson (eds) *The Expansion of International Society* (Oxford: Clarendon Press, 1984) pp. 357-69. See also the chapter by David Williams in this volume.
- 6 It is noteworthy that the semi-official *Index to British Treaties 1101-1968* (ed Parry and Hopkins — London: HMSO, 1970) makes no distinction as to counterparts — treaties concluded with indigenous peoples are interspersed with treaties with European States. The same is true for British and Foreign State Papers, and for the treaty series of Herslet and Martens. Martens was criticized for omitting treaties with indigenous peoples from his first few volumes, and subsequently sought to rectify the omission.
- 7 See especially McHugh, Paul, 'The Aboriginal Rights of the New Zealand Maori at Common Law', Ph.D. Thesis, Cambridge University, 1987.
- 8 GBPP, 1837, vol. 7, p. 80.
- 9 See McHugh, op. cit., ch. 3.
- 10 See generally Adams, Peter, *Fatal Necessity: British Intervention in New Zealand 1830-1847* (Auckland: Auckland University Press, 1977); and Orange, Claudia, *The Treaty of Waitangi* (Wellington: Allen and Unwin, 1987).
- 11 Willoughby Shortland, for instance, argued that in the military situation of New Zealand in the 1840s, the promises in Article II of the Treaty were essential to the maintenance of British government — see his letter to Lord Stanley of 18

- January 1845. GBPP, 1845, vol. 33 pp. 355-61. Cf. also Belich, James, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict* (Auckland: AUP, 1986).
- 12 GBPP, 1840, vol. 33, pp. 627-8 (p. 378 of the Correspondence Relative to New Zealand).
- 13 GBPP, 1841, vol. 17, p. 523 (p. 27 of the Correspondence Respecting the Colonization of New Zealand).
- 14 GBPP, 1841, vol. 17, p. 528 (p. 72 of the Correspondence Respecting the Colonization of New Zealand).
- 15 On estoppel generally, see the following section.
- 16 ICJ Rep., 1974, p. 253.
- 17 *Le Moniteur* (Chambre des Députés), 1844, p. 1545. The original text is: 'De 1815 à 1838, plusieurs efforts ont été faits en Angleterre pour déterminer le gouvernement à réclamer la souveraineté sur la Nouvelle-Zélande en vertu de ces actes passagers que je viens de rappeler. Le gouvernement s'y est toujours refusé; non-seulement il s'y est refusé, mais il a par plusieurs actes publics, par plusieurs du gouvernement, reconnu, formellement reconnu l'indépendance de la Nouvelle-Zélande comme formant un Etat sous ses chefs naturels.'
- 18 *Le Moniteur* (Chambre des Députés), 1844, pp. 1545-9. Note that this is not quite consistent with the emphasis placed on the Proclamation of 21 May in respect of the South Island by Richardson J in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641. Following the approach of Marshall CJ in *Johnson v McIntosh*, (1823) 8 Wheat. 54, it is possible to view the Proclamation of 21 May as an assertion of rights based on 'discovery' as against other European powers, with the subsequent Proclamation enunciating Māori consent to the extension of British sovereignty to the South Island in the terms set out in the Treaty.
- 19 *US Memorial* in the Webster claim, 1913, pp. 58-9 — quoting the *Report of the US Senate Committee on Foreign Relations*, 14 April 1892. A copy of the Memorial is in the Bodleian Law Library, Oxford.
- 20 *Webster Memorial*, p. 92. The earlier (1887) *Report of the Committee* is printed at p. 211. There the Committee stated that 'The sovereignty of a tribe being admitted, all question as to their right to convey their lands disappears. This is conspicuously true as to the New Zealand chiefs, whose rights are expressly admitted in the treaty of cession and merge into the British colonial system, and upon which treaty every land title in the colony is distinctly based, whether accruing to the Crown or to British subjects.' (*Memorial*, pp. 220-1.) The State Department took a similar position in a Memorandum submitted in 1890 — see *Webster Memorial*, p. 98. See also the *Opinion of the State Department's Law Bureau* given in 1880 (*Memorial* at p. 264). In another Report, the Committee said that the Treaty of Waitangi 'is the sole basis of any right of dominion, or property, that the British Government has ever acquired in those islands. Whatever may have been the previous designs of that Government as to the acquisition of New Zealand by conquest, the treaty of February 6, 1840, placed the chiefs of the tribes, respectively, on the footing of sovereign rulers and recognized their full right to treat as such with Great Britain or any other power.' (*Memorial*, pp. 228-9.)
- 21 *Record of the Proceedings of the Commissioners and Umpire*, UK Public Records Office, File FO 9732, p. 125 at p. 126 (Opinion of 4 November 1854). The Umpire did not express a view on this issue. Material discovered by G. Marston and P. McHugh.
- 22 *Ibid.*, p. 130.
- 23 Award of 12 December 1925 — (1926) 20 *American Journal of International Law* 391. Legal opinions given to the Aborigines' Protection Society by Phillimore and Woolmer, published in 1848, further support this view. See Chamerovzow, L.A., *The New Zealand Question and the Rights of Aborigines* (London: T.C. Newby, 1848), appendix.
- 24 O'Connell, D.P., *International Law*, vol. 1 (London: Stevens & Sons, 1965. See also pp. 436-42 on acquired rights.), p. 508. Also pp. 436-42.
- 25 ICJ Rep., 1975, paragraphs 81 and 82.
- 26 Appendix to Chamerovzow, *op. cit.*, p. 5.
- 27 *Ibid.*, p. 49.
- 28 The United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities has appointed a Special Rapporteur, Miguel Alfonso Martínez, who began by preparing a preliminary 'Outline on the Study of Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations' (UN Doc E/CN.4/Sub.2/1988/2/Add. 1 of 24 August 1988). From this outline it appears that his final report will endeavour to address the international legal status of certain categories of treaty involving indigenous peoples, and may thus shed some light on the juridical status of the Treaty of Waitangi.
- 29 On this point, an analogy may be drawn with cases under the Minorities Treaties in Europe after World War I — for example, the *Minority Schools in Albania* case, PCIJ Rep., Series A/B, no. 64 (1935).
- 30 Compare James Crawford's interesting work on the need for an 'Aboriginal public law' in Australia, and the possibilities of developing it through a treaty or compact between the Government and Aboriginal people. A preliminary version was 'The Aboriginal Legal Heritage: Aboriginal Public Law and the Treaty Proposal' (paper delivered at The Bicentennial Australian Legal Convention, Canberra, September 1988).
- 31 The manner and extent to which international law, and comparative law material, influences New Zealand municipal law must be the subject of a separate paper.
- 32 As the ICJ said in the *Nuclear Tests* cases, 'One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. . . . (ICJ Rep, 1974, p. 268 (*Australia v France*) and p. 473 (*New Zealand v France*)). On the importance of good faith in the natural law systems of Victoria and Suarez see Scott, *The Spanish Conception of International Law and of Sanctions* (Washington, 1934), pp. 86-7 and 130-1. See also Lachs, 'Some Thoughts on the Role of Good Faith in International Law' in *Declarations on Principles* (Leyden: Sijthoff, 1977) 47.
- 33 See Article 2(2) of the United Nations Charter and, specifically on treaties, Article 26 of the Vienna Convention on the Law of Treaties 1969: 'Every treaty in force is binding upon the parties to it and must be performed in good faith.' Note also the central importance of good faith as a principle of treaty interpretation prescribed in Article 31 of the Vienna Convention 1969. The 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations is in the same terms. (The Vienna Conventions do not themselves apply directly to bilateral treaties having parties other than States or inter-governmental organizations, but they expressly keep open the possibility that such treaties may be recognized and regulated by international law.) See also e.g., the *Nuclear Tests* cases, ICJ Rep, 1974, p. 268 and p. 473; and Sep Op Sefériadés in the *Lighthouses* case, PCIJ, 1934, Series A/B, No 62, at 47.
- 34 (1916) 1 Scott at 170. See also *US Nationals in Morocco*, ICJ Rep, 1952, at 212: 'The power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith.'
- 35 Virally, M., 'Review Essay: Good Faith in Public International Law' (1983) 77 *AJIL* 130, 132-3.
- 36 Paulsson, 'May a state invoke its internal law to repudiate consent to international arbitration?' (1986) 2 *Arbitration International* 90. See also ICC Award no. 1939 (1971), quoted by Derains, 'Le statut des usages du commerce international devant les juridictions arbitrales', [1973] *Revue de l'arbitrage* 122, 145. E.A. Mann drew from such principles the practical implication that the concept of denial of justice must be extended: 'In its practical effect the failure of a contracting State to implement an arbitration clause is tantamount to barring access to the tribunal which could, should, and is agreed to, be available. Obstruction by a State has a different quality from obstruction by a private person.' 'State contracts and international arbitration' (1967) 42 *BYIL* 28. On the importance of good faith as a principle of German public law in dealing with international issues see the decision of the Bavaria Superior Provincial Court in the *Russian Nobleman Nobility* case (1971), 72 *ILR* 435 at 444.
- 37 Cheng, Bin, *General Principles of Law as Applied by International Tribunals* (London: Stevens, 1953 — reprinted by Grotius Publications, Cambridge, 1987), p. 123. This is based upon *Free Zones*, PCIJ, 1932, Series A/B, no. 46, at p. 167; and (perhaps less unequivocally) *Oscar Chinn*, PCIJ, 1934, Series A/B, no. 63, at p. 86. The doctrine

- of abuse of rights has been invoked in several international commercial arbitrations between a corporation and a State — see e.g., *IMP v Libya* (1973) 53 ICLR at 331 (abuse of sovereign power); and the Interim Award in *Westland Helicopters v Arab Organization for Industrialization* (1984) 23 ILM 1071, although this Award was eventually annulled and a challenge to the arbitrators mounted (Dudin in [1987] *Revue de l'arbitrage* 205).
- 38 The most vociferous champion of the doctrine was Judge Alvarez — see e.g., *Corfu Channel (Merits)*, ICJ Rep. 1949, at 48; *Competence of the General Assembly for the Admission of a State to the United Nations*, ICJ Rep. 1950, at pp. 15-21. See also Judge Ammoun in *Barcelona Traction*, ICJ Rep. 1970, 324. Several other dicta are to similar effect, as are the pleadings of several States in PCIJ and ICJ cases.
- 39 A proponent of this latter approach was H. Lauterpacht, writing just as the doctrine was beginning to appear in academic literature, in *The Function of Law in the International Community* (Oxford: OUP 1933), ch. 14, esp. p. 286. On the categories see Kiss, A., 'Abuse of Rights', in *Encyclopedia of Public International Law*, Inst. 7, pp. 1-5. See also Hiyomade, B.O., 'The Scope and Content of a Complaint of Abuse of Right in International Law' (1975) 16 *Harvard ILJ* 47; Paul, V., 'The Abuse of Rights and Bona Fides in International Law' (1977) 28 *Österreichische ZRV* 107; and Taylor, G.S.D., 'The Content of the Rule against Abuse of Rights in International Law' (1972-1973) 46 *BYIL* 323.
- 40 In the United States, for instance, the policy of the new union concerning Indians was set forth in the Northwest Ordinance of 1787:

The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress.

- (Quoted by Cohen, F., 'The Spanish Origin of Indian Rights in the United States' (1942) 31 *Georgetown Law Journal* 1, (2.) See also Normanby's Instructions to Hobson of 14 August 1839, quoted by, *inter alia*, Somers J in *NZMC v A-G* [1987] 1 NZLR 641, 692-3; and Adams, Peter, *Fatal Necessity: British Intervention in New Zealand 1830-1847* (Auckland: AUP, 1977), pp. 238-45.
- 41 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 673. On the central importance of good faith in the partnership between the Crown and the Māori people see also Cooke P at pp. 664 and 667, Richardson J at pp. 680-3, Somers J at p. 693, and Casey J at p. 703.
- 42 [1987] 1 NZLR 641, 682. He cites Article 2 of the UN Charter, Articles 26 and 31(1) of the Vienna Convention on the Law of Treaties 1969, and Virally in (1983) 77 *AJIL* 130.
- 43 2 Op. A-G (1828) at p. 133. See also *R v Sphiboy* [1929] 1 DLR 307, 314, where Patterson J, having held that the Micmac-Nova Scotia Treaty of 1752 was not a treaty because of incapacity of the parties and lack of ratification by Great Britain, added a plea for a form of moral estoppel: 'Having called the agreement a treaty, and having perhaps lulled the Indians into believing it to be a treaty with all the sacredness of a treaty attached to it, it may be the Crown should not now be heard to say it is not a treaty. With that I have nothing to do. That is a matter for representations to the proper authorities — representations which if there is nothing else in the way of the Indians could hardly fail to be successful.' (The 1752 Treaty was held to be valid and binding by the Supreme Court of Canada in *Simon v The Queen* [1985] 2 SCR at p. 401.) A similar moral compulsion was evoked by Lord Denning MR in *R v Secretary of State for Foreign Affairs, ex p. Indian Association of Alberta* [1982] 1 QB 892, 919.
- 44 On estoppel see generally Brownlie, *Principles of Public International Law*, 3rd ed, (Oxford: OUP, 1979), pp. 637-9; Bowett, D.W., 'Estoppel before International Tribunals and its Relations to Acquiescence' (1957) 33 *BYIL* 176; MacGibbon, I.C., 'Estoppel in International Law' (1958) 7 *ICLQ* 468; Zoller, E., *La bonne foi en droit international public* (Paris: Pédone, 1977).
- 45 ICJ Rep. 1984, 246 at pp. 304-10. Although no indication is given in the judgment, reservations about the doctrine of estoppel in international law often concern the

- acceptability of a total procedural bar to certain assertions, or the operation of specific common law doctrines such as issue estoppel, promissory estoppel, and estoppel by deed.
- 46 ICJ Rep. 1969, p. 26.
- 47 ICJ Rep. 1960, 192 at 213.
- 48 Oscar Schachter poses the issue in the form: 'Let us suppose governments in conformity with a nonbinding agreement follow a course of conduct which results in a new situation. Would a government party to the agreement be precluded from challenging the legality of the course of conduct or the validity of the situation created by it?' He argues that in certain cases an international organization, for instance, would apply the doctrine of estoppel. 'The Twilight Existence of Nonbinding International Agreements' (1977) 71 *AJIL* 296, 301.
- 49 The *Expenses* case, ICJ Rep. 1962, Opinion, and esp. Sep. Ops Fitzmaurice and Spender.
- 50 ICJ Rep. 1962, at 32. See also the *Report of the Court of Arbitration in the Argentina-Chile boundary arbitration 1966* (McNair Pres. Kirwan and Papworth) (IMSO, 1966) p. 66-8.
- 51 Several are cited in the speech of Lord John Russell in GBPP 1840, vol. 55, pp. 531-3.
- 52 *Report of the Select Committee on Aborigines* (1837), GBPP, 1837, vol. 7, p. 80. The Committee felt that:

Compacts between parties negotiating on terms of such entire disparity are rather the preparatives and the apology for disputes than securities for peace: as often as the resentment or the cupidity of the more powerful body may be excited, a ready pretext for complaint will be found in the ambiguity of the language in which their agreements must be drawn up, and in the superior sagacity which the European will exercise in framing, in interpreting, and in evading them.

- 53 Note, for instance, the terms of Normanby's instructions to Hobson, quoted above.
- 54 Opinion by the Hon. Sir Robert Stout on Webster's Land Claims, *Appendices to the Journals of the New Zealand House of Representatives*, 1893, A-4, p. 3.
- 55 *Motunui Report*, Wai-6, 1983, pp. 55-8 (typescript).
- 56 *Orakei Report*, Wai-9, 1987, pp. 128-9.
- 57 *Motunui Report*, Wai-6, 1983, p. 55.
- 58 *Maukahu Report*, Wai-8, 1985, p. 88; *Orakei Report*, Wai-9, 1987, pp. 128-35.
- 59 *Muriwhenua Report*, Wai-22, 1988, p. 188.
- 60 This point was made by the Court of Appeal in *New Zealand Maori Council v Attorney-General*. In rejecting a submission by counsel for the Crown based on certain international law principles concerning treaty interpretation, Casey J said that 'the deliberate choice of the expression "Principles of the Treaty" in s. 9 [of the State-Owned Enterprises Act] indicates that a more fundamental approach must be taken in determining its impact on the workings of the State-Owned Enterprises Act in today's very changed conditions' ([1987] 1 NZLR 641, 703). See also the *Muriwhenua Report*, p. 189.
- 61 175 US 1, 10-11 (1899) (US Supreme Court). In *Worcester v Georgia* Marshall CJ refused to accept that the Indian parties to a treaty in the English language would have been in a position to draw a distinction between the word 'allotted' and the words 'marked out'. (6 Pet 515, 552 (1832) — see also McLean J at p. 582.)
- 62 *Nowegijick v The Queen* [1983] 1 SCR 29 (Supreme Court of Canada).
- 63 *Simon v The Queen* [1985] 2 SCR at 404, per Dickson CJ. See also Sanders, Douglas, 'Aboriginal Peoples and the Constitution' (1981) 19 *Alberta Law Rev.* 413, 414, 18.
- 64 *Brazilian Loans*, PCIJ, Series A, Nos 20 and 21, p. 114 (1929); *David Goldenberg & Sons* 2 RIAA 901, 907 (1928).
- 65 *Petroleum Developments v Abu Dhabi* 18 ICLR 144 (1951).
- 66 6 RIAA 173, 183 (1928).
- 67 6 RIAA 173, 187.
- 68 *International Status of South West Africa* ICJ Rep. 1950, at 132.
- 69 See, for example, *Genin v The Queen* (1984) 13 DLR (4th) 591 (Supreme Court of Canada); *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664 per Cooke P ('the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties'); *United States v Kagama* 118 US 375 (1886) (US

- Supreme Court); *Morton v Mancari* 417 US 535 (1974) (US Supreme Court). See also *Chocoma Nation v US* 119 US 1 (1886) (US Supreme Court), where Matthews J said: 'The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former. . . The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.' This dictum was applied by Morrow J in *Re Paulette's Application* [1973] 6 WWR 97, 143 (Northwest Territories Supreme Court).
- 70 Note the interesting dictum in the ICJ's opinion in the *Western Sahara* case that, whereas Morocco contended that the Arabic text of the Morocco-Spain Treaty of 1767 implied Spanish recognition of Moroccan sovereignty in the disputed area, but the Spanish text bore a different meaning, 'it would be difficult to consider such international recognition as established on the sole basis of a Moroccan text diverging materially from an authentic text of the same treaty written in the language of the other State.' (ICJ Rep, 1975, pp. 50-1.)
- 71 The cessions obtained by the United States in respect of American Samoa appear to have been executed in the Samoan language in the first instance. English versions of the texts are contained in the *American Samoa Code Annotated* (1981), pp. 2-3. See also Gray, J.A.C., *American Samoa: A History of American Samoa and its United States Naval Administration* (1960), pp. 108-17.
- 72 The English version and Māori versions are placed on an equal footing by the Treaty of Waitangi Act 1975. The differences between the two have been analysed extensively elsewhere — see Ross, Ruth, 'Te Tiriti o Waitangi: Texts and Translations' (1972) 6 *New Zealand Journal of History* 129-52; Orange, Claudia, *The Treaty of Waitangi* (Wellington: Allen and Unwin, 1987); the reports of the Waitangi Tribunal to date; the chapters by Hugh Kawharu and David Williams in this volume; and *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.
- 73 Delia Opekokew asserts, perhaps optimistically, that 'The disparity between our [Indian] understanding of the treaties and the actual contents of the written documents disappears if the verbal promises, assurances, and guarantees given by the Treaty Commissioners during negotiations are regarded as an integral part of the Treaty agreements.' (*The First Nations: Indian Government in the Community of Man*, 1980, p. 17).
- 74 Such collateral agreements constitute part of the context — Vienna Convention 1969, Article 31(2).
- 75 This type of case arises especially where the reports of the negotiators on behalf of the State indicate that their understanding of the treaty, and the explanation of it which they gave to the counterpart, was significantly different from the written text. (See, for example, the evidence considered in *Re Paulette's Application* [1973] 6 WWR 97, at pp. 138-43). It is not clear whether in such cases the written agreement can be defeated only if it falls within one of the established heads of invalidity, such as fraud. The doctrine contended for here is a form of *non est factum*, but it may not be more than a strong principle of construction.
- 76 'The Nolin-Paypom Treaty and Wild Rice' (unpublished paper, 1980). Similar studies have been done in respect of Treaties 8 and 11 in Canada (Rene Fumoleau, *As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939*, Toronto: McClelland and Stewart, 1973); and, in respect of the Treaty of Waitangi, see Hugh Kawharu's chapter in this volume. The decision of the Privy Council in *Attorney-General for Canada v Attorney-General for Ontario* (1897) AC 199 should not be seen as conflicting with the approach described in this section — the Privy Council's construction of the treaties in that case proceeded on the express assumption that the outcome was a 'matter of absolute indifference to the Indians', who were not parties to the litigation (p. 212).
- 77 Useful starting points in the secondary literature in English include: the symposium in (1978) 27 *Buffalo Law Rev.* (No. 4); Barsh, Russel L., 'Indigenous North America and Contemporary International Law' (1983) 62 *Oregon Law Rev.* 73; Sanders, Douglas, 'The Re-Emergence of Indigenous Questions in International Law' (1983) 1 *Canadian Human Rights Yearbook* 3; the articles in (1987) 13 *Transnational Perspectives* (No. 1); Thompson, Ruth, (ed.), *The Rights of Indigenous Peoples in International Law: Selected Essays on Self-Determination* (Saskatchewan: University of Saskatchewan Native Law Centre, 1987); Crawford, James, *Aboriginal Self-Government in Canada*, a research report for the Committee on Native Justice of the Canadian Bar Association (January 1988); and Hannum, Hurst 'New Developments in Indigenous Rights' (1988) 28 *Virginia Journal of International Law* 649.
- 78 The revised version of Convention 107, due for adoption by the 1989 International Labour Conference.
- 79 Although often not implemented, it is notable that several countries in South and Central America have legislation recognizing indigenous land rights. For instance, the Brazilian Indian Statute of 1973 is drafted to be consistent with ILO Convention 107. Under Article 2 of the Statute:
- It is the duty of the Union, the States and the Counties (municipios) . . . to . . . V. Guarantee the Indians the right to remain, if they so wish, permanently in their habitat, providing them with resources there for their development and progress. VI. Respect, in the process of integrating the Indian in the national communion, the cohesion of the native communities, and their cultural values, traditions, usages and customs. . . IX. Guarantee the Indians and native communities, in the terms of the Constitution, permanent possession of the land they inhabit, recognizing their right to exclusive usufruct of the natural wealth and all the utilities existing on that land.
- In Peru, Legislative Decree No. 20,653 of June 1974 provides for the recognition of the juridical personality of native communities and guarantees their entitlement to the lands which they occupy. Similar recent legislation recognizing the rights of indigenous peoples to lands they have traditionally occupied, and providing for the demarcation of such lands and the issuance of title documents, is now operative in Colombia, Ecuador, and Panama. In Argentina, the Aboriginal Communities Law 1985 (Ley sobre Política Indígena y apoyo a las Comunidades Aborígenes, no. 23,302) was promulgated in November 1985, and appears now to be in operation; it is also consistent on its face with the standards of ILO Convention 107.
- 80 See also the useful discussion of ILO Convention 107 in the First Report of the Norwegian Sami Rights Committee, *Om Samenes Rettsstilling* (Nou 1984: 18; Oslo, Universitetsforlaget, 1984), pp. 301-13.
- 81 1981 Report, p. 167.
- 82 *Lal Chand Mato & Ors. v Coal India Ltd. & Ors.*, Order of the Supreme Court of India (Bhagwati CJ, D.P. Madon and G.L. Oza JJ.), unreported, New Delhi, 13 December 1985, CMI No. 16331 of 1982, at p. 2. ILO Convention 107 was also cited in *Gerhardy v Brown*, (1985) 57 ALR 472, 533 (High Court of Australia) per Mason J, although it was not relied upon heavily.
- 83 ILO, *Report of Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957* (No. 107), ILO Document APPL/MER/107/1986/D.7 (1986), p. 18.
- 84 *Ibid.*, p. 18.
- 85 *Report of the UN Commission on Human Rights, 10th Session — UN Doc. ESCOR (XVIII), Suppl. No. 7* (1954), para. 40.
- 86 UN Doc E/CN.4/1987/L.11/Add.5 (1987) pp. 5-7. Similar resolutions were passed again in 1988.
- 87 See, for example, the decision of the European Court of Human Rights in *Lithgow v United Kingdom* (1986) 8 *European Human Rights Reports* 329.
- 88 Article 5(d) (v) raises some difficulties, including the extent to which (if at all) it establishes a general treaty obligation to respect the right to property independent of the requirement that States guarantee equality before the law to everyone without distinction as to race, colour, or national or ethnic origin. The use of the phrase 'without distinction' rather than 'without adverse distinction' raises issues similar to those concerning the 'special measures' provisions in Articles 1(4) and 2(2). These issues are discussed in the writer's D.Phil thesis (forthcoming).

- On the equality issue see e.g., the report of the Australian Law Reform Commission on *The Recognition of Aboriginal Customary Laws* (Canberra: Australian Government Publishing Service, 1986), ch 9.
- 89 (1983) 5 *European Human Rights Reports* 35.
- 90 [1984] AC 689, 700 per Lord Diplock.
- 91 See, for instance, Flory, Maurice, *Droit international du développement* (Paris: PUF, 1977); and Pellet, Alain, *Le droit international du développement* (2nd ed., Paris: PUF, 1987). A recent collection in English is Snyder, Francis, & Slim, Peter, (eds), *International Law of Development: Comparative Perspectives* (Abingdon: Professional Books, 1987).
- 92 See generally *Our Common Future, the Report of the World Commission on Environment and Development* (Oxford: OUP, 1987) (the Brundtland Commission Report).
- 93 *Report on the Muriwhemua Fishing Claim*, Wai-22, 1988, p. 235.
- 94 UN Doc E/CN.4/1334 of 2 January 1979.
- 95 See, for example, Donnelly, Jack, 'In search of the Unicorn: The Jurisprudence and Politics of the Right to Development' (1985) 15 *California Western International Law Journal* 473; Alston, Philip, 'Making Space for New Human Rights: The Case of the Right to Development' (1988) 1 *Harvard Human Rights Yearbook* 3-40; and Pellet, Alain, 'Note sur quelques aspects juridiques de la notion de droit au développement', in Flory, M., (ed), *La formation des normes en droit international du développement* (Paris: CNRS, 1983).
- 96 James Crawford concludes that 'quite apart from the failure of the General Assembly Declaration to be adopted by consensus, there is so far no sufficient acceptance or articulation of the right to development as a peoples' right for it to qualify as such. On the other hand, some elements of modern State practice... [suggest] that some elements which might go to make a right to development may be evolving.' Crawford, James, 'Some Conclusions' in Crawford (ed), *The Rights of Peoples* (Oxford: Clarendon Press, 1988) pp. 173-4.
- 97 Türk was also one of the leading members of the Commission on Human Rights' Working Group on the Right to Development, which drafted the UN Declaration on the Right to Development.
- 98 Türk, Danilo, *Statement at the Fifth Session of the Working Group on Indigenous Populations*, Geneva, 5 August 1987, pp. 8-9 (typescript available in United Nations files). A lengthy summary of this statement is given in the *1987 Report of the Working Group on Indigenous Populations*, UN Doc E/CN.4/Sub.2/1987/22, at p. 13 and p. 15.
- 99 *Indigenous Peoples: A Global Quest For Justice* (London: Zed Books, 1987) p. 121.
- 100 The text of the San Jose Declaration is reproduced in UN Doc. E/CN.4/Sub.2/1986/7; and in Crawford, James, (ed.) *The Rights of Peoples* (Oxford: OUP, 1988), p. 202.
- 101 Unesco Doc. SS 82/WS.32 of 12 July 1982, p. 33; also UN Doc. E/CN.3/Sub.2/1982/2/Add. 1, annex VI.
- 102 ILO Doc. APPL/MER/107/1986/D.7 (1986).
- 103 International Labour Conference, 75th Session, 1988, Report VI(1).
- 104 International Labour Conference, 75th Session, 1988, Provisional Record No. 32, p. 24.
- 105 UN Doc. E/CN.4/Sub.2/1987/22, p. 30.
- 106 See generally Department of Maori Affairs, *Partnership Perspectives: A Discussion Paper* (Wellington, 1988).
- 107 One example is Thomas Berger's 1985 report on the disastrous results of the Alaska Native Claims Settlement Act 1971. This is salutary for, as Berger points out, when it was passed 'ANCSA was hailed as a new departure for the resolution of aboriginal claims. By its terms, Alaska Natives would have land, capital, corporations, and opportunities to enter the business world. By its terms, Alaska Natives would receive title to forty-four million acres of land and \$962.5 million in compensation. By its terms, Alaska Natives were obliged to set up corporations to serve as the vehicles for the ownership and management of this land and the money, which became corporate assets... Congress wanted to bring the Alaska Natives into the mainstream of American life.' Berger, Thomas R., *Village Journey — The Report of the Alaska Native Review Commission* (New York: Hill and Wang, 1985), p. 20.
- 108 See the helpful study by Pratt, Lyndel, 'Cultural Rights as Peoples' Rights in International Law', in Crawford, James, (ed), *The Rights of Peoples* (Oxford: OUP, 1988) pp. 93-106.
- 109 *Lovelace v Canada*, General Assembly Official Records, A/36/40, Annex XVIII (1981); *Kitok v Sweden* (GAOR, A/43/40, p. 221, (1988)).
- 110 Annual Report of the Inter-American Commission on Human Rights 1984-1985, p. 31. Dicta in the Human Rights Committee's final views in *Kitok* indicate that the Committee is likely to support this interpretation when an appropriate case arises. At least two such potential cases have been before the Committee for some years, but it does not appear that the outcome of either the Denny (Miqmaq) or Lubicon Lake Band complaints against Canada will necessarily turn on Article 27.
- 111 UN Doc. E/CN.4/SR 369 (1953), p. 5.
- 112 *Ibid.*, pp. 10-11.
- 113 The text is reprinted in Lerner, Nathan, *The UN Convention for the Elimination of All Forms of Racial Discrimination* 2nd ed. (Leiden, 1980).
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- 115 United Nations, *Study of the Problem of Discrimination Against Indigenous Populations* (Martinez Cobo Report), ch. 21, paragraphs 509 and 510 (UN Doc. E/CN.4/Sub.2/1983/21/Add. 8 (1983), p. 67).
- 116 *Land Law and Custom in the Colonies* (Oxford, 1946), frontispiece.
- 117 Elkin, A.P., 'Aspects of Aboriginal Philosophy' (1969) 40 *Oceania* 85, 96-7. See also, for instance, Maddock, Kenneth, *Anthropology, Law and the Definition of Australian Aboriginal Rights to Land* (Nijmegen, 1980).
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- 119 *Finding of the Waitangi Tribunal on the Manukau Claim*, 1985, p. 103.
- 120 *Report of the Working Group on Indigenous Populations* (1985) (E/CN.4/Sub.2/1985/22). In the first full draft of a proposed 'Universal Declaration on Indigenous Rights' the Chairman-Rapporteur of the Working Group, Mrs Erica-Irene Daez put forward 28 draft principles, including versions of those already adopted and one couched in terms: 'The duty of States to honour treaties and other agreements concluded with indigenous peoples' (UN Doc. E/CN.4/Sub.2/1988/24.)
- 121 *Declaration of the World Conference to Combat Racism and Racial Discrimination* (1978) (A/CONF.92/40, United Nations publication, Sales No. E.79.XIV.2, ch. 11).
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- 123 *Programme of Action of the Second World Conference to Combat Racism and Racial Discrimination* (1983) (A/CONF.119/26, United Nations publication, Sales No. E.83.XIV.4, ch. 2).
- 124 *San Jose Declaration* (1981) (reproduced in UN Doc E/CN.4/Sub.2/1986/7.) On ethno-development, see the preceding discussion on the right to development.
- 125 World Council of Indigenous Peoples (1983) (E/CN.4/Sub.2/AC.4/1983/5, p. 16). These texts are also available in the UN's *Compilation of Existing Legal Instruments and Proposed Draft Standards Relating to Indigenous Rights*, UN Doc M/HR/86/136 (1986).
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Waitangi

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