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**The Application of the “Best Interests” Principle to
Maori Children’s Collective Cultural Rights: A
Conceptual Shift for the New Zealand Family Court?**

A thesis
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ABSTRACT

Indigenous Peoples assert their collective rights in a world where Western liberal theory and individual rights dominate. International human rights law, however, increasingly recognises Indigenous Peoples collective rights in addition to their members' individual rights. In 2007 the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples, which represents the most comprehensive acknowledgement of Indigenous Peoples collective rights within international law. In 2009 the Committee on the Rights of the Child issued under the United Nations Convention on the Rights of the Child General Comment No. 11 "Indigenous children and their rights under the Convention". The Comment references the United Nations Declaration on the Rights of Indigenous Peoples as providing important guidance on the rights of indigenous children. The Comment provides authoritative guidance to State Parties that the application of the "best interests" principle to indigenous children under the Convention requires the assessment of indigenous children's collective cultural rights and their need to exercise such rights collectively with members of their group, in addition to the indigenous children's individual rights. Only then can the best interests of indigenous children be determined.

As a State Party, New Zealand is obliged to implement the United Nations Convention on the Rights of the Child through legislation, judicial determinations and administrative processes. The best interests principle is already the paramount consideration and touchstone for judicial decision-making under the Children, Young Persons, and Their Families Act 1989 and Care of Children Act 2004. The Family Court of New Zealand (while making some inroads in the 1980s and 90s) has yet, however, to develop a coherent and robust approach to the assessment of Maori children's collective cultural rights when applying the best interests principle as it is obliged to do. General Comment No. 11 and the United Nations Declaration on the Rights of Indigenous Peoples assist by providing authoritative guidance. They augment New Zealand's family legislation, common law and social policy, which already acknowledge cultural rights and the collective nature of Maori familial relationships.

This paper looks beyond children's individual rights and the universal application of such rights. It considers the assessment of Maori children's collective cultural rights in addition to their individual rights under the best interests principle. Further, it analyses the relevant international and domestic authority the Family Court of New Zealand must consider when applying the best interests principle to Maori children, and the practical realities the recognition of Maori children's collective cultural rights present. A conceptual shift by the Family Court and counsel is required. This paper urges the Family Court to develop the application of the best interests principle under the Care of Children Act 2004 and the Children Young Persons and Their Families Act 1989 to include the assessment of Maori children's collective cultural rights in addition to their individual rights. In so doing the common law will reflect New Zealand's unique history and circumstances, and comply with the United Nations Convention on the Rights of the Child. If it fails to do so, the Family Court risks being the subject of criticism for breaching the Convention, being out of sync with international human rights law, domestic legislation and social policy, and increasingly losing relevancy.

PREFACE

The writer, having practised family law for almost 18 years (including significant work as Lawyer for the Child) and being passionate about the best interests of children, was ill-informed in respect to Maori children's collective cultural rights. That circumstance pervades the Family Court of New Zealand. Maori children's collective cultural rights are rarely advanced and when they are it is in a piecemeal way rather than being within a holistic assessment to determine their best interests which encompasses both their collective and individual rights. This paper is an effort to address that situation.

My thanks to Valmaine Toki for introducing me to the United Nations Declaration on the Rights of Indigenous Peoples; it was the catalyst for this paper.

I can never fully express my appreciation to Jennifer Weston; I am so lucky. Thank you so much for your support and assistance.

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TABLE OF CONTENTS

ABSTRACT	iii
PREFACE	v
INTRODUCTION	1
OUTLINE	5
CHAPTER ONE: The Best Interests Principle and Children’s Rights	9
I “The Best Interests” Principle	10
II The Evolution of International Children’s Rights	12
A The Geneva Declaration of the Rights of the Child 1924	13
B The United Nations Declaration on the Rights of the Child 1959	15
C The United Nations Convention on the Rights of the Child 1989	16
III Custody, Guardianship and Parental Rights and Responsibilities	20
CHAPTER TWO: Collective Rights and Responsibilities	23
I Maori and Collectivism	23
A Principles underlying Maori child-raising	27
CHAPTER THREE: International Law and Collective Rights	33
II The Increasing Recognition of Indigenous Peoples Collective Rights within International Human Rights Law	33
III The United Nations Declaration on the Rights of Indigenous Peoples and UNCROC	35
IV New Zealand’s adoption of UNDRIP	39
V Recognition of Maori Collective Cultural Rights in Context	41
A The Family Disputes Resolution Act 2013	43
CHAPTER FOUR: UNCROC: International Authority on the Rights of the Child	47
I United Nations Committee on the Rights of the Child	47
A Periodic Reviews	49
II General Comments and their Status	52
CHAPTER FIVE: General Comment No. 11 (2009) Indigenous children and their rights under the Convention.	55
I General Comment No. 11- Outline	56
II Article 30 and general obligations of State Parties under UNCROC	59
III General Principles: the best interests of the child	61
A The Best Interests Principle and Collective Cultural Rights	62

B	Assessing Collective Cultural Rights of Indigenous Children _____	64
C	Limitations on the application of the best interests principle to collective cultural rights _____	67
IV	Affirmation of Indigenous Children’s Collective Cultural Rights under UNCROC _____	69
A	Indigenous Children and the Status of the Convention on the Rights of the Child _____	69
B	Committee for the Rights of the Child “General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para.1)” _____	71
CHAPTER SIX: Maori Children’s Collective Cultural Rights and New Zealand Family Law –the Framework _____		75
I	The Guardianship Act 1968 _____	76
A	<i>B v Director-General of Social Welfare</i> _____	76
B	Maori Children’s Collective Cultural Rights following <i>B v Director-General of Social Welfare</i> _____	80
II	The Children, Young Persons, and Their Families Act 1989 _____	84
III	The Care of Children Act 2004 _____	89
A	Collective Cultural Rights and the Section 5 Principles _____	92
B	Ascertaining Collective Cultural Rights under COCA _____	93
CHAPTER SEVEN: Maori Children’s Collective Cultural Rights and New Zealand Family Law –the Practical Realities _____		97
I	The Best Interests Principle in Theory and in Practice _____	97
II	Practical Realities and the Best Interests Principle. _____	98
A	Whanau Dysfunction _____	99
B	Abstract or Cause Driven Proceedings _____	100
III	The role of the Judiciary and of Counsel _____	101
IV	A Way Forward _____	104
V	Neglecting Collective Cultural Rights _____	106
CONCLUSION _____		109
BIBLIOGRAPHY _____		111
CASES _____		111
New Zealand _____		111
England _____		111
LEGISLATION _____		111
New Zealand _____		111
England _____		112
OTHER OFFICIAL SOURCES _____		112

INTERNATIONAL MATERIALS _____	112
Treaties _____	112
United Nations Material _____	113
SECONDARY MATERIALS _____	114
Texts _____	114
Journal Articles _____	115
Internet materials _____	115
Other Sources _____	115
APPENDICES _____	117
APPENDIX A: CONVENTION ON THE RIGHTS OF THE CHILD _____	117
APPENDIX B : COMMITTEE ON THE RIGHTS OF THE CHILD GENERAL COMMENT No. 11 (2009) _____	137
APPENDIX C: UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES _____	157

INTRODUCTION

This thesis questions whether the Family Court of New Zealand has an obligation to recognise Maori children's collective cultural rights when applying the best interests principle. In particular, it questions whether there is an obligation to interpret and apply the best interests principle to include Maori children's collective cultural rights in addition to their individual rights.

When the Family Court of New Zealand determines proceedings under the Children, Young Persons, and Their Families Act 1989 (CYPFA) or the Care of Children Act 2004 (COCA), the welfare and best interests of the child is the paramount consideration.¹ In New Zealand it is referred to as the paramountcy principle. "Welfare" has connotations for the child's physical and material wellbeing, whereas "best interests" carries more of a sense of the child as an individual with personal needs and interests. They are synonymous with the protection and respect for children and their rights and constitute the "best interests principle". Children's welfare and their rights are inextricably intertwined within Western ideology and within the three international children's rights treaties of the 20th century. An appreciation of the synthesis of children's welfare and best interests, and the evolution of children's rights, is essential before considering the application of the best interests principle to Maori children's collective cultural rights.

New Zealand as a State Party to the United Nations Convention on the Rights of the Child (UNCROC) is bound to implement the Convention within its domestic legal and administrative systems.² UNCROC is the most ratified human rights treaty in history. UNCROC has a proactive Committee on the Rights of the Child (the Committee) which monitors compliance by State Parties. The Committee also issues General Comments to guide State Parties interpret and implement UNCROC. General Comment No. 11 "Indigenous children and their rights under the Convention" (General Comment No. 11) is of particular significance. General Comment No. 11 provides authoritative guidance to State Parties on indigenous

¹ Children, Young Persons, and Their Families Act 1989, s 6; Care of Children Act 2004, s 4(1).

² United Nations Convention on the Rights of the Child 1577 UNTS 3 (Adopted and opened for signature, ratification and accession November 1989, entered into force 2 September 1990).

children's rights under UNCROC and is analysed in detail.³ In unambiguous terms it obliges State Parties to recognise indigenous children's collective cultural rights under the best interests principle. The Family Court of New Zealand must apply the best interests principle by virtue of its incorporation within CYPFA and COCA. New Zealand's obligations under UNCROC require the Family Court to take into account the authoritative guidance provided by the Committee under General Comment No. 11. The Family Court, if it is to interpret and implement UNCROC in accordance with General Comment No. 11, must fully appreciate the extent of the recognition of Indigenous Peoples collective rights within international human rights law, and have particular regard to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); a declaration New Zealand has endorsed.⁴

A conceptual shift in the way the best interests of Maori children are assessed is required if their collective cultural rights are to be recognised. The Family Court must appreciate that collective rights constitute a fundamentally different way to conceive the best interests of Maori children. It must also accept that a Maori child's collective cultural rights and responsibilities are as valid as his/her individual rights and responsibilities. Further, the Family Court needs to develop a coherent and robust approach to the application of the best interests principle to Maori children that recognises their collective cultural rights. If the Court fails to do so, it risks being the subject of domestic and international complaint and losing relevancy over time.

The best interests principle is flexible, dynamic and can accommodate change. The principle is capable of incorporating into the Western legal tradition indigenous children's collective cultural rights. The practical application of the best interests principle which includes an assessment of Maori children's collective cultural rights, however, poses a number of challenges and possibilities. The judiciary, counsel and parties all have obligations associated with the recognition of Maori children's collective cultural rights. The first is to fully apprehend their obligations to recognise Maori children's collective rights under UNCROC, General Comment No. 11 and UNDRIP. They augment New Zealand's existing common law which already

³ Committee on the Rights of the Child *Indigenous children and their Rights under the Convention* CRC/C/GC/11 (2009) [the Committee] [General Comment No. 11].

⁴ United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295 (adopted by the General Assembly 13 September 2007).

recognises Maori children's collective rights as a fundamental starting point. They must also acknowledge the realities for some Maori children, that their immediate families may lack the capacity to meet their needs.

If a Maori child's collective rights are to be advocated, the filing of detailed evidence is essential. That evidence must address the nature and extent of the relevant collective cultural rights and the need for the child to exercise those rights both individually and with members of his/her group. The evidence should also address the group's responsibilities to the child and its capacity to meet them. The child's collective rights and individual rights can then be balanced within all applicable statutory principles and relevant factors to determine what is in that particular child's best interests. The application of the best interests principle to Maori children, if approached in this way, will genuinely consider all relevant matters when determining what is in their best interests.

Some scholars, however, suggest that the Family Court of New Zealand (which is part of the colonial legal system of social control) could never in a meaningful way break the shackles of Eurocentric thought. For instance Jackson is cynical about the State legal system incorporating Maori legal and philosophical concepts. In Jackson's view, doing so forms part of a continuum of colonisation. The legislative incorporation of Maori legal and philosophical concepts raises the justified fear that incorporation "captures, redefines, and uses Maori concepts to freeze Maori cultural and political expression within the parameters acceptable to the State".⁵ Similarly, Mikaere criticises legislation which incorporates Maori customary law to legitimise a Western system of law imposed.⁶

An alternative view which is advanced within this paper is that the authority afforded to the Family Court to apply the best interests principle to recognise Maori children's collective cultural rights is unique and will facilitate the recognition of

⁵ Moana Jackson, "The Treaty and the Word: The Colonization of Maori Philosophy" in Graham Oddie and Roy Perrett (eds) *Justice Ethics and New Zealand Society* (Oxford University Press, 1992) 1 at 8.

⁶ Natalie Ramarihia Coates "Me mau nga ringa Maori i nga rakau a te Pakeha? Should Maori Customary Law be Incorporated into Legislation?" (LLB (Hons) Dissertation, University of Otago – Te Whare Wananga o Otakou, 2009) citing Ani Mikaere, "How will the future generations judge us? Some thoughts on the relationship between Crown law and tikanga Maori" (paper presented at the Ma te rango te Waka ka Rere: Exploring a Kaupapa Maori Organisational Framework, Te Wananga o Raukawa, Otaki, 2006).

Maori customary law within New Zealand family law. While the criticism by scholars such as Jackson and Mikaere may prove to be valid, this paper argues that the judiciary, counsel and parties have the opportunity to consciously address that risk.

The prospect of Maori customary law enriching the common law through the application of the best interests principle will not receive unqualified support, but it should not deter the attempt. As Joseph stated in his paper “Re-Creating Legal Space for the First Law of Aotearoa-New Zealand”:⁷

The future of Aotearoa-New Zealand must lie in a single legal system which nevertheless recognises and respects the world views, values, customary laws and institutions of the two great founding cultures of this country.

The Treaty of Waitangi is acknowledged by our Courts as authority for the recognition of Maori children’s collective rights.⁸ The Treaty is referenced but any discussion is limited given this paper addresses obligations which arise by virtue of New Zealand being a State Party to UNCROC and the best interests principle being the paramount consideration under CYPFA and COCA. Such a narrow referencing of the Treaty may be criticised however the Treaty constitutes a fundamental but separate ground upon which to assert Maori children’s collective cultural rights.

⁷ Dr Robert Joseph “Re-Creating Legal Space for the First Law of Aotearoa-New Zealand” (2009) Vol 17 Wai L Rev 74 at 96.

⁸ See Chapter Six.

OUTLINE

The first chapter provides the foundation required to appreciate the application of the best interests principle to children. The evolution of the best interests principle and of children's rights within the Western liberal tradition and their synthesis within three international children's rights treaties are analysed. The prominence of the best interests principle under UNCROC and its recognition of cultural and social rights are discussed. Lastly, Western family law concepts such as guardianship and their underlying values and evolution are examined.

The second chapter discusses Maori collective values and the principles underlying traditional Maori child-raising. The values and social relationships within traditional Maori societies differ significantly to those in the West. The rights of the individual are subordinate to the rights of the group. Maori collective concepts and customary law are discussed in general with attention paid to the family unit (whanau) and the wider collective relationships of hapu and iwi. No attempt will be made to reconcile Maori and Western concepts; they do not correspond. Metge stressed the conceptual differences when she explained:⁹

To come to grips with Maori custom law, it is necessary to recognise that Maori concepts hardly ever correspond exactly with those western concepts, which they appear, on the surface, to resemble. While there is a degree of overlap, there are usually divergences as well. Even if the denotation- the direct reference – is substantially the same, the connotations are significantly different.

The third chapter provides an international human rights context within which to appreciate the recognition of Maori children's collective cultural rights under UNCROC. UNDRIP is considered in detail given it constitutes the most significant international recognition of Indigenous Peoples collective rights to date. New Zealand's endorsement of UNDRIP and the recognition of Maori collective rights within New Zealand social policy concludes the discussion. The application of the best interests principle which encompasses Maori children's collective cultural rights

⁹ Joan Metge "Commentary on Judge Durie's Custom Law" (unpublished paper for the Law Commission, 1996) 3 cited in Law Commission *Maori Custom and Values in New Zealand* (NZLC SP9, 2001) at 29.

is found to be consistent with both international human rights law and New Zealand social policy.

Chapter four examines in detail the responsibilities of the Committee on the Rights of the Child; in particular, the Committee's responsibility to monitor State Parties' compliance with UNCROC and to facilitate its implementation by issuing General Comments. The Periodic Review of State Parties' compliance and the important role civil society plays within the review process are discussed. The status of a General Comment is examined in depth, including the authoritative guidance General Comments provide to domestic Courts to interpret, develop and implement their obligations under UNCROC.

The fifth chapter is devoted to an analysis of the Committee's General Comment No 11. Paragraphs 30 to 33 of General Comment No. 11 are the focus of detailed attention given they address the recognition of indigenous children's collective cultural rights when applying the best interests principle. The Committee's guidance to State Parties that indigenous children's individual and collective cultural rights must be assessed when determining their best interests is analysed. Limitations on application of the best interests principle to indigenous children's collective cultural rights are then discussed. Finally, affirmation of indigenous children's collective rights by the Secretary General of the United Nations in 2012 and within UNCROC General Comment No. 14 (2013) on the best interests principle is discussed. UNDRIP is shown to have been instrumental in the development of both General Comment No. 11 and 14.

Chapter six analyses the leading decision of the High Court of New Zealand and a number of subsequent Family Court of New Zealand decisions which recognise Maori children's collective cultural rights. The general principles enunciated by the High Court and their application under the Guardianship Act 1968 are discussed. The statutory framework for the application of the best interests principle within CYPFA and COCA are then considered. The common law authority and the statutory frameworks under CYPFA and COCA support the application of a best interests principle which recognises Maori children's collective cultural rights; General

Comment No. 11 and UNDRIP augment them. As Commons makes clear in respect to the subjectivity of judicial determinations:¹⁰

The common law itself is only the decisions of disputes according to the prevailing customs each decision operating as a precedent. Between the multitude of competing precedents there is opportunity for judges to select, so that the common law changes and “grows” by “artificial selection” looking towards future consequences...

The final chapter addresses the practical application of the best interests principle which recognises Maori children’s collective cultural rights. The realities which confront the Family Court and the realities when applying the best interests principle within a Court setting are acknowledged. They include the need for there to be specific evidence addressing the particular child’s collective cultural rights and the exercise of those rights individually and with members of his/her group. General propositions or abstracted cause-driven cultural considerations will not assist the practical application of the best interests principle which recognises a particular Maori child’s collective cultural rights. The chapter concludes by suggesting a way forward to assist the practical application of the best interests principle which recognises Maori children’s collective cultural rights in addition to their individual rights.

The challenge the Family Court must overcome is the conceptual shift required to recognise the validity and holistic nature of Maori children’s collective cultural rights and the values which underpin them. A collective rights perspective should be applied to all of the statutory principles and relevant factors in addition to an individual rights perspective when determining what is in a particular Maori child’s best interests.

¹⁰ John R Commons *The Legal Foundations of Capitalism* (The Macmillan Company, New York, 1924) at 239.

CHAPTER ONE:

The Best Interests Principle and Children's Rights

The best interests principle and children's rights within Western ideology are inextricably intertwined. This chapter examines their respective origins and their synthesis within three international children's rights treaties of the 20th century being:

- The Geneva Declaration of the Rights of the Child (1924),
- The United Nations Declaration of the Rights of the Child (1959), and
- The United Nations Convention on the Rights of the Child (1989).

The best interests principle is a much earlier notion and is based on the paternalistic belief that children are innocent and need protection. Children's rights on the other hand are based on the Western liberal notion that the individual child is an autonomous rights holder.

The 20th century witnessed a dramatic change in the socio-legal status of children. The breadth of children's rights has grown with each treaty elaboration. All three treaties incorporate the best interests principle but it is most prominent within UNCROC. UNCROC is the most widely adopted of all of the United Nations human rights treaties; its articles encompass health, education, social, cultural and economic rights. It can be distinguished from its predecessors given State Parties must implement the Convention's articles within their domestic legal and administrative systems and their compliance is monitored. Constituted under UNCROC, the Committee on the Rights of the Child carries out Periodic Reviews of State Parties compliance and issues General Comments to guide State Parties interpret and implement their obligations under the Convention.

The synthesis of the best interests principle and social and cultural rights within UNCROC has created the flexibility necessary to accommodate cultural diversity. The recognition of indigenous children's collective cultural rights in addition to their individual rights while outside the Western tradition can therefore be accommodated. Just as a parent's interest in the development and welfare of a child was once regarded in the West as a "right," it is now more accurately conceived as a responsibility or duty. A collective group may also be conceived as having responsibilities or duties

to a child member and the child as having rights and responsibilities to the group to whom he/she belongs.

I “The Best Interests” Principle

The international recognition of “children’s rights” within the three treaties of the 20th century is intertwined with the much earlier notion of the need to protect the innocence of childhood. The paternalistic notion that children are innocent and need protection has its origins in western ideology. The 18th century is generally regarded as being the period when crucial transformations in Western ideology concerning childhood developed.¹¹ Three views emerged. The first perceived the child as essentially corrupt. This perception was based on some elements of Christian tradition which believed children were born with original sin inherent in the sinfulness of man.¹² Puritanism for example required education and strict discipline to secure children’s proper behaviour.¹³ The second regarded children as a blank slate so children were neither good nor bad.¹⁴ The third and ultimately prevailing view was based upon Rousseau’s “Romantic” concept that children are pure or innocent.¹⁵ The central notions of Romanticism were reverence for, and sanctification of, childhood.¹⁶ As such Romanticism:¹⁷

... embedded in the European and the American mind a sense of the importance of childhood, a belief that childhood should be happy, and a hope that the qualities of childhood, if they could be preserved in adulthood, might help redeem the adult world.

The romantic conception of children underpinned the need to protect “at risk” children in the 19th century (such as orphans, delinquents and endangered children). The need to protect was guided by the principle that it was in the children’s “best

¹¹ Claire Breen *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* (Kluwer Law International, The Hague, 2002) at 35.

¹² At 36.

¹³ At 36 citing Archard, D., *Children; Rights and Childhood* (Routledge, New York, 1995) at 38.

¹⁴ At 36.

¹⁵ At 38.

¹⁶ At 39.

¹⁷ At 39 citing Hugh Cunningham *Children and Childhood in Western Society since 1500* (Longman, London, 1995) at 77-78.

interests” to intervene.¹⁸ It was commonly accepted that “children’s perfectibility postulated by Enlightenment philosophy and corresponding romantic constructions of childhood preordained them to be saved from appallingly poor living conditions”.¹⁹ The best interests principle therefore justified intervention into family life to protect at risk children.

The institutions created to protect at risk children however, came to be criticised in the latter half of the 19th century and the beginning of the 20th. The massing together of children within institutions took no account of the child’s natural desire for home life, affection and parental love.²⁰ Reformers and philanthropists, drawing on romantic notions of childhood, sought to protect and foster children to advance their best interests. The notion of “the best interests of the child” developed and in Cunningham’s view was underpinned by:²¹

... a conviction that the way childhood was spent was crucial in determining the kind of adult the child would become, and an increasing awareness that childhood had rights and privileges of its own.

The best interests principle thus evolved over the 19th and early 20th centuries from a notion that children required protection and saving, to a broader notion. The broader notion encompassed children’s wellbeing and an appreciation that children had rights and privileges of their own. The evolution of the best interests principle can be appreciated from multiple perspectives. Breen describes the evolution of the tradition of the best interests of the child as having moved through three phases.²² First, the child being treated in a paternalistic manner reflecting the rights of the father within a society based on a notion of paternal supremacy. The second phase reflected a balancing of parental rights between parents but a non-interventionist approach to the upbringing of children remained. Lastly, the best interests of the child although paternalistic in nature being based upon a greater degree of interventionism in family

¹⁸ Zoe Moody “Transnational treaties on children’s rights: Norm building and circulation in the twentieth century” (2014) 50 *Paedagogica Historica: International Journal of the History of Education* 151 at 153 citing Jeroen Dekker, *Educational Ambitions in History: Childhood and Education in an Expanding Educational Space from the Seventeenth to the Twentieth Century* (Peter Lang, Berlin, 2010).

¹⁹ At 153.

²⁰ Breen, above n 11, at 42.

²¹ Moody, above n 18, at 154 citing Hugh Cunningham *Children and Childhood in Western Society since 1500* (2nd ed, Harlow: Pearson Education, 2005) at 41.

²² Breen, above n 11, at 16.

life.²³ Whatever perspective is taken in respect to the evolution of the best interests principle, it is a Western tradition which over time has justified increased intervention in family life.

The rise of democracies and egalitarian ideals during the 20th century resulted in widespread State intervention in the upbringing of children based on the tradition of the best interests of children (such as the provision of health, education and welfare services).²⁴ The increased intervention in family life to promote the welfare of children coincides with the increase in children's rights during the 20th century. There is, however, an inherent tension when intervening in family life based on the welfare of children on the one hand and children's rights on the other. Children's rights recognise children's capacity for autonomy as individual members of society, whereas the best interests principle is based on the need to protect and nurture. The paternalistic approach of the best interests principle and autonomous individual approach of the "rights of the child" coexist but as Breen notes:²⁵

This paternalistic approach has continued to exist somewhat uneasily alongside the tradition of children's rights which have emerged more recently and which would appear to favour a greater degree of autonomy for the child.

The three international children's rights treaties of the 20th century incorporated both the best interests principle and children's rights. Any tension between a paternalistic and child's rights approach has assisted rather than hindered the development and application of children's rights the treaties espouse.

II The Evolution of International Children's Rights

The 20th century witnessed a dramatic change in the socio-legal status of children.²⁶ In Moody's socio-legal analysis of the translation of human rights of children into international hard law, the process is viewed as dynamic; however, the three

²³ At 16.

²⁴ Moody, above n 18, at 154 citing Jeroen Dekker, "Children at risk in History: A story of expansion" (2009) 45 *Paedagogica Historica: International Journal of the History of Education* 17.

²⁵ Breen, above n 11, at 16.

²⁶ Moody, above n 18, at 151.

international children's rights treaties in the 20th century "seem to have frozen the rights of the child at three different moments".²⁷

An analysis of the evolution of human rights of children into international hard law supports Moody's view but only to a point. Moody's view cannot be sustained in respect to the third and most comprehensive treaty, UNCROC. The binding nature of UNCROC on State Parties distinguishes it. Significantly, the combination of the work undertaken by the Committee and the flexibility provided by the incorporation of children's rights and the best interests principle within UNCROC, has meant that children's rights rather than being frozen, have evolved. UNCROC's recognition of indigenous children's collective cultural rights is a good example. Rather than freezing children's rights, UNCROC facilitates the development of State Parties' domestic laws to give effect to children's rights not previously contemplated within traditional Western liberal theory.

*A The Geneva Declaration of the Rights of the Child 1924*²⁸

The definitive trigger points for the internationalisation of children's rights during the 20th century have been attributed to two devastating major armed conflicts in Europe, the First and Second World Wars.²⁹ The "child saving" movement and related ideals of protection and education rooted in the 19th century was amplified by perceptions of children as the innocent victims of adult war.³⁰

The Save the Children International Union (the Union) was founded in 1919 by two British women, Eglantyne Jebb and her sister Dorothy Buxton, to save European children affected by war.³¹ The Union was seeking to expand its activities to broader child welfare issues and Jebb suggested drafting a child's charter as an international guideline for child welfare.³² Initially the idea was to have a Declaration

²⁷ At 164.

²⁸ Geneva Declaration of the Rights of the Child, League of Nations O.J. Spec. Supp. 21 (adopted 26 September 1924).

²⁹ At 155 citing Paula S. Fass, "A historical context for the United Nations Convention on the Rights of the Child" (2011) 633 *Annals of the American Academy of Political and Social Science* 17.

³⁰ At 155 citing Dominique Marshall, "The construction of children as an object of international relations: The Declaration of Children's Rights and the Child Welfare Committee of the League of Nations, 1900-1924" (1999) 7 *International Journal of Children's Rights*: 108, quoting the assistant to the Secretary General of the League of Nations.

³¹ At 157.

³² At 157.

endorsed by influential philanthropists worldwide and translations circulated extensively. The creation process was almost exclusively the work of non-governmental organisations, which were assisted by geographical proximity and access to numerous national delegations. This facilitated the circulation of ideas as well as norms, strategies of persuasion and intensive lobbying.³³ The culmination was the Declaration of Geneva (the Declaration); proclaimed by the League of Nations Assembly in 1924. Member States were invited “to be guided by its principles in the work of child welfare”.³⁴

The Declaration contains five principles as set out below. The principles were considered by its authors to be “chapter headings”, giving freedom for national initiatives to develop them.³⁵ The Declaration was not legally binding so member States were free to implement the principles as they saw fit. The Geneva Declaration of the Rights of the Child adopted on 26 September, 1924 reads as follows:

By the present Declaration of the Rights of the Child, commonly known as "Declaration of Geneva," men and women of all nations, recognizing that mankind owes to the Child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed:

The child must be given the means requisite for its normal development, both materially and spiritually;

The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured;

The child must be the first to receive relief in times of distress;

The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation;

The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.

The best interests notion of the innocent child in need of protection is readily apparent within the Preamble, which states “...recognizing that mankind owes to the child the

³³ At 156.

³⁴ At 157 citing LoNA, PV of the Ve Committee, 12th meeting (Friday 18 (sic) September 1924 at 15.30), sequel to the protection of children.

³⁵ At 158 citing ASG-IUCW, AP 92.2.2, Tri/65-3, PV of the fifth General Council, Thursday-Friday 28 - 29 February 1924, Commission of the "Declaration of Geneva".

best that it has to give...” The five principles which follow the Preamble constitute statements of rights intended to protect individual children’s physical, emotional and psychological wellbeing and to protect them against oppression and exploitation.

The Declaration was broadly diffused in Western societies and used as a basis for developing and promoting children’s rights including the passing of legislation.³⁶ The period between the First and Second World Wars saw the adoption of numerous treaties which contributed to the internalisation of specific children’s rights such as the raising of the minimum age of employment and consolidation of social security entitlements.³⁷ In 1933 the League of Nations adopted a resolution requiring governments to send it reports concerning child welfare measures taken in respect to the Declaration.³⁸ The Second World War and its aftermath gave rise to further universal human rights treaties. The growth of universal human rights was a reaction to the inhumanity perpetrated during this period including the inhumane treatment of children.

B The United Nations Declaration on the Rights of the Child 1959

Immediately following the Second World War, the Save the Children International Union offspring, the International Union for Child Welfare, started lobbying the newly created United Nations Organisation.³⁹ The double trauma of the use of youth and children by the Nazis in political campaigning and the extermination of children in concentration camps reinforced the need to take humanitarian action on behalf of children.⁴⁰ The Union for Child Welfare wanted the Declaration re-endorsed and the United Nations Temporary Social Commission agreed. The Declaration was, however, considered outdated and in need of redrafting to incorporate principles related to non-discrimination, social security and the family.⁴¹ The Union for child Welfare, having drafted the Declaration, viewed itself as having a proprietary interest in any re-draft but failed to obtain a mandate to do so. The Human Rights Commission of the United Nations was busy drafting the Universal Declaration on

³⁶ At 159.

³⁷ At 158.

³⁸ At 158.

³⁹ At 159.

⁴⁰ At 155.

⁴¹ At 159.

Human Rights and the re-drafting of the Declaration was left undeveloped for the next decade.⁴²

It was not until 1959 that the United Nations Declaration on the Rights of the Child (UNDRC) was adopted.⁴³ Even then some member States felt the Universal Declaration on Human Rights recognised human rights for every human being including children and was therefore sufficient.⁴⁴ Unlike the Declaration, (which was non government organisation instigated and driven), UNDRC was strictly a multi-governmental-driven document.⁴⁵ UNDRC (like the Declaration) was not legally binding on member States who were free to implement the principles as they saw fit. UNDRC articles employed extensive use of universal human rights language but also employed welfare and best interests language. To complicate matters, UNDRC articles mixed specific principles and general principles making its translation by member States into domestic law more difficult. The fact that UNDRC mixed general and specific principles in combination with rights and welfare language rendered it inapplicable according to some jurists.⁴⁶

It was apparent by the 1970s that a renewal of UNDRC was necessary for its survival. Most of the international organisations concerned with children's welfare neither referred to UNDRC nor promoted it, and many non-government organisations drafted their own children's charters.⁴⁷ The gap between social reality and its norms (such as youth rights) within Western society and UNDRC was obvious. The children's rights regime based on UNDCR and children's protection needs were progressively losing coherence.⁴⁸

C The United Nations Convention on the Rights of the Child 1989

UNCROC was adopted by the General Assembly 10 years after its drafting process began. The drafting process was neither purely non-government nor multi-

⁴² At 160.

⁴³ United Nations Declaration of the Rights of the Child, U.N. Doc A/4354 G.A. Res. 1386 (XIV) (1959).

⁴⁴ Moody, above n 18, at 160.

⁴⁵ At 161.

⁴⁶ At 161 citing Jordi Cots, "BICE and the rights of the child: the message of the Convention and the message of the BICE", BICE, childhood in the world (1996): 4-7.

⁴⁷ At 161.

⁴⁸ At 161 citing Jack Donnelly, "International human rights: A regime analysis", International Organization 40, no. 3 (1986): 599-642 for a definition of regime coherence.

government-driven; rather it was a consensus driven process which took account of scientific advances as well as the social realities of Western societies. As Moody puts it, “One could say that the UN learnt from its mistakes and the fate of its unpopular UNDRC”.⁴⁹ A consensus driven and inclusionary process was essential because UNCROC, unlike its predecessors, was to be legally binding on Member States. Member States, if they were to ratify UNCROC without reservation, needed to agree to all of the rights and obligations UNCROC set out, which inevitably required compromise in the drafting process.

UNCROC (copy annexed) was adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, for entry into force 2 September 1990.⁵⁰ UNCROC is the pre-eminent international children’s rights treaty.⁵¹ It has been ratified by 194 countries which makes it the most widely adopted of all the United Nations human rights treaties.⁵² Member States who have ratified UNCROC are obliged to implement the Convention’s articles (and optional protocols if member States have adopted them) and to submit Periodic Reports addressing their compliance.⁵³ The Periodic Review of compliance by State Parties is undertaken by the Committee.⁵⁴ The Committee also provides assistance to State Parties to develop and implement UNCROC within their domestic legal and administrative systems. The Committee issues General Comments, which provide authoritative guidance in the interpretation, application, and development of children’s rights under UNCROC. The Committee has been instrumental in ensuring children’s rights under UNCROC develop to accommodate social, scientific, technological and political change.

The form of UNCROC followed that of its predecessor: a Preamble citing human rights treaties and principles before articulating children’s rights within its articles. The scope of UNCROC is, however, much broader. UNCROC articles encompass health, education, social, cultural, legal and economic rights but as Breen observes, “the best interests standard may be regarded as being the overall theme of

⁴⁹ At 161.

⁵⁰ Above n 2. See Appendix A.

⁵¹ United Nations Treaty Collection <<http://treaties.un.org>>.

⁵² United Nations Treaty Collection.

⁵³ Art 44.

⁵⁴ Art 43.

the Convention”.⁵⁵ Reference to “best interests” appears eight times within the UNCRC’s 54 articles in addition to being one of the four governing General Principles.⁵⁶

Agreement on the specific wording of the best interests General Principle set out in Article 3(1) required negotiation and a number of re-drafts. The initial discussions principally concerned two issues. Firstly whether, the best interests of the child principle should be the pre-eminent consideration in respect to actions taken by children’s parents, guardians and, social or State institutions.⁵⁷ Agreement was reached by consensus that reference to parents and guardians would be removed from the draft as there was no intention to regulate private family decisions.⁵⁸ Secondly, the proposed wording of the best interests of the child as *the paramount consideration* was considered too broad by some delegates who preferred the term *a primary consideration*.⁵⁹ The concern voiced was that others may have equal or superior legal interests to that of the child and therefore the child’s best interests should not prevail in every case.⁶⁰ The Working Group of the Commission on Human Rights redrafted the proposed Article 3(1) as follows:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be *the primary consideration*.

[Emphasised, as ultimately substituted for “a” as referred to below]

The final contentious issue arising from the redraft of Article 3(1) was whether the best interests of the child should be “the” or “a” primary consideration. The same arguments made in opposition to the use of the word *paramount* were raised. In light of the reservations by many of the delegates about making the interests of the child “the” primary consideration, the Working Group ultimately agreed and adopted the text which provides that the best interests of the child shall be “a” primary consideration.⁶¹

⁵⁵ Breen, above n 11, at 79.

⁵⁶ At 79.

⁵⁷ At 81.

⁵⁸ At 81.

⁵⁹ At 81.

⁶⁰ At 81.

⁶¹ At 81.

Once ratified, State Parties are obliged to implement the rights recognised within UNCROC including the best interests General Principle in Article 3(1). States must “not only adhere to the norm but also have to make it part of their national juridical system”.⁶² The obligation is clear in Article 4 which reads as follows:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

UNCROC as the latest elaboration of international children’s rights continues to intertwine the notion of individual rights of autonomous children with the welfare notion inherent within the best interests principle. The recognition of cultural and social rights within UNCROC, in association with the elevation of the best interests principle as a primary consideration, creates flexibility to accommodate cultural diversity over time. The binding nature of UNCROC and the role the Committee on the Rights of the Child plays in its implementation, ensure its continued relevancy. That is important given notions of childhood and family life change, become rapidly outdated and may be irrelevant outside Western liberal tradition.⁶³ Breen points out that in non-Western cultures where collective rights prevail, the validity of the best interests principle is arguable. In Breen’s view the best interests principle may be:

... [in] conflict with traditions that are non-Western in nature and which have a different tradition of the relationship between the family and the child, where the protection and the rights of the latter in particular are often subsumed in the common good. As such, it is arguable that the validity of the standard of the best interests of the child, as an international mechanism for the protection of the welfare of the child that has failed to take account of such different traditions, is questionable.⁶⁴

Breen’s observations are sound but predate UNDRIP, General Comment No 11 and subsequent United Nations affirmations which explicitly acknowledge indigenous children’s collective cultural rights within the best interests principle of UNCROC.

⁶² Moody, above n 18, at 162-163.

⁶³ Breen, above n 11, at 22 citing Roberts, R. "The Social Laws of the Qoran" (Curzon Press, London, 1971) at 40-53.

⁶⁴ At 22.

The best interests principle in combination with children's rights within UNCROC is proving to be flexible enough to accommodate different traditions.

III Custody, Guardianship and Parental Rights and Responsibilities

The relationship between the family and the child within Western tradition has historically been governed by concepts such as custody, guardianship and parental rights. These concepts reflect Western values which have evolved over time. The rights of the father of a child in Victorian society were based upon the notion of paternal supremacy. The evolution of children's rights in combination with the best interests principle has transformed the way the family and the child relationship are conceived. Parental rights are now conceived as parental responsibilities and duties, irrespective of the parent's gender. An analysis of statute and common law authority concerning custody and guardianship illustrate that concepts such as custody, guardianship, and parental rights evolve over time and while based on the individual rights and responsibilities, have changed significantly.

The common law right of a father to have the custody of his legitimate child was at one time essentially absolute in the absence of abuse. A factor mitigating that right was the inability by habeas corpus to compel a child who had attained the "age of discretion". The age of discretion was 14 years for boys and 16 years for girls. In 1804 in *Rex v De Manneville* the father, upon habeas corpus, obtained custody of his 8 month old child from the child's mother.⁶⁵ Lord Ellenborough C.J. said, "Then [the father] having a legal right to the custody his child, and not having abused that right, is entitled to have it restored to him".

A factor mitigating the common law right of the father to have the custody of his child was the development in Chancery of the equitable principle of the welfare of the child. As Fox L.J. however pointed out in *Gillick v West Norfolk and Wisbech Area Health Authority*:⁶⁶

The fusion of the law and equity, with the rules of equity prevailing, which was enacted in 1875 by the Supreme Court Judicature Act (38 & 39 Vict. C.

⁶⁵ *Rex v De Manneville* (1804) 5 East 221 at 233.

⁶⁶ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, at 141.

77) does not, however, seem to have diminished the inclination of the courts to enforce the wishes of the father.

The learned Justice was referring to the 1878 and 1883 *Agar-Ellis* cases.⁶⁷ The father had restricted contact between his 16 year old daughter and her mother. Sir Richard Malins V.C. said in the 1878 case:⁶⁸

The father is the head of the house, he must have the control of his family ... and this court never does interfere between a father and his children unless there be an abandonment of the parental duty.

The *Agar-Ellis* cases aroused strong debate at the time and were influential in the passage of section 5 of the Guardianship of Infants Act 1886 which provided that the court might:⁶⁹

upon the application of the mother of an infant ... make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents.

The principle of virtual supremacy of the wishes of parents as represented in the *Agar-Ellis* decisions has over time come to be regarded as too extreme and the notion of parental rights as unacceptable. The common law rights of parents have been abrogated by statute and replaced with the principle that parents have responsibilities and duties to their children.

In New Zealand “guardianship” under the Guardianship Act 1968 was defined as “the right of control over the upbringing of a child”.⁷⁰ The definition was amended in COCA. The concept of control was jettisoned and replaced by the concept of parental care. Incidents of guardianship are set out in s 16 of COCA and include “having the role of providing day-to-day care for the child”.⁷¹ Parental responsibilities, duties and powers are emphasised and given prominence rather than parental control. Justice Heath in *Hawthorne v Cox* succinctly described parental rights as having been surpassed when he said a “parent’s interest in the development

⁶⁷ *Agar-Ellis* (1878) 10 Ch.D. 49 and *Agar-Ellis* (1883) 24 Ch.D. 317.

⁶⁸ *Agar-Ellis* (1878) 10 Ch.D. 49 at 56.

⁶⁹ Guardianship of Infants Act 1886 49 & 50 Vict, c.27 see *Gillick v West Norfolk*, above n 65, at 142, per Scrutton L.J. *In re Carroll (An Infant)* [1931] 1 KB 317, at 335.

⁷⁰ Guardianship Act 1968, s 3(1).

⁷¹ Care of Children Act 2004, s 16(1)(a).

of his or her child does not amount to a ‘right’ but is more accurately described as ‘a responsibility or duty’”.⁷²

The evolution from parental rights to parental responsibilities remains squarely within the Western tradition. The concept that parents or caregivers have “responsibilities or duties” not “rights” in the development of the child is nevertheless a significant change. The writer suggests that non-Western traditions which conceive groups or collectives as having responsibilities or duties in respect of children who belong to them is not conceptually difficult. Children have increasingly been acknowledged as bearers of rights and where an indigenous child is part of a collective group, the group’s responsibilities to the child and the child’s collective rights should be assessed to determine what is in his/her best interests.

⁷² *Hawthorne v Cox* [2008] 1 NZFLR 409, at [61].

CHAPTER TWO: Collective Rights and Responsibilities

The central tenet of collectivism is that groups bind and mutually obligate their individual members. An individual is a component of the group. It is the group which is the primary unit within collective societies. As a consequence an individual's sense of identity, values, personal traits and wellbeing all reflect a social structure which places their collective responsibilities to the group before their individual needs or desires.

Many cultures and in particular Indigenous Peoples emphasise members' responsibilities to the group (collective responsibility) rather than individual member's rights. The values system and structure of collective societies is fundamentally different to the Western model which is based on rights primarily vesting in the self-interested individual. Justice Durie explains the divergence between the Western and Indigenous Peoples perspectives on rights in the following way:⁷³

...indigenous peoples who lived or live a tribal life in districts occupied by small but autonomous and competitive bands, clans or hapu without allegiance to a central regime depended on group integrity and individual loyalty for survival. As a result indigenous peoples' perspective on rights is different.

I Maori and Collectivism

Maori customary law emphasises relationships between people based on values rather than rules.⁷⁴ The Maori values system requires the observance of protocol with conduct governed by an overwhelming desire to behave in a way consistent with those who have great mana.⁷⁵ This values based system (rather than rules based system) has been described as agent-centred rather than act-centred.⁷⁶ Justice Durie acknowledges the suggestion that the Maori based values system has parallels with

⁷³ Justice Eddie Durie "Constituting Maori" in Grant Huscroft & Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 241 at 253.

⁷⁴ At 258 citing E.T. Durie *Custom Law* (Waitangi Tribunal Research Unit, Treaty Research Series, January 1994) at 104.

⁷⁵ At 258 citing J Paterson. *Exploring Maori Values* (Palmerston North, Dunmore Press. 1992).

⁷⁶ At 258.

the model of ethics described by Aristotle as “virtue ethics”.⁷⁷ The analogy is made between virtue-centred morality which requires a moral community which conceives of its life as a shared project, and the Maori values system including Maori socio-political organisation which also conceives “life as a shared project”.⁷⁸

Collective responsibility within Maori society means individual rights or entitlements are indivisible from the whanau (family group), hapu (extended family group) and iwi (tribal group) welfare.⁷⁹ The individual and the collective have reciprocal obligations based on precedent handed down by tipuna (ancestors). The collective whanau or hapu accept the consequences for a member’s wrongdoing.⁸⁰ The responsibility of the whanau and hapu for an individual member’s actions strengthens the sense of reciprocal group obligations. Kinship ties of responsibility and duty and the consequences of individual or group action therefore have direct consequences for whanau, hapu or iwi.⁸¹ The Maori kinship system links every individual to ancestors and to whanau, hapu and iwi at varying degrees of removal and is all embracing.⁸²

Collective responsibility in a “life as a shared project” is illustrated by reference to the muru, which is a kind of utu (reciprocity or balancing which entails a complex web of responsibilities and obligations).⁸³ The aim of muru is to restore balance by containing retribution from escalating to harmful levels within close kin groups. The process emphasises the accountability of the entire kin group for the actions of individuals within the group.⁸⁴ If tikanga (proper principles) conflict, the appropriate principle is determined by balancing them in the particular circumstances to

⁷⁷ At 258 citing E.T. Durie *Custom Law* (Waitangi Tribunal Research Unit, Treaty Research Series, January 1994) at 103.

⁷⁸ At 258 citing E.T. Durie at 109.

⁷⁹ Ministry of Justice *He Hinatore ki te Ao Maori A Glimpse into the Maori World: Maori Perspectives on Justice* (March 2001) Maori Social Structures <www.justice.govt.nz> at *Collective Responsibility*.

at *Collective Responsibility*.

⁸⁰ At *Collective Responsibility*.

⁸¹ At *Collective Responsibility*, citing Moana Jackson *The Maori and the Criminal Justice System: A New Perspective: He Whaipanga Hou* (Department of Justice, Policy and Research Division Wellington, 1987-1988) at 39-44.

⁸² At *Collective Responsibility*.

⁸³ Di Pitama, George Ririnui & Ani Mikaere *Guardianship, Custody and Access: Maori Perspectives and Experiences* (August 2002) Maori Concepts of Guardianship, Custody and Access: A Literature Review <www.justice.govt.nz> at [7.2].

⁸⁴ Justice Durie, above n 73, at 258.

determine which tikanga prevails.⁸⁵ This example demonstrates the flexibility of tikanga to accommodate change whilst allowing the values upon which the tikanga are based to endure.

The enduring nature of tikanga in a changing society is aptly articulated by Justice Durie as follows:⁸⁶

Maori customary law has conceptual regulators that have remained important for many Maori. The way these conceptual regulators are expressed in today's society is not identical to the way they were expressed before the Treaty of Waitangi, at the time of the Treaty of Waitangi over 160 years ago, or as they will be expressed in 160 years from now. Change has occurred within Maori society to produce a different set of standards that are acceptable, but the underlying values remain the same. Tikanga Maori has always been very flexible, but the values that the tikanga is based on are not altered. One of the values that may now form part of the Maori value system is that of equality, which may have precedence over other values at times. It thus seems to me entirely evident that Maori cultural practices can change to accommodate, for example, gender non-discrimination rights, without breaching the rights of Maori as indigenous people or attacking the fundamental values of Maori society.

Current tikanga has its origins in the tikanga of 18th century tipuna but has changed over the intervening 200 years in response to social, economic and political circumstances, internal and external pressures, and Maori creativity.⁸⁷ It will undoubtedly go on changing.⁸⁸

Ruru refers to tikanga as applying to a collective, not just the sum of its individual members.⁸⁹ Significantly, tikanga is not universal. Maori collectives are closely associated with particular and distinctive tikanga. Ruru emphasises that tikanga may differ between hapu, iwi and whanau.⁹⁰ Tikanga are ideal patterns or guidelines for living and are continually abstracted from and fed back into the real life behaviour of group members.⁹¹ Ruru also acknowledges the social change that

⁸⁵ At 258.

⁸⁶ At 259.

⁸⁷ Jacinta Ruru "Kua tutu te puehu, kia mau: Maori aspirations and family law policy" in Mark Henighan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) 57 at 59.

⁸⁸ At 59.

⁸⁹ At 59.

⁹⁰ At 59.

⁹¹ At 59 citing Law Commission *Maori Custom and Values in New Zealand Law* (NZLC SP9, 2001).

has occurred following New Zealand's colonisation and that individual members of whanau, hapu and iwi nowadays abide by tikanga Maori to varying levels depending upon their circumstances.⁹²

A society based on the collective responsibility of its members to the group has a philosophical foundation which is very different from a society based on the individual as its primary unit. Therefore, Western liberal concepts do not necessarily correlate with indigenous/Maori concepts of collectivism.⁹³ The temptation to define indigenous understanding of collective responsibility simply in Western concepts such as "rights" and "collective rights" would be incorrect or incomplete. Mikaere uses the example of land tenure to illustrate the point as follows:⁹⁴

... the assertion that Maori concepts of land tenure did not include the notion of individual ownership: rather that land was considered to be held by the collective, in trust for present and future generations. While there is nothing incorrect in such a statement, focusing merely on the individual-collective contrast that a comparison with Western land law invites results in the omission of a vast amount of material about the true significance of land; the role of Papatuanuku as a spiritual being, as ancestress, as the ultimate nurturer of her human descendants: the dual meaning of the term "whenua" (meaning both land and afterbirth) and the significance of returning the whenua to the whenua after a child is born to the hapu; the profound importance of land to the question of hapu identity; and so on.

Justice Durie refers to the analogy of a human body's limbs to describe the tension between individual and collective rights. In his words, "The theology conveyed to Maori is that we are part of one body and it is not unusual that the body should have more than one limb".⁹⁵ Different cultural realities give rise to separate and uncoordinated limbs of society and the only feasible option, Justice Durie suggests, is to do our best to harmonise them.⁹⁶ The different limbs of a single body can be made to work in unison or at least must be made to do so if the body is not to be dysfunctional.⁹⁷

⁹² At 59.

⁹³ Metge, above n 9.

⁹⁴ Pitama, Ririnui & Mikaere, above n 83, at [7.1].

⁹⁵ Justice Durie, above n 73, at 241.

⁹⁶ At 241.

⁹⁷ At 241.

Justice Durie argues cultural rights have both individual and collective aspects to them and that cultural rights do not invalidate the search for global standards.⁹⁸ He suggests that in today's global community the promotion of global standards to which societies should aspire is valid; however the imposition of inappropriate norms (sometimes unwittingly) is not.⁹⁹ The tempering of universal standards of human rights to accommodate cultural diversity is suggested by Justice Durie as a means to protect the human rights of peoples of all cultures.¹⁰⁰

Maori society like Western society evolves, adapts and responds to new needs, challenges and ideas.¹⁰¹ Understanding that individualism and individual responsibility was uncommon in traditional Maori society, is to identify a fundamental distinction between them. No attempt has been made to do anything other than to introduce some basic concepts concerning Maori collective society. Understanding the way Maori conceive collective family and child relationships, the relevant tikanga and the extent of engagement with whanau, hapu and iwi is essential when assessing the best interests of a Maori child. General principles underlying Maori child-raising highlight the collective nature of Maori children's collective cultural rights.

A Principles underlying Maori child-raising

Maori children are traditionally considered to belong not only to their parents but to the whanau and beyond; to the hapu and iwi. The concept is encapsulated by Metge as follows:¹⁰²

[C]hildren belong, not to their parents exclusively, but to each of the whanau to which they have access through their parents. Belonging in this context is a matter of identity, not possession. It derives in the first place from Whakapapa (ancestry) but should be confirmed and strengthened by regular social interaction.

⁹⁸ At 253.

⁹⁹ At 253.

¹⁰⁰ At 256.

¹⁰¹ Ministry of Justice, above 79 at *Introduction*.

¹⁰² Pitama, Ririnui & Mikaere, above n 83 at [7.3] citing Metge, J. *New Growth from Old: the Whanau in the Modern World* (Victoria University of Wellington Press, Wellington, 1995) at 140.

Traditional concepts of whanau are founded upon a set of principles which include manaakitanga (caring), tatou tatou (collective responsibility) and mana tiaki (guardianship).¹⁰³ Whanau is primarily used to define a group of relatives by reference to a recent ancestor, comprising several generations, nuclear families, and households, and having a degree of ongoing corporate life, focused in group symbols such as name, land base (turangawaewae) or taonga (treasure or sacred).¹⁰⁴ The land base may include a marae and land operated as an incorporation or trust. Taonga include ornaments, weapons, cloaks, ancestral history and whakapapa (genealogies).¹⁰⁵ Whanau members would generally work together and on special occasions in the fulfilment of four main functions being:¹⁰⁶

- Care and management of turangawaewae and taonga,
- The organisation of hui (gatherings) associated with events in the lives of members or of the group as a whole,
- The provision of mutual support, and
- The socialisation of children.

Children are considered to be “tatou tamariki” (children of us many) as well as “taua tamariki” (children of us two).¹⁰⁷ Regarded as taonga, children are to be treated with respect, responsibility, love and care by all members of their group. A functioning whanau expects to share the care and control of children within the whanau. That means whanau parenting includes feeding, affection, and discipline in everyday and crisis situations, whether the natural parents are there or not.¹⁰⁸ In public and private gatherings, children are attended to by the relatives closest to hand or the quickest off the mark. Whanau also share in, what Western ideology conceive as, the guardianship responsibilities to children (tamariki), but are additional or supplementary to the children’s maternal/paternal parents.¹⁰⁹ Grandparents have a

¹⁰³ Convention on the Rights of the Child *Consideration of reports submitted by States Parties under article 44 of the Convention: Second periodic reports of States Parties due in 2000 New Zealand*, CRC/C/93/Add.4 (2003) at [362].

¹⁰⁴ Ruru, above n 87, at 59.

¹⁰⁵ At 59.

¹⁰⁶ At 59.

¹⁰⁷ At 63.

¹⁰⁸ At 64.

¹⁰⁹ At 64.

special relationship with their grandchildren (mokopuna). Particular attention is given to three activities which parents avoid:¹¹⁰

- Fostering children's self esteem by praise and expressions of affection,
- Developing verbal skills through storytelling and discussion, and
- Talking about sex and emotional matters.

Parental avoidance of these matters may be seen from an "exclusive parental responsibility perspective" as deficient but not from a "collective responsibility perspective".¹¹¹

Ideally Maori children should have easy access to both parents and grandparents. Separation can result in a child missing out on vital aspects of their psychological development.¹¹² Maori parents appreciate and capitalise on whanau collective parental responsibility. This includes not just care and protection when the children are out of their sight but if they are rebellious or withdrawn they may call upon relatives to talk to the child or care for the child. It can also include a child being chosen to inherit whanau knowledge or the endorsement of a child's ambitions, which enables parents to support their children as whanau in a way they might otherwise feel unable to do as parents.¹¹³

When assessing the best interests of a Maori child, the concept of whanaungatanga supports a collective rights perspective rather than individual rights perspective. Whanaungatanga encompasses kinship responsibilities, duties, and values arising from a close familial, friendship or reciprocal relationship.¹¹⁴ Collective responsibility is integral to whanaungatanga and has been said to make the distinction between egoism and altruism in the Maori world impossible because acting for the group is acting for oneself.¹¹⁵ Accordingly, a Maori child's caregivers/parents can be viewed from a collective rights perspective as being responsible not only to the child for the child's care and welfare but also being responsible to a defined wider group (whanau, hapu and Iwi). The reverse also

¹¹⁰ At 64.

¹¹¹ At 64.

¹¹² At 64.

¹¹³ At 65.

¹¹⁴ Ministry of Justice, above n 79, at *Te Whanau*.

¹¹⁵ Justice Durie, above n 73, at 258 citing J Paterson.

applies. The wider group (whanau, hapu and Iwi) can be viewed as being collectively responsible for the welfare of the child including protection from neglect or harm. Rangihau makes clear, notions of children as “possessions” or parents as the natural and exclusive guardians are contrary to Maori tradition when stating:¹¹⁶

The Maori child is not to be viewed in isolation, or as part of a nuclear family. The Maori tradition, the importance attached to the child’s interest is subsumed under the importance attached to the responsibility of the tribal group through the tribal traditions and lore of inherited circumstances. The hapu or tribal group, is bound to provide for the physical, social and spiritual well-being of the child and its upbringing as a member of a particular hapu. This responsibility would take precedence over the view of the birth parents.

Conversely from a child rights perspective, a Maori child has collective rights and responsibilities as a member of a collective group. The child’s rights and responsibilities are again best described by Metge in the following terms:¹¹⁷

They [children] have rights to their genealogical identity, to love, to support and to socialisation in tikanga Maori, from other members of their whanau, as well as, and sometimes instead of their parents. In their turn they are expected to honour reciprocal responsibilities to their parents, their ancestors and the whanau as a group.

Ruru makes an important distinction between descent-group “whanau” (being descendants of the whanau ancestor excluding most husbands and wives) and “extended-family” (which includes spouses and adopted children who are not descendants but actively participate in whanau activities). The differentiation goes to the functions of Maori social life as the descent-group comes to the fore in respect to the management of group property, the choice of public representatives, and relations between hapu and iwi. The extended-family comes to the fore in relation to mutual support, child-raising and the organising of hui.¹¹⁸

Whanau take a variety of organisational approaches to fulfilling their functions. Some form komiti (clubs) or kotahitanga (unions) which meet on a regular or semi regular basis. Others act as needs arise however members of the older generation (kaumatua) usually fill high profile roles such as public speechmakers (kai-korero),

¹¹⁶ Pitama, Ririnui & Mikaere, above n 83 at [7.6] citing J Rangihau *Address to High Court Judges* (3 April 1987) at 6.

¹¹⁷ Pitama, Ririnui & Mikaere, above n 102 at [7.3] citing Metge at 141.

¹¹⁸ Ruru, above n 86 at 60.

chairpersons and directors of ceremony (kai-whakahare).¹¹⁹ Ruru refers to a close partnership behind the scenes facilitated by active middle-aged and promising youth.¹²⁰

Ruru also points out that Maori can belong to more than one whanau.¹²¹ The ancestor descent traced through one parent to one whanau does not prevent membership of the other parent's whanau. It also does not prevent membership of a spouse's whanau. Full membership of whanau, hapu or iwi however requires more than descent from an ancestor. Active participation in the group's affairs is paramount, based on take ahi ka, "keeping the home fires burning".¹²²

When whanau are fully functional, its members are bound to each other by ties of aroha (loyalty as well as affection) and feel a commitment to provide financial and moral support to each other and group hospitality to guests (manaakitanga).¹²³ Significantly, traditional tikanga means the whanau accept responsibility for each other's behaviour including sharing the blame when a member offends against community norms and helping the member make reparation.¹²⁴ Contemporary whanau functionality departs to a greater or lesser extent from this model for many reasons including physical proximity of members, economic circumstances, and leadership.¹²⁵ Maori nuclear families may or may not belong to a functioning whanau.¹²⁶ If they do, a tension between members' loyalty to each other and their loyalty to the whanau as a whole is usual.¹²⁷

Ruru opines that most Maori nuclear families do not currently belong to a fully functioning whanau.¹²⁸ Notwithstanding, she refers to one if not both spouses as usually having first-hand experience of functioning whanau during their impressionable years of childhood and internalising many associated beliefs and practices, which significantly affects the way they organise their family life.¹²⁹ Maori

¹¹⁹ At 60.

¹²⁰ At 60.

¹²¹ At 60.

¹²² At 62.

¹²³ At 60.

¹²⁴ At 60.

¹²⁵ At 60.

¹²⁶ At 61.

¹²⁷ At 61.

¹²⁸ At 61.

¹²⁹ At 61.

are considerably more likely than non-Maori to live in households containing two or more families.¹³⁰ This indicates the continuing importance and relevancy of functioning whanau to Maori.

The idealised and general understanding of the hierarchy of Maori society as a pyramid with whanau at the base, hapu in the middle and iwi at the apex is an oversimplification. Hapu are related whanau collectives associated with a marae and a local community. Hapu was the most basic political unit within traditional Maori society.¹³¹ Iwi are related hapu associated with regional territory. The reality may be that there is more than one level of hapu between whanau and iwi. Some whanau which grow very large and segment into small functioning whanau may continue to call themselves whanau when hapu would be more appropriate.¹³²

It is important that the judiciary and counsel appreciate that whanau is the first line of defence when a Maori individual or nuclear family is in need of assistance. If the whanau is lacking or dysfunctional, the responsibility and intervention lies next with the hapu and then with the iwi, at least in theory.¹³³ It is more likely to work in rural areas within a tribal territory where marae committees know their whanau. In urban areas where members of hapu of many iwi are mixed and many Maori have lost touch with their roots, formal organisations are usually formed on an iwi rather than hapu basis.¹³⁴ In such cases, the runanga (administrative group) of the relevant iwi will identify the appropriate whanau or hapu.¹³⁵

The judiciary and counsel must also appreciate the basic tenets of collective Maori society if Maori children's collective cultural rights are to be recognised by the Family Court. It is not simply recasting Maori collective concepts within a Western liberal framework. Reference to and consideration of Maori customary law is necessary. It is UNCROC, the application of the best interests principle under CYPFA and COCA, and UNDRIP which oblige the Family Court of New Zealand to do so.

¹³⁰ Convention on the Rights of the Child, above n 103, at [398].

¹³¹ Ministry of Justice, above n 79 at *Te Hapu*.

¹³² Ruru, above n 87, at 61.

¹³³ At 62.

¹³⁴ At 62.

¹³⁵ At 62.

CHAPTER THREE:

International Law and Collective Rights

The recognition of indigenous children's collective cultural rights under UNCROC is consistent with international human rights law which has increasingly acknowledged Indigenous Peoples collective rights. The universal application of individual human rights has evolved over time to accommodate cultural diversity and cultural rights. Numerous international human rights covenants, declarations, and instruments over a long period have affirmed Indigenous Peoples collective and cultural rights. Recognition of Indigenous Peoples collective cultural rights within the International Covenant on Civil and Political Rights in 1966 has for instance been eclipsed by UNDRIP in 2007. New Zealand has endorsed UNDRIP and has acknowledged Maori collective rights within domestic social policy. The recognition of Maori children's cultural collective rights under the best interests principle is consistent with international human rights law and domestic social policy.

II The Increasing Recognition of Indigenous Peoples Collective Rights within International Human Rights Law

Historically international human rights law has emphasised the protection of individual civil and political rights against the State.¹³⁶ The Universal Declaration of Human Rights (UDHR) which was adopted by the United Nations General Assembly in 1948 is a good example.¹³⁷ The UDHR, while setting out civil, political, economic, social and cultural rights, was drafted with an individualised conception of human rights in a post World War Two era dominated by the West. The conception of human rights as individualised rights continued; however, over time the need to respect cultural diversity and cultural rights has been recognised. In 1966 two legally binding human rights treaties were promulgated, the International Covenant on Civil and

¹³⁶ Margaret Bedggood "Economic, Social and cultural rights: The International Background" in Margaret Bedggood and Kris Gledhill (eds) *Law Into Action Economic, Social and Cultural Rights in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2011) 3 at 5.

¹³⁷ Universal Declaration of Human Rights U.N. Doc A/810 (adopted by the United Nations General Assembly 10 December 1948).

Political Rights¹³⁸ (ICCPR) and the International Covenant on Economic, Social and Cultural Rights¹³⁹ (ICESCR). They both acknowledge inter alia the right of individuals to take part and participate in their cultural life (see Article 27 of ICCPR and Article 15(1)(a) of ICESCR).

ICESCR and ICCPR have not, however, met the cultural and political concerns of Indigenous Peoples. Articles 27 and 15(1)(a) of the respective treaties reflect an individual rights perspective. As Valmaine Toki observes, “culture is a product of collective behaviour” and the right to enjoy culture under Article 27 of ICCPR is expressed as belonging to “persons” not collectives.¹⁴⁰ She also points out that under Article 15 of ICESCR, the right to take part in cultural life, is expressed as belonging to “everyone” which is again an individualistic rather than collective approach.¹⁴¹ The individualised nature of the right to participate in cultural life under Article 27 is manifest when individual complaints alleging the denial of the collective right to participate in cultural life is considered.

ICCPR (unlike ICESCR) has an individual complaints procedure which indigenous individuals (as members of minority groups) have used alleging the denial of their collective cultural rights. Individual complaints alleging State Party breaches of ICCPR are determined by the Human Rights Committee under the Covenant’s First Optional Protocol. Indigenous persons have brought complaints under Article 27 alleging denial of their right to group membership and identity and alleging breaches of State responsibilities to persons who share cultural rights.¹⁴²

The first complaint brought under Article 27 alleged a collective right to cultural identity had been denied by operation of the Indian Act of Canada. The complaint was brought by Sandra Lovelace.¹⁴³ The Indian Act provided that Indian women who married non-Indian men were not entitled to live on their reserve. Ms Lovelace divorced and returned to her reserve where she had grown up. The Human

¹³⁸ International Covenant on Civil and Political Rights 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976).

¹³⁹ International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (adopted 16 December 1966, entered into force 3 January 1976).

¹⁴⁰ Valmaine Toki “Indigenous Peoples’ Rights” in Bedgood and Gledhill, above n 136, 260 at 271. At 271.

¹⁴² Terri Libesman “Can International Law Imagine the World of Indigenous Children?” (2007) 15 The International Journal of Children’s Rights 283 at 292.

¹⁴³ *Sandra Lovelace v Canada* Communication No. 24/1977, CCPR/C/13/D/24 (1977).

Rights Committee found Ms Lovelace’s right to enjoy her culture in community with other members of her group was the subject of ongoing interference because there was nowhere outside of the Tobique Reserve that her culture and community existed. The Committee considered the competing rights of the group and of the individual, and recognised the nexus between an individual’s enjoyment of their cultural rights and the need to maintain and protect the rights of the group.¹⁴⁴

Collective cultural rights of individual members of groups such as Ms Lovelace have been acknowledged within the confines of this individualised complaints procedure. The Human Rights Committee in its General Comment No. 23 “The rights of minorities (Art 27)” clarified the individual right to community with other members of their group when it said (at para 6.2):¹⁴⁵

Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by states may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group.

Article 27 does not, however, address the collective rights of Indigenous Peoples as *sui generis* groups. The complaints mechanism enables individuals to complain that their individual rights to community or culture with other members of their group have been denied by the State, but it does not entitle Indigenous Peoples as a collective to bring complaints. Article 27 is also limited in scope which reduces the nature and the extent of its application. It was not until UNDRIP was adopted by the General Assembly in 2007 that Indigenous Peoples comprehensive collective rights were recognised within one document by the international community.

III The United Nations Declaration on the Rights of Indigenous Peoples and UNCROC

The United Nations Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly on 13 September 2007.¹⁴⁶ UNDRIP is the most comprehensive

¹⁴⁴ Libesman, above n 142.

¹⁴⁵ Human Rights Committee *General Comment No. 23: Article 27 (Rights of Minorities)*, CCPR/C/21/Rev.1/Add.5 (1994).

¹⁴⁶ Above n 4, see appendix B.

and the most significant recognition of Indigenous Peoples collective rights in international human rights history. It followed more than 20 years of effort by the United Nations Working Group on Indigenous Populations, State representatives and indigenous communities. James Anaya, in his report to the General Assembly as Special Rapporteur on the “Rights of indigenous peoples” in 2011, referred to the evolution of UNDRIP as the gradual emergence over three decades of a common body of opinion on the rights of indigenous peoples based on long-standing principles of international human rights law and policy.¹⁴⁷ He went on to describe the adoption of the Declaration as:¹⁴⁸

... the most prominent manifestation of this common body of opinion, encapsulating as it does a widely shared understanding of the rights of indigenous peoples that has been building over decades from a foundation of existing sources of international human rights law.

The comprehensive scope and the extent of the rights elaborated within one instrument dedicated to Indigenous Peoples individual and collective rights distinguishes UNDRIP from any other human rights instrument. Kiri Toki makes the following three important points in respect to the significance of UNDRIP:¹⁴⁹

1. The Declaration provides Indigenous Peoples with an international standard to measure State action,
2. The Declaration codifies the amalgam of indigenous international rights into one document, and
3. The Declaration is the only United Nations document dedicated to Indigenous Peoples rights and addresses indigenous specific concerns.

UNDRIP does not create new or special rights separate from the fundamental human rights that apply universally but elaborates upon the cultural, historic, social, and economic circumstances of Indigenous Peoples.¹⁵⁰ It contains minimum standards of recognition, protection and promotion of Indigenous Peoples rights.¹⁵¹ Indigenous

¹⁴⁷ Rights of Indigenous Peoples *Report of the Special Rapporteur on the rights of indigenous peoples*, UN Doc A/66/288 (2011) at [62].

¹⁴⁸ At [62].

¹⁴⁹ Kiri Toki, Ko Nga Take Ture Maori “What a Difference a ‘DRIP’ makes; The Implications of Officially Endorsing the United Nations Declaration on the Rights of Indigenous Peoples” (2010) 16 Auckland U L Rev 243 at 245-6.

¹⁵⁰ Above n 147, at [63].

¹⁵¹ United Nations Human Rights Office of the High Commissioner, “Indigenous Peoples and United Nations Human Rights System” Fact Sheet No. 9/Rev.2, (2013) at 4 <<http://www.ohchr.org>>.

Peoples individual and collective human rights, including the right to culture, identity, education, health, employment, language and many others, are affirmed within the Declaration's 23 preambular paragraphs and 46 substantive articles.¹⁵²

A core principle of UNDRIP is the right of Indigenous Peoples to self determination consistent with the principle of territorial integrity and the political unity of States.¹⁵³ UNDRIP also affirms Indigenous Peoples rights to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired and the right to redress if without free, prior, and informed consent those rights have been impinged.¹⁵⁴ Indigenous Peoples right to self government and autonomy in matters relating to internal and local affairs including political, legal, economic, cultural institutions, and social systems and the right to pursue their economic, social, and cultural development are affirmed.¹⁵⁵ States have inter alia a duty to consult with Indigenous Peoples and seek their free, prior, and informed consent before adopting and implementing legislative or administrative measures which may affect them.¹⁵⁶ The right to prompt decision making through just and fair procedures for the resolution of conflicts and disputes with States or other parties is also affirmed.¹⁵⁷ Indigenous Peoples are also entitled to effective remedies for infringements of both their individual and collective rights.¹⁵⁸

It is the extent of the recognition of Indigenous Peoples collective rights which distinguished UNDRIP as groundbreaking.¹⁵⁹ Indigenous Peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognised in the Charter of the United Nations, the UDHR and international human rights law.¹⁶⁰ UNDRIP acknowledges indigenous persons' individual rights but Indigenous Peoples rights are by definition collective rights.¹⁶¹ The adoption of UNDRIP is affirmation from the international community that

¹⁵² See United Nations Human Rights Office of the High Commissioner for Human Rights *Declaration on the rights of Indigenous peoples (2007)* < <http://www.ohchr.org>>.

¹⁵³ Above n 4, at art 1, 3, and 46.

¹⁵⁴ Art 26, 27 and 28.

¹⁵⁵ Art 4 and 5.

¹⁵⁶ Art 19.

¹⁵⁷ Art 40.

¹⁵⁸ Art 40

¹⁵⁹ At 7.

¹⁶⁰ Art 1.

¹⁶¹ Above n 151, at 7.

Indigenous Peoples require recognition of their collective rights as Peoples to enable them to enjoy human rights.¹⁶²

All of the rights affirmed by UNDRIP apply to indigenous children however given they are vulnerable, their rights have been emphasised as follows:

- That particular attention shall be paid to the rights and special needs of indigenous youth and children in the implementation of the Declaration,¹⁶³
- States shall take measures in conjunction with Indigenous Peoples to ensure children enjoy the full protection and guarantees against all forms of violence and discrimination,¹⁶⁴
- States shall pay particular attention the needs of indigenous children to ensure continuing improvement of their economic and social conditions.¹⁶⁵

Notwithstanding that particular attention must be paid to the needs and rights of indigenous children under UNDRIP, the holistic nature of collective societies is such that all of the rights affirmed need to be acknowledged when assessing indigenous children's best interests. Indigenous children's collective cultural rights (and their underlying values) which directly impact upon familial relationships may, however, be of particular relevance. They include inter alia Indigenous Peoples rights affirmed under UNDRIP to maintain and develop their:

- cultural heritage,
- traditional knowledge,
- cultural expression,

and to determine the responsibilities of individuals to their communities.¹⁶⁶

The right of Indigenous Peoples to collectively share the responsibility for the upbringing and wellbeing of children falls squarely within the concept of family and family relationships and responsibilities. The collective right to share the responsibility for the upbringing and wellbeing of indigenous children is affirmed by UNDRIP, which links that right to the rights of the child under UNCROC. UNDRIP's Preamble emphasises the collective right to raise children and its inter-relationship

¹⁶² At 7.

¹⁶³ Art 22.

¹⁶⁴ Art 22.

¹⁶⁵ Art 21.

¹⁶⁶ Art 31 and 35.

with the rights of the child under UNCROC when it states, “the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, *consistent with the rights of the child*” (emphasis added).

UNDRIP’s Preamble explicitly qualifies Indigenous Peoples collective rights in respect to the upbringing and wellbeing of children. The exercise of the collective rights must be consistent with “the rights of the child”. The qualification requires, in the writer’s view, the rights under UNDRIP and UNCROC to be considered together. General Comment No. 11 provides a linkage between UNCROC and UNDRIP in respect to indigenous children’s rights. General Comment No. 11 is a comprehensive guide to the application of UNCROC to indigenous children. The Comment’s guidance in respect to the best interests principle specifically addresses its application to indigenous children’s collective cultural rights. It stresses that an indigenous child’s best interests is conceived as both an individual and collective right. It also stresses that the application of the best interests principle to an indigenous child requires consideration of the child’s collective cultural rights and need to exercise those rights collectively with members of his/her group. Consideration of UNDRIP, UNCROC and General Comment No. 11 in combination is essential if the Family Court of New Zealand is to recognise Maori children’s collective cultural rights when assessing their best interests as it is obliged to do. This imperative is discussed in detail in chapter five.

IV New Zealand’s adoption of UNDRIP

New Zealand was one of four States which initially opposed the adoption of UNDRIP (along with Australia, Canada, and the United States). New Zealand objected to four articles; Article 26 (the right to lands, territories and resources), Article 28 (the right to redress or fair, just and equitable compensation), and Articles 19 and 32 (the right(s) of obtaining free, prior, and informed consent).¹⁶⁷ These were regarded by the government of the day as being “fundamentally incompatible with the constitution

¹⁶⁷ Kiri Toki, above n 149, at 248-249 citing Rosemary Banks “Explanation of Vote by HE Rosemary Banks, New Zealand Permanent Representative to the United Nations” (New Zealand Ministry of Foreign Affairs and Trade, 2007) <www.mfat.govt.nz>.

and legal norms of New Zealand”.¹⁶⁸ All of the countries opposed to the adoption of UNDRIP have since withdrawn their opposition and now support the Declaration. New Zealand endorsed UNDRIP on 20 April 2010.

New Zealand’s endorsement of UNDRIP has been claimed by some as the most significant event for Maori indigenous rights since the signing the Treaty of Waitangi (Treaty).¹⁶⁹ Endorsement of UNDRIP does not oblige the New Zealand government to implement its articles (unlike UNCROC). Minister Sharples emphasised (when he moved to support the Declaration at the United Nations Permanent Forum on Indigenous Issues) that New Zealand’s existing legal and constitutional framework would evolve in accordance with New Zealand’s domestic circumstances and define the bounds of New Zealand’s engagement with the aspirational elements of UNDRIP.¹⁷⁰ In respect to decision-making he said:¹⁷¹

... where the Declaration sets out principles for indigenous involvement in decision-making, New Zealand has developed, and will continue to rely upon its own distinct processes and institutions that afford opportunities to Maori for such involvement. These range from broad guarantees of participation and consultation to particular instances in which a requirement of consent is appropriate.

New Zealand’s domestic circumstances will increasingly play an important role in the recognition of the collective rights of Maori. New Zealand’s history and in particular the rights and obligations arising from the Treaty, ensure that. UNDRIP is an additional ground within international human rights law to advance the recognition of those rights. A Declaration according to the office of Legal Affairs of the United Nations Secretariat “is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where the maximum compliance is expected”.¹⁷²

¹⁶⁸ At 248-249.

¹⁶⁹ At 244, see fn 6 citing Sir Eddie Durie and Karen Johansen.

¹⁷⁰ At 244, see Pita Sharples “Supporting UN Declaration restores NZ mana” (press release, 20 April 2010).

¹⁷¹ At 244.

¹⁷² Above n 151, at 9 citing *Report of the Commission on Human Rights on its Eighteenth Session*, E/3616/Rev.1 (1962) at [105].

In the writer's view, the role UNDRIP will play in the future recognition of Maori children's collective cultural rights in combination with UNCROC and General Comment No. 11 is, however, more than simply aspirational.

V Recognition of Maori Collective Cultural Rights in Context

New Zealand social policy increasingly recognises that Maori collective rights and responsibilities within family relationships are fundamental to the welfare and best interests of Maori children and their whanau. Whanau Ora and E Tu Whanau are both social policy initiatives which are whanau based and foster Maori collective cultural rights and responsibilities. That recognition is consistent with UNDRIP and international human rights law. The strengthening of the Maori social services sector (including Whanau Ora and iwi social services) and the continued political and economic growth of iwi require recognition. The Family Court of New Zealand must appreciate this dynamic and the social context driving its development, if it is to remain relevant.

In 2009 the Minister for the Community and Voluntary Sector, the Honourable Tariana Turia, established the Taskforce on Whanau-centred Initiatives in order to develop a new approach for the design and delivery of government funded services and initiatives to whanau.¹⁷³ The purposes of the Taskforce (as set out in the Terms of Reference) included the development of an evidence-based framework for whanau-centred service delivery to strengthen whanau capabilities, and of an integrated approach to whanau wellbeing.¹⁷⁴ The Taskforce recommendations were integral to the development of Whanau Ora. One of the principle recommendations the Taskforce made was:¹⁷⁵

... that Whanau Ora services are shaped by te ao Maori [the Maori world]. It is critical that the cultural distinctiveness of whanau is recognised in the delivery of services. Despite varying levels of participation in te ao Maori, this is a central component of contemporary whanau experience. Services should be attuned to whanau cultural norms, whanau traditions and whanau heritage,

¹⁷³ *Whanau Ora: Report of the Taskforce on Whanau-Centered Initiatives* (Ministry of Social Development 6 April 2010) at 10 <www.tpk.govt.nz>

¹⁷⁴ *Whānau Ora: A whānau-centred approach to Māori wellbeing* (Ministry of Social Development, discussion paper by the Whānau Ora Taskforce, September 2009) at 1 <www.nzdoctor.co.nz>.

¹⁷⁵ Above n 173, at 9 [4].

while at the same time recognising the realities and opportunities in te ao Maori and in wider society.

The Taskforce findings in respect to whanau participation in te ao Maori (the Maori world) and whanau participation with hapu and iwi put into context the growing level of engagement by Maori with their culture and its trajectory, as follows:

While full participation in wider society is essential for whanau welfare, active participation in Maori communities and networks is also an important determinant of wellbeing. Despite urbanisation, over the past two decades there has been increased whanau access to Maori culture, Maori networks, marae and tribal endeavours. An important enabling instrument has been the Treaty of Waitangi. The recognition of the significance of the Treaty to social as well as economic policies was highlighted by the Royal Commission on Social Policy in 1988 and a Treaty-based cultural dimension to wellbeing was subsequently acknowledged by the Crown in regard to Maori language, Maori education, and service delivery to Maori.¹⁷⁶

The relationship of whanau to hapu and iwi has also assumed greater significance this century, partly in response to iwi delivery of health and social services and also as a consequence of Treaty of Waitangi settlements. The relationship has mutual benefits. Iwi registers of whanau members have provided relevant justifications for establishing social services and lodging claims, while whanau have benefited from iwi programmes, employment by iwi authorities and access to iwi resources.¹⁷⁷

The Honourable Minister Turia has said that Whanau Ora, “... is about restoring to ourselves, our confidence in our own capacity to provide for our own – to take collective responsibility to support those who need it most.”¹⁷⁸

E Tu Whanau (a Programme of Action for Addressing Family Violence) is a further social policy initiative which is based upon the collective responsibilities of whanau, hapu and iwi.¹⁷⁹ The Programme of Action to address the violence which is occurring within whanau is founded on the belief that significant change is not possible without reclaiming those things that once made Maori strong, such as tikanga, but in a way that is relevant for living in today’s world.¹⁸⁰ It is also based

¹⁷⁶ At 16 [2.3.8].

¹⁷⁷ At 17 [2.3.10].

¹⁷⁸ “Whanau Ora: Theory and Practice” (2011) 37 BPJ at 11.

¹⁷⁹ The Māori Reference Group for the taskforce for action on violence within families, “E Tu Whānau Programme of Action for Addressing Family Violence 2013 – 2018” <www.familyservices.govt.nz>.

¹⁸⁰ At 13[3.4].

upon fundamental Maori aspirations such as the concept of whanaungatanga.¹⁸¹ It focuses on strength and empowerment - spiritually, physically, mentally and emotionally. A strong, empowered whanau is the foundation for the success of E Tu Whanau as it is said to ensure there is a strong, connected hapu and iwi.¹⁸² Violence issues are addressed as a collective responsibility based upon the whole whanau, not just the immediate individual(s) concerned.¹⁸³

The programme provides a framework to help transform the serious impact of violence within whanau, hapu and iwi based upon the strengths within te ao Maori. It focuses on strategies and solutions which encompass the whole whanau and include those actions and behaviours which uphold the values underpinning tikanga in contemporary society.¹⁸⁴

A The Family Disputes Resolution Act 2013

The Family Court of New Zealand was the subject of reform, which for the most part took effect in April 2014. The enactment of the Family Disputes Resolution Act 2013 was a significant outcome. It introduced an entirely new pre-litigation Family Dispute Resolution process (mediation) which must usually be completed (subject to exceptions including urgent applications) before parties are permitted to file applications in the Family Court.¹⁸⁵ After the commencement of proceedings, parties seeking guardianship directions or parenting orders may nevertheless be directed to Family Dispute Resolution if a Judge considers there is a reasonable prospect of agreement and the parties have not participated in Family Dispute Resolution within the preceding 12 months.¹⁸⁶

The Family Disputes Resolution Act prescribes how family dispute organisations and providers are appointed, and procedural matters including qualification and competency requirements. To be appointed as a family dispute resolution provider (mediator), a person must be qualified and competent to provide services intended to resolve family disputes.¹⁸⁷ The qualification and competency

¹⁸¹ At 7[1.1].

¹⁸² At 20[4.3].

¹⁸³ At 20[4.3].

¹⁸⁴ At 3.

¹⁸⁵ Care of Children Act, s 46E(4).

¹⁸⁶ Section 46F(2), (3).

¹⁸⁷ Family Disputes Resolution Regulations 2013, r 9(1).

criteria include providers being culturally aware, in particular of Maori values and concepts.¹⁸⁸ A provider's duties include identifying matters in issue, facilitating discussion between the parties and assisting the parties reach agreements which serve the welfare and best interests of all children involved in the dispute.¹⁸⁹

FairWay Resolution Limited is a national provider of Family Dispute Resolution services. It has a team of more than 150 accredited Family Dispute Resolution providers in 61 locations. In October 2014 FairWay announced "Tumeke Whanau Whanui: Whanau Dispute Resolution Strategy Delivery for Maori" in furtherance of its obligation to ensure its providers are competent in respect to Maori values and concepts.¹⁹⁰ The strategy establishes a conceptual framework for discussion and to support the development of its Maori cultural initiative. The initiative acknowledges the collective and holistic nature of Maori familial relationships and is designed to ensure:¹⁹¹

... providers will have a level of competency and knowledge of the Treaty and Tikanga in order to provide mediation services competently to Maori families. That whanaungatanga (relationships), tamariki (children), and whanau (family) is the foundation stone of importance to ensure the promotion and advocacy for the welfare of children.

The initiative will be used to establish criteria to determine Maori competencies and identify accredited Maori providers. It will also assist in the development of a process to determine if providers are culturally safe practitioners. Cultural supervision and training packages will also be developed under the initiative.¹⁹² The FairWay strategy acknowledges Maori children's collective cultural rights and whanau, hapu and iwi responsibilities to children.

New Zealand social policy recognises that there is a nexus between the welfare and best interests of Maori children and their whanau, and Maori children's collective cultural rights. As identified by the Taskforce, there has been increased whanau access to Maori culture, Maori networks, marae and tribal endeavours over

¹⁸⁸ At r 7(i).

¹⁸⁹ Family Disputes Resolution Act 2013, s 11.

¹⁹⁰ FairWays Resolution Limited: Ta te Hinengaro Tokeke Whakatau, Tumeke *Whanau Whanui: Whanau Dispute Resolution Strategy Delivery for Maori* (October 2014).

¹⁹¹ At 2.

¹⁹² At 10.

recent decades and Maori social services are growing.¹⁹³ That trend is likely to continue.

¹⁹³ Above n 176.

CHAPTER FOUR:

UNCROC: International Authority on the Rights of the Child

UNCROC is unique because:

- it is specific to children;
- it is the most ratified human rights treaty in history; and
- State Parties must implement the Convention's articles within their domestic legal and administrative systems.

This combination of attributes, coupled with a proactive Committee, has facilitated the Convention's implementation and the ongoing development of children's rights. The Committee monitors and reviews State Parties compliance by Periodic Review (discussed below) and issues General Comments. General Comments assist State Parties to implement their obligations under UNCROC by providing authoritative guidance through legal analysis, policy recommendation and practice direction.¹⁹⁴ The Committee's functions are crucial to the implementation and ongoing development of children's rights under UNCROC. The review of State Parties' compliance and implementation of UNCROC by the Committee at Periodic Review and the Committee's issuing of General Comments and their status within international law are discussed. This discussion provides the foundation required for the detailed analysis of the Committee's General Comment No. 11, Indigenous children and their Rights under the Convention in chapter five.

I United Nations Committee on the Rights of the Child

The United Nations Committee on the Rights of the Child was established under Part II of UNCROC.¹⁹⁵ The Committee's principle function is to examine the progress made by State Parties in realising their obligations under UNCROC and its three Optional Protocols:¹⁹⁶

¹⁹⁴ Paula Gerber, Joanna Kyriakakis and Katie O'Byrne "General Comment 16 on the State Obligations regarding the impact of the business sector on children's rights: what is its standing, meaning and effect?"(2013) 14 *Melb. J. Of Int'l L.* 93 at 101-102 citing Helen Keller and Leena Grover, "General Comments on the Human rights Committee and Their Legitimacy" in Helen Keller and Geir Ulfstein (eds) *UN Human Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012) 116.

¹⁹⁵ Art 43(1).

¹⁹⁶ Art 43(1).

1. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict,¹⁹⁷
2. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography,¹⁹⁸ and
3. Optional Protocol to the Convention on the Rights of the Child on a communication procedure.¹⁹⁹

The third Optional Protocol (Third Protocol) was opened for signature and ratification in February 2012 and came into force on 14 April 2014, three months after the 10th State Party had ratified it (as provided for in Article 19(1) of the Third Protocol). The Third Protocol empowers the Committee to receive and consider individual communications alleging violations of UNCROC and its Protocols by State Parties. The Committee is therefore able to investigate communications which allege breach of cultural rights.²⁰⁰ New Zealand has yet to ratify the Third Protocol. When New Zealand does, individuals or groups who allege New Zealand has violated any of the rights set out within UNCROC and its protocols will be entitled to communicate complaints to the Committee for investigation. The Third Protocol provides that after investigation State Parties must consider the views of the Committee and submit a response which includes action taken and envisaged in light of the Committee's views.²⁰¹ Further, where grave or systemic violations are alleged, the Committee may undertake an investigation under the inquiry procedure set out in Part III of the Third Protocol. The Committee submits a report biennially to the General Assembly. That report must include a summary of its activities under the Third Protocol.²⁰²

The Committee consists of 18 independent experts who are nominated by State Parties and elected by secret ballot.²⁰³ Committee members are appointed for a term

¹⁹⁷ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (adopted and opened for signature, ratification and accession 25 May 2000, entered into force 12 February 2002).

¹⁹⁸ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (adopted and opened for signature, ratification and accession 25 May 2000, entered into force 18 January 2002).

¹⁹⁹ Optional Protocol to the Convention on the Rights of the Child on a communication procedure (opened for signature on 28 February 2012, entered into force 14 April 2014).

²⁰⁰ Art 10.4.

²⁰¹ Art 11.1.

²⁰² Art 16.

²⁰³ Above n 2, art 43(2) and (3).

of four years and may be re-elected. The Secretary-General of the United Nations provides the necessary staff and facilities for the Committee to function. The Committee has wide powers to investigate compliance and to report its findings. Integral to the Committee's principle function of examining compliance and progress made by State Parties in realising their obligations under UNCROC, are the Periodic Reviews it carries out.

A Periodic Reviews

State parties must submit to the Committee (through the Secretary General) reports on the measures they have adopted which give effect to the rights within UNCROC, and on the progress made in the enjoyment of those rights.²⁰⁴ The initial report must be provided within two years of UNCROC coming into force in the relevant State and at five yearly intervals thereafter.²⁰⁵ New Zealand's next periodic review is this year (2015).

In 2010 the Committee adopted guidelines on the form and content of the five yearly periodic reports to be submitted by State Parties.²⁰⁶ The Committee has endeavoured to structure the reporting process and the dialogue with State Parties in a way which addresses issues of principle concern in a methodical and informative way.²⁰⁷ The guidelines request that reports contain relevant legislation, judicial, administrative and other information including statistical data. Reports should also address "factors or difficulties encountered," "progress achieved," "implementation priorities," and "specific goals" for the future.²⁰⁸ In respect to indigenous children, the guidelines specifically request State Parties to take account of General Comment No. 11 (2009) on indigenous children and their rights under the Convention. In particular, State Party reports should address indigenous children and their rights under the general principles in Articles 2, 3, 6 and 12 and in respect to education,

²⁰⁴ Art 44(1).

²⁰⁵ Art 44(1).

²⁰⁶ Committee on the Rights of the Child *Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by State parties under Article 44 paragraph 1(b) of the Convention on the Rights of the Child* UN Doc CRC/C/58/Rev.2 (25 November 2010).

²⁰⁷ Committee on the Rights of the Child, "Working Methods" <<http://www.ohchr.org> >

²⁰⁸ Committee on the Rights of the Child.

leisure and cultural activities under Articles 28, 29, 30 and 31.²⁰⁹ States Parties are obliged to make their reports widely available to the public in their own countries.²¹⁰

The review process of a State Party begins well before the Committee review session (which is when the particular State Party's report is formally reviewed). A pre-session working group convenes a private meeting to consider the State Party's periodic report and to formulate a "list of issues" (the List).²¹¹ The List constitutes the priorities the Committee intends to address within the review.

The Committee adopted its "Guidelines for the participation of partners (non-government organisations and individual experts) in the pre-session working group of the Committee on the Rights of the Child" in 1999.²¹² The Committee invites non-government organisations and National Human Rights Institutions to submit reports, documentation or other information to assist it in gaining a comprehensive picture about how UNCROC is being implemented in the particular country.²¹³ The Committee invites selected non-government organisations and experts (based on their submissions) to participate in the pre-session meetings which are closed to the public. The Committee may also invite specialized agencies, the United Nations Children's Fund and other competent bodies as it considers appropriate, to provide expert advice and/or report on the implementation of the UNCROC in areas within the scope of their respective mandates.²¹⁴ The process provides the Committee with the opportunity for dialogue with partners and recognises the contribution civil society makes to the review and, development of children's rights under UNCROC.

State Parties are provided with the List following the pre-session working groups and may also be asked to provide additional or updated information prior to the review session. The Committee asks the State Government to provide answers to the List in writing, in advance of the review session and with sufficient time for them to be translated.²¹⁵ The procedure enables States to prepare for the discussion with

²⁰⁹ Above n 206 at [27] and [38].

²¹⁰ Art 44(6).

²¹¹ Above n 207.

²¹² Committee on the Rights of the Child *Guidelines for the Participation of Partners (Ngos and Individual Experts) in the Pre-sessional Working Group of the Committee on the Rights of the Child*, UN Doc CRC/C/90, (1999).

²¹³ Above n 207.

²¹⁴ Art 45(a).

²¹⁵ Above, n 207.

the Committee having had the benefit of the List, and the Committee having the benefit of a reply before the review session. The intention is that the discussion will focus on an analysis of the “progress achieved” and “factors and difficulties encountered” in the implementation of UNCROC and “future goals” and priorities.²¹⁶ Relevant United Nations bodies and agencies are represented at the review session.²¹⁷

The Committee has the power to refer a Periodic Report from a State Party which contains a request or indicates a need for technical advice or assistance to a specialized agency, the United Nations Children’s Fund or any other competent body.²¹⁸ The Committee’s observations and suggestions (if any) on any such request or indication of a need for specialised assistance must accompany a referral.²¹⁹ State Parties may also request support (including training seminar’s or other assistance) to implement UNCROC from the United Nations Advisory Services in the Field of Human Rights.²²⁰

The Committee makes Concluding Observations in writing following a Periodic Review session. Concluding Observations include suggestions and general recommendations based on the information received as a consequence of the review.²²¹ Suggestions and general recommendations must be provided to the State Party concerned and are then reported to the General Assembly, together with comments (if any) from the State Party.²²² The Concluding Observations are disseminated to all relevant bodies and agencies within and outside of the United Nations as a basis for discussion and international cooperation.²²³ The Committee expects its Concluding Observations will be addressed in a detailed manner within the State Party’s subsequent periodic report including follow up measures to address any issues identified at Periodic Review.²²⁴

²¹⁶ Above n 207.

²¹⁷ Art 45(a).

²¹⁸ Art 45(b).

²¹⁹ Art 45(b).

²²⁰ United Nations Programme of Advisory Services in the Field of Human Rights GA Res 926, X (1955), see Fact Sheet No.3 (Rev.1), Advisory Services and Technical Cooperation in the Field of Human Rights online <<http://www.ohchr.org>>.

²²¹ Committee on the Rights of the Child *Rules of Procedure* UN Doc CRC/C/4/Rev.3 (16 April 2013) at [75] and [76].

²²² Art 45 (d).

²²³ Above n 207.

²²⁴ Above n 207.

The Committee also has the ability to recommend that the General Assembly request the Secretary-General to undertake on its behalf, studies on specific issues relating to the rights of the child.²²⁵ Lastly, the Committee issues General Comments to promote the interpretation and implementation of UNCROC and to assist State Parties to fulfil their reporting obligations. This promotes compliance but also provides guidance in the process.

II General Comments and their Status

The practice of issuing General Comments to guide State Parties arose because some States and treaty committee members were reluctant to countenance explicit findings of treaty violations by individual State Parties.²²⁶ General Comments were developed to provide guidance to State Parties generally, rather than targeting individual States.²²⁷ The Human Rights Committee of the United Nations issued guidelines in 1980 for the development of General Comments under human rights treaties. The guidelines were issued despite the absence of any specific mandate in any human rights treaty which empowered a treaty committee to publish General Comments interpreting the meaning of treaty provisions.²²⁸ The Human Rights Committee interpreted the vague reference to General Comments in article 40(4) of the *International Covenant on Civil and Political Rights* as empowering it to formulate General Comments to guide States generally.²²⁹ Article 40(4) provides:

The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.

Thereafter, any other human rights treaty committee was assumed to have the authority to issue General Comments if the treaty under which it was constituted

²²⁵ Art 45(c).

²²⁶ Gerber et al, above n 194, at 98.

²²⁷ Gerber et al, citing *Report of the Human Rights Committee*, UN GAOR, 36th sess, Supp No 40, UN Doc A/36/40 (29 September 1981) annex IV (“Statement on the Duties of the Human Rights Committee under Article 40 of the Covenant”).

²²⁸ At 97.

²²⁹ At 98.

referred to them. That assumption has been the subject of debate. Otto has gone so far as to suggest that treaty committees have a degree of “hard interpretative power” inherent within their supervisory capacity.²³⁰ In any event as Keller and Grover point out, no State Party has ever raised a formal objection to the competence of a treaty committee to issue a General Comment, which indicates general State acceptance of authority to do so.²³¹

The only reference UNCROC makes to the Committee's ability to issue General Comments is following a review session. The Committee may make suggestions and general recommendations arising from a Periodic Review based on information received pursuant to Articles 44 and 45 of UNCROC.²³² The Committee has subsequently developed its own rules on procedure, which include its ability to issue General Comments to guide State Parties to implement the Convention.²³³

The status of General Comments has increased with the passage of time and with an ever increasing number being issued. It is generally accepted that General Comments are not legally binding but they have as Craven states, “considerable legal weight”.²³⁴ The precise status of General Comments remains allusive and may depend upon the context in which they are applied. General Comments are, however, authoritative aids to the interpretation of State Parties’ treaty obligations. The authoritative status of General Comments is aptly encapsulated within two excerpts from Gerber, Kyriakakis and O’Byrne’s detailed analysis of the Committee's General Comment No. 16 “On State Obligations Regarding the Impact of the Business Sector on Children’s Rights” as follows:²³⁵

Otto notes that General Comments are now often thought of as “quasi-judicial” and as carrying “enormous political and moral weight”.²³⁶ In the view of Thomas Buergenthal, a former Judge of the International Court of Justice, General Comments frequently address difficult issues of interpretation

²³⁰ At 99 citing Dianne Otto, “Gender Comment”: Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?” (2002) 14 *Canadian Journal of Women and the Law* 1 at 13.

²³¹ At 99 citing Helen Keller and Leena Grover, see above n 194, at 127.

²³² Art 45(d).

²³³ Above n 221, at [77].

²³⁴ Gerber et al, at 100, citing Matthew C R Craven *The International covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Clarendon Press, 1998) 91.

²³⁵ At 100 citing Henry J Steiner and Phillip Alston *International Human Rights in Context: Law, Politics, Morals* (Oxford University press, 2nd ed, 2000) 265.

²³⁶ At 99-100 citing Otto, above n 230.

²³⁷ in a form similar to the highly influential advisory opinions of international tribunals.²³⁸ Consequently, it can be said that General Comments have gradually become important instruments in the lawmaking process of treaty committees, independent of the reporting system.²³⁹

“Steiner and Alston describe modern-day general comments as “more or less authoritative” legal interpretations.”

Gerber et al conclude “general comments have taken the form of a powerful and indispensable juridical tool that assists in reinforcing standards as well as pushing at the boundaries of law”.²⁴⁰ The norm-building function of General Comments is heightened when the Comment goes beyond the express terms of the treaty. By way of example Abashidze refers to General Comment No. 5 of the Committee on Economic, Social and Cultural Rights which concerns persons with disabilities notwithstanding that ICESCR does not expressly refer to persons with disabilities.²⁴¹ Blake argues treaty committees are more capable than State Parties of elaborating “progressive and often politically unpopular interpretations”.²⁴² General Comment No. 11 is a very good example of a norm-building and progressive General Comment. It develops the application of the best interests principle within UNCROC to recognise indigenous children’s collective cultural rights in the absence of an express reference to collective rights within the Convention.

²³⁷ At 99-100 citing Thomas Buergenthal, “The UN Human Rights Committee” (2001) 5 Max Planck Yearbook of United Nations Law 341 at 387.

²³⁸ At 386.

²³⁹ At 387.

²⁴⁰ At 103.

²⁴¹ At 102 citing Aslan Abashidze, “The Complementary Role of General Comments in Enhancing the Implementation of Treaty Bodies' Recommendations and Views (The Example of CESCR)” in M Cherif Bassiouni and William A Schabas (eds) *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia, 2011) 137 at 147.

²⁴² At 102 citing Conway Blake "Normative Instruments in International Human Rights Law: Locating the General Comment" (Working Paper No 17, Centre for Human Rights and Global Justice, New York University School of Law, 2008) 13.

CHAPTER FIVE:

General Comment No. 11 (2009) Indigenous children and their rights under the Convention.

General Comment No. 11 was issued at the 50th session of the Committee on the Rights of the Child in Geneva in 2009.²⁴³ The Comment's primary objective is to provide guidance to State Parties on how to implement their obligations under UNCROC with respect to indigenous children.²⁴⁴ The Committee developed General Comment No. 11 using its experience in interpreting provisions of UNCROC in relation to indigenous children.²⁴⁵ The Committee also took account of legal developments and initiatives on the rights of indigenous children. The recommendations adopted following the Committee's Day of General Discussion on indigenous children in 2003 (which incorporated a consultative process with relevant stake holders, including indigenous children themselves) were also influential.²⁴⁶ UNDRIP provided important guidance to the Committee which included specific reference to the rights of indigenous children in a number of areas.²⁴⁷

The Committee did not call for public submissions given there had already been a participatory Day of General Discussion in 2003. The Permanent Forum on Indigenous Issues (as an advisory body to the Economic and Social Council, with a mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights) and the Office of the United Nations High Commissioner for Human Rights Indigenous Peoples Unit were consulted and involved but did not make official submissions.²⁴⁸ The International Labour Organisation and UNICEF were invited to make submissions on the final version of the Comment, although those submissions were not public.²⁴⁹

²⁴³ Above n 3, see appendix C.

²⁴⁴ At [12].

²⁴⁵ At [12].

²⁴⁶ At [12].

²⁴⁷ At [12].

²⁴⁸ Allegra Franchetti, Secretary of the Committee on the Rights of the Child quoting the secretariat focal point at the time General Comment No. 11 was being drafted, email to the author of 2 December 2014.

²⁴⁹ Franchetti, above n 248.

The Committee, by issuing General Comment No. 11, seeks to encourage good practices and highlight positive approaches in the practical implementation of the rights of indigenous children.²⁵⁰ The Comment explores specific challenges which impede indigenous children from being able to fully enjoy their rights and highlights special measures required to be undertaken by State Parties in order to guarantee the effective exercise of indigenous children's rights.²⁵¹

General Comment No. 11 specifically addresses the recognition of indigenous children's collective cultural rights within the best interests principle under the heading "Best interests of the child" at paragraphs 30 to 33. Those paragraphs will be analysed but not before a general outline of the Comment is provided and the general obligations of State Parties under Article 30 of UNCROC are considered.

I General Comment No. 11- Outline

The Introduction to General comment No. 11 begins by quoting the Preamble of UNCROC, that State Parties take "due account of the importance and cultural values of each people for the protection and harmonious development of the child".²⁵² The Committee acknowledges UNCROC as the first core human rights treaty to include specific references to indigenous children in a number of its provisions.²⁵³ Articles 17, 29 and 30 of UNCROC make specific reference to indigenous children and are recited for emphasis. The specific reference to indigenous children is said to be indicative of the recognition that they require special measures in order to fully enjoy their rights.²⁵⁴ The Introduction also acknowledges human rights treaties other than UNCROC which have played an important role in addressing the situation of indigenous children and their right not to be discriminated against. They are the:

- International Convention on the Elimination of all forms of Racial Discrimination (1965),
- International Covenant on Civil and Political Rights (1966), and
- International Covenant on Economic, Social and Cultural Rights (1966).

²⁵⁰ Above n 3, at [13].

²⁵¹ At [13].

²⁵² At [1].

²⁵³ At [1].

²⁵⁴ At [5].

The Comment's Introduction also references by year three significant events which concern indigenous children and their rights under the Convention, being:

1. In 2001, the UN Commission on Human Rights appointed a Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, subsequently confirmed by the Human Rights Council in 2007. The Council has requested the Special Rapportuer to pay particular attention to the situation of indigenous children,²⁵⁵
2. In 2003, the United Nations Permanent Forum on Indigenous Issues held its second session on the theme indigenous children and youth and the same year the Committee held its annual Day of General Discussion on the rights of indigenous children and adopted specific recommendations aimed primarily at State Parties but also UN entities, human rights mechanisms, civil society, donors, the World bank and regional development banks,²⁵⁶ and
3. In 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples which provides important guidance on the rights of indigenous peoples, including specific reference to the rights of indigenous children in a number of areas.²⁵⁷

The primary objective of General Comment No. 11 is set out in the Objectives and Structure section which follows the Introduction. That objective is the provision of guidance to State Parties on how to implement their obligations under the Convention with respect to indigenous children.²⁵⁸ A secondary objective follows, being to encourage good practices and highlight positive approaches in the practical implementation of rights for indigenous children.²⁵⁹ The Committee places particular emphasis on the interrelationship between relevant provisions which promote indigenous children's rights under UNCROC, and the Convention's General Principles (which include the best interests principle).²⁶⁰

The first substantive section of the Comment is devoted to Article 30 of UNCROC and the second, to the Convention's General Principles. These sections are respectively titled and sub-titled:

²⁵⁵ At [8].

²⁵⁶ At [9].

²⁵⁷ At [10].

²⁵⁸ At [12].

²⁵⁹ At [12].

²⁶⁰ At [14].

- ARTICLE 30 AND GENERAL OBLIGATIONS OF STATES, and
- GENERAL PRINCIPLES (arts. 2, 3, 6 and 12 of the Convention)
 - Non-discrimination
 - Best interests of the child
 - The right to life, survival and development
 - Respect for the views of the child

The balance of the Comment's sections address specific obligations of State Parties given the rights and freedoms affirmed within UNCROC. These sections are respectively titled and sub-titled:

- CIVIL RIGHTS AND FREEDOMS (arts. 7, 8, 13-17 and 37(a) of the Convention)
 - Access to information
 - Birth registration, nationality and identity
- FAMILY ENVIRONMENT AND ALTERNATIVE CARE (arts. 5, 18 (Paras.1-2), 9-11, 19-21, 25, 27 (para.4) and 39 of the Convention)
- BASIC HEALTH AND WELFARE (arts. 6, 18 (Para. 3), 23, 24, 26, 27 (Paras.1-3) of the Convention)
- EDUCATION (arts 28, 29 and 31 of the Convention)
- SPECIAL PROTECTION MEASURES (arts. 22, 30, 38, 39, 40, 37(b)-(d), 32-36 of the Convention)
 - Children in armed conflict and refugee children
 - Economic exploitation
 - Sexual exploitation and trafficking
 - Juvenile justice
- STATE PARTIES' OBLIGATIONS AND MONITORING OF THE IMPLEMENTATION OF THE CONVENTION

The significance of Article 30 of UNCROC in the recognition of indigenous children's rights has been emphasised by the Committee and is discussed in the following section. Article 30 affirms that indigenous children have the right to enjoy their culture in community with other members of their group. The distinction between the rights of indigenous children under Article 30 and the application of the best interests principle to indigenous children is also significant and needs to be appreciated. The best interests principle is an overarching general principle which is applied to all of UNCROC's articles and to all relevant matters when assessing what is in a particular child's best interests. Article 30 on the other hand is one article within UNCROC which addresses cultural rights, but it does not have general application in the way the best interests principle does. The distinction will be

apparent when the application of the best interests principle to indigenous children is analysed below.

II Article 30 and general obligations of State Parties under UNCROC

The Committee emphasises the importance of Article 30 to indigenous children and their rights by making it the first substantive section within General Comment No. 11. Article 30 recognises indigenous children as individual members of Indigenous Peoples who are entitled to enjoy their culture in community with other members of their group. Collective rights, traditions and values of indigenous cultures are given some recognition.²⁶¹ The right is established in the following terms:²⁶²

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 30 essentially replicates an indigenous person's rights under Article 27 of ICCPR to enjoy his/her culture in community with other members of his/her indigenous group.²⁶³ The Committee has acknowledged the close linkage between Article 30 of UNCROC and Article 27 of ICCPR.²⁶⁴ Article 30 recognises children as individual members of Indigenous Peoples who have rights associated with their collectives and the interrelationship between the child and his/her collective. The collective rights of Indigenous Peoples or their collective responsibilities and duties to children who belong to them as sui generis groups are not however addressed under Article 30 of UNCROC just as they are not addressed under Article 27 of ICCPR. Article 30 is also narrow in scope, which limits the nature and extent of its application. Article 30 does, however, conceive individual indigenous children's rights as being both individual and collective which is an important recognition.

By using the term "shall not be denied the right", the Committee highlights that Article 30 places State Parties under a positive obligation to protect the rights it sets out and ensure their existence and their exercise. The protection is not limited to State

²⁶¹ At [16].

²⁶² Art 30.

²⁶³ Above n 138.

²⁶⁴ Above n 3, at [16].

action or inaction through legislation, judicial or administrative authorities; it also includes acts of other persons within the State.²⁶⁵ State Parties' positive obligation to recognise and protect indigenous children's rights against denial or violation is further emphasised by the Committee's endorsement of the call of the Committee on the Elimination of Racial Discrimination upon State parties "to recognise and respect indigenous distinct cultures, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation."²⁶⁶

The Committee makes a number of observations and provides general guidance to State Parties within this section. In reliance on its reviews of State Party periodic reports, the Committee observes that many States give insufficient attention to the rights of indigenous children and the promotion of their development.²⁶⁷ The Committee considers that special measures, through legislation and policies for the protection of indigenous children, should be undertaken in consultation with the communities concerned as provided under Article 12 of UNCROC.²⁶⁸ Article 12 establishes the right of children to be heard in judicial and administrative proceedings in the following terms:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The Committee also considers that active consultation by States or their agencies should be conducted in a manner that is culturally appropriate to ensure the availability of information and interactive communication and dialogue.²⁶⁹ To ensure adequate attention is given to Article 30 in the implementation of UNCROC, State

²⁶⁵ At [16] citing Human Rights Committee *General Comment No. 23: Article 27 (Rights of Minorities)*, UN Doc CCPR/C/21/Rev.1/Add.5 (1994) at [6.1].

²⁶⁶ At [18] citing Committee on the Elimination of Racial Discrimination *General Recommendation No. 23 on Indigenous People*, A/52/18 Annex V (1997).

²⁶⁷ At [20].

²⁶⁸ At [20].

²⁶⁹ At [20].

Parties' periodic reports should provide detailed information on the special measures undertaken to guarantee indigenous children's rights under Article 30.²⁷⁰

The Committee nevertheless emphasises that the right to cultural practices provided under Article 30 must be exercised in accordance with the other provisions of UNCROC.²⁷¹ The Committee also makes clear that Article 30 under no circumstances could justify prejudice to any child's dignity, health and development.²⁷² However, where there is no prejudice to the child, the positive obligation remains.

III General Principles: the best interests of the child

The second substantive section within General Comment No. 11 is titled "GENERAL PRINCIPLES (arts. 2, 3, 6, and 12 of the Convention)". The section is divided into four parts, each part devoted to one of the four general principles the Committee has identified as fundamental to the implementation of UNCROC. The General Principles are:

- non-discrimination,
- *best interests of the child*, (emphasis added)
- life, survival and development, and
- the views of the child.

The Committee members felt strongly that the best interests of the child in relation to issues affecting individual indigenous children (family, environment/alternative care and administrative/justice decisions etc) should be clearly emphasised in the General Comment, especially as this tends to be overlooked in general documents and instructions on indigenous peoples rights.²⁷³

The best interests principle is flexible and dynamic and accordingly has enormous scope to take into account cultural differences.²⁷⁴ Alston considers it entirely appropriate that there is such scope to accommodate cultural differences when implementing human rights principles. He describes the accommodation of

²⁷⁰ At [21].

²⁷¹ At [22].

²⁷² At [22] citing UNICEF Innocenti Digest No.11 *Ensuring the Rights of Indigenous Children*, 2004, at 7 <<http://www.unicefirc.org>>.

²⁷³ Above n 248.

²⁷⁴ Above n 3, at [19].

cultural diversity as being “in many ways a type of elastic glue which enables the overall human rights enterprise to be held together”.²⁷⁵ The best interests principle continues to evolve and Alston predicted:²⁷⁶

the very extensive jurisprudential baggage accumulated by the best interests principle in both Anglo-Saxon and French contexts, is not likely to be particularly influential, and will almost certainly not be determinative, in the interpretation of the principle by international bodies.” and “Moreover, the ways in which the Convention has both formulated and situated the principle should eventually result in the need for those domestic courts which seek to apply the Convention to adopt a rather different approach from that which they themselves have hitherto developed, primarily within the limited context of custody decisions.

The Committee’s guidance in the application of the General Principle of the best interests of the child to indigenous children is significant. The guidance specifically addresses the approach to be taken when applying the best interests principle to indigenous children’s collective cultural rights in addition to their individual rights. Collective cultural rights were not simply left to be subsumed within State Parties’ general obligation to ensure indigenous children have the right to enjoy their culture in community with other members of their group under Article 30. To have done so would have been to misapprehend and diminish the status and significance of indigenous children’s collective cultural rights. The best interests principle, by virtue of being a fundamental and overarching principle, facilitates the assessment of both collective cultural rights and responsibilities, and individual rights and responsibilities, when determining what is in a particular indigenous child’s best interests.

A The Best Interests Principle and Collective Cultural Rights

The Committee through General Comment No. 11 provides specific guidance to State Parties about how their domestic courts and authorities should apply the best interests principle to indigenous children. The Committee makes clear decision-makers should assess and give appropriate weight to the:

²⁷⁵ At [19].

²⁷⁶ Philip Alston “The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights” in Philip Alston (ed) *The Best Interests of the Child Reconciling Culture and Human Rights* (Clarendon Press, Oxford, 1994) 1 at 17.

1. collective rights of an indigenous child in addition to his/her individual rights,²⁷⁷
2. exercise of an indigenous child's collective rights with members of his/her group,²⁷⁸ and
3. collective cultural rights of the indigenous children generally.²⁷⁹

The relevant paragraphs 30 – 33 are set out in their entirety before further analysis of the Committee's guidance to State Parties on the application of the best interests principle to indigenous children. Those paragraphs are as follows (emphasis added):

Best interests of the child

30. The application of the principle of the best interests of the child to indigenous children requires particular attention. The Committee notes that the best interests of the child is conceived both as a collective and individual right, and that the application of this right to indigenous children as a group requires consideration of how the right relates to collective cultural rights. Indigenous children have not always received the distinct consideration they deserve. In some cases, their particular situation has been obscured by other issues of broader concern to indigenous peoples, (including land rights and political representation).²⁸⁰ In the case of children, the best interests of the child cannot be neglected or violated in preference for the best interests of the group.
31. *When State authorities including legislative bodies seek to assess the best interests of an indigenous child, they should consider the cultural rights of the indigenous child and his or her need to exercise such rights collectively with members of their group.* As regards legislation, policies and programmes that affect indigenous children in general, the indigenous community should be consulted and given an opportunity to participate in the process on how the best interests of indigenous children in general can be decided in a culturally sensitive way. Such consultations should, to the extent possible, include meaningful participation of indigenous children.
32. *The Committee considers there may be a distinction between the best interests of the individual child, and the best interests of children as a group. In decisions regarding one individual child, typically a court decision or an administrative decision, it is the best interests of the specific child that is the primary concern. However, considering the collective cultural rights of the child is part of determining the child's best interests.*
33. The principle of the best interests of the child requires States to undertake active measures throughout their legislative, administrative and judicial

²⁷⁷ Above n 3, at [32].

²⁷⁸ At [31].

²⁷⁹ At [30].

²⁸⁰ At [30] citing UNICEF *Ensuring the Rights of Indigenous Children* Innocenti Digest 11 (2004) at 1 <<http://www.unicefirc.org>>.

systems that would systematically apply the principle by considering the implication of their decisions and actions on children's rights and interests.²⁸¹ In order to effectively guarantee the rights of indigenous children such measures would include training and awareness-raising among relevant professional categories of the importance of considering collective cultural rights in conjunction with the determination of the best interests of the child.

The Committee emphasises at the very outset of its guidance that the application of the best interests principle to indigenous children requires particular attention.²⁸² The Committee immediately follows that pronouncement by noting the best interests principle is conceived as both a collective and individual right. The application of the right "to indigenous children as a group" is said to require consideration of how the right relates to collective cultural rights.²⁸³

It is the interrelationship between the best interests of the individual indigenous child and the collective interests of the group to which the child belongs that Western liberal theory and human rights theory have historically struggled to fully apprehend. Those interests are inextricably intertwined within indigenous cultures. One cannot be ascertained without consideration of the other. Collective cultural rights and the individual rights of the indigenous child are interrelated. It is the interrelationship which requires the particular attention of decision makers when applying the best interests principle to indigenous children.

B Assessing Collective Cultural Rights of Indigenous Children

The Committee through General Comment No. 11 provides guidance to State authorities and legislative bodies when assessing the best interests of indigenous children. Decision-makers assessing the best interests of an indigenous child should consider "... the cultural rights of the indigenous child and his or her need to exercise such rights collectively with members of their group."²⁸⁴

The exercise of collective rights may be considered in at least two ways. Some collective rights may be exercised by individuals by virtue of their membership to a

²⁸¹ Committee on the Rights of the Child *General Comment No 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, UN Doc CRC/GC/2003/5 (2003) at [12].

²⁸² At [30].

²⁸³ At [30].

²⁸⁴ Committee on the Rights of the Child *General Comment No 5*, above n 281, at [31].

collective who benefits from such rights, such as the right to life, peace and freedom.²⁸⁵ Other collective rights are intended to protect and maintain the whole group. This implies that the group has a distinct *sui generis* and cannot be reduced to its constituent members, such as the right to group culture and collective familial relationships of responsibility beyond the nuclear family.²⁸⁶ The inter-relationship between the exercise of individual collective rights and indivisible collective rights of the group is helpfully explained by Shaheed in her report to the Human Rights Council as the independent expert in the field of cultural rights:²⁸⁷

One debate that constantly arises in international human rights law, in particular when it concerns cultural rights, relates to the collective dimension of rights — referring to the collective exercise of individual rights on the one hand, and the existence of collective rights per se — understood as group rights — on the other hand. Indeed, “the term ‘cultural life’ itself strongly suggests the collective”,²⁸⁸ and article 27 of the Universal Declaration of Human Rights expressly refers to the cultural life of “the community”, which today must be understood by its plural “communities”.²⁸⁹ Several points must be signalled in this respect. First, the collective dimension of cultural rights has been recognized in instruments such as the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.²⁹⁰ Second, the existence of collective cultural rights is a reality in international human rights law today, in particular in the United Nations Declaration on the Rights of Indigenous Peoples. In addition, the Committee on Economic, Social and Cultural Rights, in its general comment No. 17 on the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (art. 15, para. 8) and general comment No. 21 (para. 15), underlined that cultural rights may be exercised alone, or in association with others or as a community.²⁹¹ Third, this does not imply the denial of individual cultural rights: individuals always enjoy their right, *inter alia*, to participate or not to participate in one or several communities; to freely develop their

²⁸⁵ Committee on the Rights of the Child *General Comment No. 11*, above n 3, citing UNICEF, above n 278, at 6.

²⁸⁶ At 6, citing Office of the High Commissioner for Human Rights *Indigenous Peoples and the Environment* Leaflet No. 10 (2001).

²⁸⁷ Human Rights Council *Report of the independent expert in the field of cultural rights, Ms Farida Shaheed*, A/HRC/14/36 (2010) at [10].

²⁸⁸ At [10], citing Patrick Thornberry *Cultural rights and universality of human rights*, E/C.12/40/15 (2008), at 9.

²⁸⁹ At 7–9.

²⁹⁰ Art. 3, para. 1: “Persons belonging to minorities may exercise their rights (...) individually as well as in community with other members of their group, without any discrimination.”

²⁹¹ See also Jaime Marchan Romero, “Derechos culturales: la practica del Comité de derechos economicos, sociales et culturales”, working paper submitted to the seminar on implementing cultural rights: nature, issues at stake and challenges at 5.

multiple identities; to access their cultural heritage as well as that of others; and to contribute to the creation of culture, including through the contestation of dominant norms and values within the communities they choose to belong to as well as those of other communities.

The Committee in General Comment No. 11 assists authorities or bodies (including courts) responsible for determining the best interests of an indigenous child by emphasising the need to do more than ascertain a child's collective cultural rights; the need of Indigenous children to exercise those collective rights with members of their group must also be ascertained. Importantly, decision-makers must appreciate that an indigenous child's need to exercise his/her collective rights may be alone, or in association with others or as a community. The child's collective and individual rights can then be assessed and balanced to determine his/her best interests.

State Parties are required to undertake active measures to apply the best interests principle within their judicial systems.²⁹² The Committee in General Comment No. 11 refers to States' obligations to undertake active measures to effectively guarantee the rights of indigenous children under the best interests principle. Measures include training and awareness-raising among relevant professional categories, of the importance of considering collective cultural rights in conjunction with the determination of the best interests of an indigenous child.²⁹³

A decision-maker who does not assess an indigenous child's collective cultural rights and the child's need to exercise of those rights with other members of his/her group, will lack relevant information required to assess what is in an indigenous child's best interests. Addressing an indigenous child's individual rights only, or the inadequate assessment of the child's collective rights (including the ways such rights may be exercised), will not constitute the application of the best interests of the child principle. There are implications for the way decision-makers approach the assessment of an indigenous child's best interests. Indigenous children's collective cultural rights cannot be adequately assessed by simply assessing the child's right to cultural identity, or mandatory cultural considerations decision-makers are required to take into account. A holistic assessment process based on cogent evidence is required. Procedure may need to accommodate the giving of relevant evidence to

²⁹² Above n 3, at [33].

²⁹³ At [33].

assist the decision-maker in the determining what is in a particular indigenous child's best interests. Judicial training and professional development are further matters which will need to be addressed if an indigenous child's collective cultural rights are to be recognised and given effect (as discussed in chapters six and seven). If the assessment of an indigenous child's best interests fails to accommodate both individual and collective rights in a robust and coherent manner, it will fail to appropriately assess what is in that child's best interests.

C Limitations on the application of the best interests principle to collective cultural rights

The Committee makes clear within General Comment No. 11 that an indigenous child's best interests cannot be neglected or violated in preference for the interests of their group.²⁹⁴ Any suggestion that cultural rights permit or excuse negative customs, traditions or practices which infringe upon fundamental human rights was also rebutted by Shaheed in her aforementioned report.²⁹⁵ She referred to cultural rights being subject to limitations in the same way that international human rights are subject to limitations. In both instances, any limitations should be a last resort and in accordance with certain conditions.²⁹⁶

The imposition of limitations on cultural rights was addressed by the Committee on Economic, Social and Cultural Rights in its General Comment No 21. The Comment titled "Right of everyone to take part in cultural life (art. 15, para.1 (a), of the International Covenant on Economic, Social and Cultural Rights)" makes it clear that limitations may be necessary however they must be applied with care. The Committee on Economic, Social and Cultural Rights stated that:²⁹⁷

Applying limitations to the rights of everyone to take part in cultural life may be necessary in certain circumstances, in particular in the case of negative practices, including those attributed to customs and traditions, that infringe upon other human rights. Such limitations must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of the general welfare in a democratic society, in accordance with

²⁹⁴ At [30].

²⁹⁵ Above n 287.

²⁹⁶ At [35].

²⁹⁷ Committee on Economic, Social and Cultural Rights *Right of everyone to take part in cultural life (art. 15, para.1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc E/C.12/GC/21 (2009) at [35].

article 4 of the Convention. Any limitations must therefore be proportionate, meaning that the least restrictive measures must be taken when several types of limitations may be imposed.

The above extract refers to Article 4 of ICESCR which provides that State Parties may limit ICESCR's rights, but only to an extent compatible with the nature of those rights and solely for the purpose of promoting the general welfare of a democratic society. UNCROC does not have an equivalent to Article 4 of ICESCR. There can, however, be no doubt that the limitation of negative collective cultural practices applies when they infringe upon other fundamental human rights or prejudice a child's dignity, health or development.

The identification of precisely which cultural practices should be considered contrary to human rights is acknowledged by Shaheed as no simple task.²⁹⁸ The assessment of an indigenous child's collective cultural rights and individual human rights, and the imposition of any justified limitations will ultimately fall to the courts. At the fulcrum of any such assessment will be the application of the best interests principle. Shaheed described the balancing of cultural rights and individual rights to ascertain their limitations as requiring:²⁹⁹

a legal framework indicating principles on the basis of which cultural rights may be limited and an independent judiciary able to adopt an informed decision on the basis of such a legal framework, as well as international human rights law, taking into consideration the practice of international human rights supervisory bodies.

Any framework to determine an indigenous child's best interests must balance a child's collective cultural rights and individual rights, and only after an appropriate assessment (which encompasses consideration of relevant evidence) should any limitations be imposed. Any such framework will be neither static nor universal. Rights evolve and collective cultural rights do not have universal application to all indigenous children; they develop as the needs of the particular collective change. The practice of international human rights supervisory bodies is an important source of authority for domestic courts as they increasingly accommodate collective cultural

²⁹⁸ Above n 287, at [36].

²⁹⁹ At [36].

rights of children based on a principled framework, General Comment No. 11 in particular.

IV Affirmation of Indigenous Children's Collective Cultural Rights under UNCROC

In 2012 the General Assembly was presented with a report from the Secretary General (requested in its resolution 66/141 of 4 April 2012) on the status of the Convention on the Rights of the Child with a focus on indigenous children. The report titled "Status of the Convention on the Rights of the Child" of 3 August 2012 acknowledged the collective rights of indigenous children in addition to their individual rights in unambiguous terms.³⁰⁰

A Indigenous Children and the Status of the Convention on the Rights of the Child

The Secretary General's report endorses General Comment No. 11 and its guidance on the application of the best interests principle to indigenous children's collective cultural rights. The report also highlights the nexus between UNCROC and UNDRIP, and the continued influence UNDRIP will have in the protection and promotion of indigenous children's collective cultural rights.

The unambiguous affirmation of indigenous children's collective rights under UNCROC and the significance of UNDRIP in the realisation of those rights is best appreciated by the replication of three consecutive paragraphs from the Secretary General's report. Those paragraphs are compelling and read as follows:

11. Indigenous children enjoy both individual and collective rights and freedoms as do their wider communities. Indigenous peoples' collective freedoms are specifically guaranteed under article 27 of the International Covenant on Civil and Political Rights, in the International Labour Organization (ILO) Indigenous and Tribal Peoples' Convention, 1989 (No. 169) and in the United Nations Declaration on the Rights of Indigenous Peoples.
12. Rights guaranteed by the Convention on the Rights of the Child are applicable to all children irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other

³⁰⁰ Report of the Secretary General, *Status of the Convention on the Rights of the Child*, UN Doc A/67/225 (2012).

status. The Convention is underpinned by the principles of equality and non-discrimination (article 2); the best interests of the child (article 3); the right to life, survival and development (article 6); and the right to be heard and to participate (article 12). The principle of equality and non-discrimination are also reinforced in ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples which stress that indigenous peoples are entitled to enjoy both their individual and collective rights as individuals and as a group free from discrimination of any kind. The rights of indigenous children are underpinned not only by the principles of the Convention on the Rights of the Child but also by the principles of self-identification, and respect for cultural identity, as espoused under the Declaration.

13. The United Nations Declaration on the Rights of Indigenous Peoples contains child-sensitive provisions: recognizing the right of indigenous families and communities to retain shared responsibilities for the upbringing, training, education and well-being of their children, and protection of the child from forceful removal from its group to another group (article 7); the right of the child to all levels and forms of education of the State without discrimination (article 14.2); and the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account the special vulnerability of children and the importance of education for their empowerment (article 17.2).

The Secretary General unequivocally affirms indigenous children's collective cultural rights in paragraph 11 above when he states that "Indigenous children enjoy both individual and collective rights and freedoms as do their wider communities". He does so again in paragraph 12 above when he states that "indigenous peoples are entitled to enjoy both their individual and collective rights as individuals and as a group free from discrimination of any kind".

The Secretary General also highlights the nexus between UNCROC and UNDRIP in respect to indigenous children's collective rights. After reiterating that UNCROC is underpinned by the four fundamental principles identified by the Committee (including the best interests of the child) in paragraph 12 above, he states:

the rights of indigenous children are underpinned not only by the principles of the Convention on the Rights of the Child but also by the principles of self-identification, and respect for cultural identity, as espoused under the Declaration[UNDRIP].

Further, the Secretary General's report reinforces the nexus between UNCROC and UNDRIP and their future application by referring to them as a "blueprint for the

protection and promotion of the rights of indigenous peoples provid[ing] a solid basis for accelerated implementation of the rights of indigenous children”.³⁰¹ The Secretary General’s report preceded the Committee issuing its guidance under General Comment No. 14 on the best interests principle which affirms the application of the best interests principle to indigenous children’s collective cultural rights in addition to their individual rights.

B Committee for the Rights of the Child “General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para.1)”

The Committee’s General Comment No. 14 (Comment No. 14) provides a general framework for the application of the best interests principle by State Parties to UNCROC. Comment No. 14 underlines the best interests principle as being a threefold concept, namely:³⁰²

1. A substantive right,
2. A fundamental, interpretative legal principle, and
3. A rule of procedure.

Comment No. 14 defines the process for due consideration (especially in judicial and administrative decisions) when assessing and determining the best interests of a child.³⁰³ The full application of the concept of the best interests principle is said to require “the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his/her human dignity”.³⁰⁴ The overall objective of Comment No. 14 is the promotion of a real change in attitudes leading to the full respect of children as rights holders.³⁰⁵ Comment No. 14 makes a significant contribution to the recognition of indigenous children’s collective cultural rights by firstly affirming them and secondly by linking Comment No. 14 with General Comment No.11.

³⁰¹ At [67].

³⁰² Committee for the Rights of the Child *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para.1)* CRC/C/GC/14 (2013) at [6].

³⁰³ At [10].

³⁰⁴ At [5].

³⁰⁵ At [12].

The Committee acknowledges within General Comment No. 14 that the best interests principle under UNCROC is drafted as an individual right. It then goes on to emphasise:³⁰⁶

...the term “children” implies that the right to have their best interests duly considered applies to children not only as individuals, but also in general or as a group. Accordingly States have the obligation to assess and take as a primary consideration the best interests of children as a group or in general in all actions concerning them. This is particularly evident for all implementation measures. The Committee underlines that the child’s best interests is conceived both as a collective and individual right, and that the application of this right to indigenous children as a group requires consideration of how the right relates to collective cultural rights.

The above quotation acknowledges that indigenous children’s collective cultural rights must be assessed when applying the best interests principle, and in so doing draws directly from General Comment No. 11. The Committee, when underlining that an indigenous child’s best interests are conceived both as a collective and individual right, has taken directly from General Comment No. 11. The above quotation also refers to the application of the right (best interests principle) to indigenous children as a group requiring consideration of how the right relates to collective cultural rights, which is again taken directly from General Comment No. 11. While Comment No. 14 is specific to the best interests principle, it references General Comment No. 11 which is specific to indigenous children’s rights under UNCROC. It is therefore appropriate when applying the best interests principle to indigenous children that decision-makers have regard to both General Comment No. 11 and Comment No. 14.

Ultimately the weighing and balancing of factors to determine the best interests of a particular indigenous child is to ensure the full and effective enjoyment of his/her rights under UNCROC and promote the holistic development of the child.³⁰⁷ It is the recognition, assessment and weight to be given to indigenous children’s collective cultural rights when determining what is in their best interests which presents challenges for decision-makers who instinctively apply Western liberal values. The Committee, through General Comment No. 11 and Comment No.

³⁰⁶ At [24].

³⁰⁷ At [82].

14, is signalling that the practical application of the best interests principle to indigenous children's collective cultural rights requires a jurisprudential shift in the assessment and application of the principle. The application of the best interests principle in respect to indigenous children obliges decision-makers to recognise and give effect to indigenous children's collective cultural rights in addition to their individual rights. The conceptual shift required of decision-makers must be embraced.

CHAPTER SIX:
Maori Children's Collective Cultural Rights and New Zealand
Family Law –the Framework

Maori children's collective cultural rights have been acknowledged by both the High Court of New Zealand and the Family Court of New Zealand; in particular, the place of the Maori child within a whanau, and the obligations and responsibilities of members of the whanau to the child, together with the advantages of the child being nurtured within a group. That acknowledgement has, however, been general in nature. The Family Court has adopted it as a starting point prior to the assessment of a particular Maori child's best interests. The application of the best interests principle to Maori children has tended to ignore the holistic nature of their collective cultural rights. It has instead focussed on specific aspects of a Maori child's culture. An analysis of decisions in which Maori children's collective rights were advocated, suggests that the Court's failure to consider those rights as relevant in all aspects of a Maori child's life has been a consequence of at least two factors. The first has been the lack of cogent evidence. The second has been the lack of a coherent and robust approach when assessing Maori children's collective cultural rights in addition to their individual rights.

New Zealand's leading common law authority on Maori children's collective cultural rights under the Guardianship Act 1968 is *B v Director-General of Social Welfare*. That High Court decision is analysed, together with subsequent Family Court decisions.³⁰⁸ The statutory framework of principles under CYPFA and COCA are then discussed. The conclusion reached is that the framework of principles under COCA (and to a lesser extent CYPFA) may have unwittingly compartmentalised cultural issues. As a consequence, the significant recognition of Maori children's collective cultural rights under the Guardianship Act 1968 has not developed under CYPFA and COCA as it ought to have. It is the writer's contention that a collective cultural rights perspective should be applied to any of the CYPFA or COCA principles and to any other factor/s when assessing what is in a Maori child's best

³⁰⁸ *B v Director-General of Social Welfare* (1997) 15 FRNZ 501; also reported as *B P v DGSW* [1997] NZFLR 422 and *Barton-Prescott v DGSW* [1997] 3 NZLR 179.

interests. Further, that such an approach can and must be adopted given the Court's obligations pursuant to UNCROC, General Comment No. 11, UNDRIP and the application of the best interests principle under CYPFA and COCA.

I The Guardianship Act 1968

A B v Director-General of Social Welfare

The "welfare" of the child was the paramount consideration under the Guardianship Act 1968 (cf the "welfare and best interests" under CYPFA and COCA).³⁰⁹ The Guardianship Act did not set out a statutory framework of principles to guide Courts when assessing and determining what would promote a child's welfare - that was a matter for the Court.

In 1997 the collective cultural rights and welfare of a Maori child were issues before the High Court in *B v Director-General of Social Welfare*. The appellant grandmother (B) had unsuccessfully sought the custody of her daughter's child in the Family Court. The child's mother (B's daughter) had consented to the adoption of the child to a third party and had opposed B's application for custody and additional guardianship. B's application to be appointed an additional guardian had been adjourned by the Family Court Judge. The child's mother subsequently withdrew from proceedings and the Department of Social Welfare (which retained interim custody of the child) was made a party to the appeal. B had sought custody to protect the child's indigenous rights to be raised and nurtured by her whanau, hapu and iwi, which B asserted would be lost if the child were to be adopted. The proposed adoptive mother was Maori but not of B's iwi although there were shared ancestral links.

The High Court ultimately dismissed the appeal but set out in summary form the general principles given the issues raised. The learned Gallen and Goddard JJ set out the following four principles:³¹⁰

First, we accept as a starting point the account given by Professor Mead of the place of a child within a whanau and the obligations and responsibilities of members of the whanau to that child, together with the advantages which that brings of the child being nurtured within a group which not only focuses the ancestral and genealogical position of the child through whakapapa and the

³⁰⁹ Guardianship Act, s 23.

³¹⁰ Above n 308, at 512 [3].

spiritual significance of the child's ancestry, but also emphasises the place within the land. It also makes available the support, care, and concern of those members of the whanau who themselves see their occupation in such a context and were themselves brought up within the ambit of the family of which the child is a member by virtue of her birth.

We do not consider that it is possible to overstress the significance of these aspects of a child's upbringing and consider that arises both because in practical terms the child's welfare is dependent upon it, but also because the familial constitutions and relationships are an important part of the culture of all people and are entitled to preservation under the provisions of the Treaty of Waitangi and the *Draft Treaty on Indigenous Peoples' Rights*, [emphasis added] both of which formalise, at least to some extent, what might otherwise be seen as vague generalities.

Secondly, we consider that the importance of those concepts as a starting point applies to all the statutory provisions which apply to the care, nurture, and upbringing of children.

Thirdly, while they apply and form the starting point, they are subsumed within the concept of the welfare of the child, which provides the ultimate standard under all of the statutory provisions concerned. It may reasonably be said that the welfare of the child will depend upon their acknowledgement and, where possible, their involvement in the future of the child. We emphasise therefore, that the child holds the central position within the context provided by the concepts of family to which reference has been made. That means that the child's interests will not be subordinated to the interests of any other member of the family or whanau, nor will the interests of the child be subordinated to those of the whanau as a whole. In addition, the ability of the whanau itself and the caregivers within the whanau, must be assessed with regard to the particular circumstances of the case and the needs of the child itself. It cannot be assumed that in all cases the standards and values accepted by the traditional society from which the child comes will be preserved or available within the whanau to which reference must be made.

Fourthly, we do not see these questions in terms of rights or possessions. They are rather to be seen in terms of relationship and potential.

The High Court pre-empted international human rights elaborations in respect to Maori children's collective rights when it expressly recognised whanau collective responsibility for children who belong to their group and the place of children within whanau. The Treaty and UNDRIP (which was in draft form and not to be adopted by the General Assembly for another 10 years) were both acknowledged as authoritative in formalising what might otherwise be perceived as "vague generalities" associated with the practical assessment of Maori children's

collective cultural rights. *B v Director-General of Social Welfare* is an oft-cited authority for the principle that:³¹¹

the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is reference to the Treaty in the statute.

The acknowledgement by the High Court that the familial organisation of Maori and the status, future and control of children as taonga were entitled to preservation and protection under the Treaty, has received far less attention than the preceding passage notwithstanding, the Justices said:³¹²

We also take the view that the familial organisation of one of the peoples a party to the Treaty, must be seen as one of the taonga, the preservation of which is contemplated. Accordingly we take the view that all Acts dealing with the status, future, and control of children are to be interpreted as coloured by the principles of the Treaty of Waitangi. Family organisation may be said to be included among those things which the Treaty was intended to preserve and protect.

The High Court accepted the appellant's submission that when decisions affecting a Maori child are made, the view of whanau is important and should, whenever possible or appropriate, be ascertained in traditional ways.³¹³ The appellant's submissions addressing the concept of collective responsibility for Maori children were alluded to by the Court as follows:³¹⁴

the institutions of whanau, hapu and iwi have evolved to give life to Maori values and give rise to collective responsibilities as well as collective and individual obligations, which together form the complex matrix governing human relationships within those institutions. She [counsel for the appellant] noted that for that reason a collective, as opposed to an individualistic, response is appropriate where the relationships and the position of the person affected are under consideration.

The High Court also recognised that there are limits to Maori children's collective rights. The Court rejected any concept that the whanau as a whole or individual members have rights which can subordinate the interests of the child itself.³¹⁵ Twelve

³¹¹ At 506[3].

³¹² At 506[3].

³¹³ At 508 [39].

³¹⁴ At [30].

³¹⁵ At 512 [39].

years later, General Comment No. 11 also rejected any concept that the best interests of the child can be neglected or violated in preference for the best interests of the group.³¹⁶ The High Court again had pre-empted the elaboration of international human rights law concerning children's collective cultural rights. Significantly, the High Court's decision in *B v Director-General of Social Welfare* preceded the Care of Children Act 2004 coming into force by more than seven years, the issuing of General Comment No. 11 by at least 12 years, and New Zealand's endorsement of the UNDRIP by at least 13 years.

In the absence of a statutory framework of principles to guide the High Court in its decision-making process under the Guardianship Act (unlike CYPFA and COCA), the four general principles and obiter enunciated in *B v Director-General of Social Welfare* provided authoritative guidance to the Family Court when assessing what would promote the best interests of Maori children. The decision in hindsight can be seen as being both insightful and enlightened. The decision was, as all family law decisions are, ultimately determined on the specific facts the Court considered relevant. The Court referred to the non-exhaustive checklist of considerations set out in the well known authority *D v W* to assist it in its determination, being:

- The strength of existing and future bonding.
- Parenting attitudes and ability.
- Availability for and commitment to quality time with a child.
- Support for continued relationships (with other parties).
- Security and stability of the home environment.
- Availability and suitability of role models.
- Positive or negative effects of a wider family group.
- Provision for physical care and help.
- Material welfare.
- Stimulation and new experiences.
- Educational opportunities and the wishes of the child.³¹⁷

The appeal was a de novo hearing which ultimately endorsed the conclusions of the Family Court Judge. The evidence concerning Maori children's collective cultural rights and, whanau, hapu and iwi responsibilities to Maori children appears to have been of a generalised nature. The High Court for example relied upon inter alia the

³¹⁶ Above n 3, [30].

³¹⁷ *D v W* (1995) 13 FRNZ 336.

expert evidence (provided by affidavit) of Professor Hirinui Moko Mead (subsequently knighted) which addressed the place within the whanau of the Maori child and the obligations of the whanau to the child. The collective cultural rights of the particular child in his/her particular circumstances and the collective responsibilities of the child's whanau, hapu and iwi to that child do not appear to have been the subject of any detailed evidence or analysis. The capacity of the whanau, hapu and iwi to discharge their responsibilities to the child and the child's need to exercise his/her collective rights with members of his/her group again, do not appear to have been the subject of any detailed evidence or analysis by the High Court.

Courts rely upon the parties to provide appropriate and relevant evidence to support their claims. Evidence addressing any of the factors enunciated within *D v W* can be analysed from a collective rights perspective in addition to an individual rights perspective. Additional factors which concern the collective cultural rights of a Maori child may well be relevant in any particular case. The High Court in *B v Director-General of Social Welfare* ultimately determined the points on appeal in reliance upon the evidence presented. It is questionable (because of the apparent lack of evidence) whether the Court apprehended the particular child's collective cultural rights or the child's need to exercise his/her collective rights either alone, or in association with others or as a community. The child's collective cultural and individual rights were not assessed and balanced to determine his/her best interests notwithstanding the High Court's obvious willingness to entertain doing so.

B Maori Children's Collective Cultural Rights following B v Director-General of Social Welfare

The assessment of what was in a particular Maori child's welfare took on a more holistic appearance following *B v Director-General of Social Welfare*. Maori children's collective cultural rights were increasingly recognised by the Family Court as important considerations. An example of such a holistic and proactive approach being taken the Family Court is in *RE T*.³¹⁸

³¹⁸ *Re T* (2000) 19 FRNZ 11.

In *RE T* in 2000, the Family Court was presented with what began as an adoption of a Maori child to a European New Zealander and a European Australian. The applicants were resident in Australia, and because it was going to take some time for the adoption to be processed by the Australian authority, the applicants applied for custody and additional guardianship in New Zealand. Rather than a whanau member opposing the application, it was the Department of Child, Youth and Family Services. The Department opposed the applications, arguing issues associated with culture and residence. The Department took the view that the custody and additional guardianship applications should be treated in a manner similar to an inter-country adoption.

The learned Judge did not grant the applications sought notwithstanding the parents' consent and that the child's lawyer supported the placement. Citing *B v Director-General of Social Welfare*, His Honour Judge Callaghan instead directed a psychological report to address aspects of the child's cultural needs due to a paucity of evidence. In the absence of appropriate consultation with whanau, hapu and iwi, the Court made a referral to a Care and Protection Coordinator recommending a family group conference be held to facilitate that opportunity. The Adoption (Intercountry) Act 1997 and UNCROC were held to be relevant given the placement involved inter-country issues.³¹⁹ The Court acknowledged the collective nature of Maori children's whanau relationships when it stated:

New Zealand culture has developed and is developing a unique awakening into Maori culture and its importance in the life of Maori children, they are taonga of the current generation and concepts of exclusive possession, are not concepts of their culture.³²⁰

This young child, T, has connections to several Maori iwi, of which only one in reality has been consulted and, in my view, on the evidence only to a relatively limited extent. This Court must act responsibly to the child and to that extent, again to the applicants and parents, but the obligation to the child is and must be pitched at a higher level and, as I have mentioned or inferred, I do not consider that there has been sufficient consultation to have taken place in New Zealand to look at options of placement here.³²¹

³¹⁹ Adoption (Intercountry) Act 1997.

³²⁰ At 21 [13].

³²¹ At 22[9].

In the same year, the Family Court in *Pita v Putahi*³²² similarly endorsed the principles enunciated within *B v Director-General of Social Welfare* but ultimately declined a paternal grandmother's application for access to her grandchild. A psychological report had been directed by the Court and notwithstanding some effort by the grandmother to demonstrate the report was culturally inappropriate and insensitive, that assertion was totally rejected. The Court in expressing its gratitude to counsel, noted that all counsel had Maori ancestry and were well informed of the cultural issues of particular importance in the case.³²³

Despite the lack of specific reference to the cultural needs or rights of Maori children or their collective groups within the Guardianship Act, New Zealand Courts developed the common law to a point where the collective cultural rights of Maori children were acknowledged subject to an evidential foundation being established.

Beyond the Family Court, the common law continues to be enriched by the acknowledgement and/or reception of Maori customary law. The Court of Appeal in *Takamore v Clarke* was confronted with a dispute over Mr Takamore's body including his place of interment.³²⁴ Mr Takamore's whanau claimed his body, asserting their collective rights according to Tuhoe custom. Mr Takamore's executrix and partner Ms Clarke asserted her common law duties over Mr Takamore's body. The Court of Appeal recognised that where Maori custom has continued without interruption since its origin, is reasonable, is certain in its terms and has not been displaced by Parliament through clear statutory wording, it forms part of New Zealand's common law.³²⁵ The Court considered that the integration of Maori customary law into the common law, as far as it is reasonably possible, was consistent with the Treaty of Waitangi, the recognition of the collective nature of indigenous culture (as recognised in particular by UNDRIP), and with other international human rights conventions to which New Zealand is a party.³²⁶

³²² *Pita v Putahi* (2000) 19 FRNZ 644.

³²³ At [22].

³²⁴ *Takamore v Clarke and Takamore* [2011] NZCA 587.

³²⁵ At [13].

³²⁶ At [16] and [254].

The Supreme Court in *Takamore v Clarke*³²⁷ subsequently clarified the approach to be taken when Maori customary law and the common law are being developed (per Elias CJ):

[94] Values and cultural precepts important in New Zealand society must be weighed in the common law method used by the Court in exercising its inherent jurisdiction, according to their materiality in the particular case. That accords with the basis on which the common law was introduced into New Zealand only “so far as applicable to the circumstances of the ... colony”.³²⁸ It is the approach adopted in *Public Trustee v Loasby*³²⁹ and, in Australia, in *Manktelow v Public Trustee*.³³⁰ Maori custom according to tikanga is therefore part of the values of the New Zealand common law.

[95] What constitutes Maori custom or tikanga in the particular case is a question of fact for expert evidence or for reference to the Maori Appellate Court in an appropriate case.³³¹ A court asked to identify the content of custom by evidence is not engaged in the same process of interpretation or law-creation, as is its responsibility in stating the common law. As in all cases where custom or values are invoked, the law cannot give effect to custom or values which are contrary to statute or to fundamental principles and policies of the law. But it is necessary for the Court to take care in identifying the custom or values truly relevant to its determination. In that connection, I consider that the majority in the Court of Appeal were wrong to see the custom or values here invoked as requiring the Court to accept determination according to tikanga, including by forcible removal of the body of the deceased.

The *Takamore* decisions provide additional guidance to the Family Court when applying the best interests principle to Maori children’s collective cultural rights. They highlight that the assessment of a Maori child’s collective cultural right/s, and his/her need to exercise them individually and collectively with members of his/her group, will require specific and potentially expert evidence. Traditional Maori customary law, its continued application and its development within contemporary New Zealand society will also need to be assessed. The decisions also highlight that the reception of Maori customary law into New Zealand’s family common law

³²⁷ *Takamore v Clarke and Takamore* [2012] NZSC 116.

³²⁸ The English Laws Act 1858, s 1; and English Laws Act 1908, s 2; the effect of these provisions is now preserved by s 5 of the Imperial Laws Application Act 1988.

³²⁹ *Public Trustee v Loasby* (1908) 27 NZLR 801 (SC), at 807.

³³⁰ *Manktelow v Public Trustee* [2001] WASC 290, (2001) 25 WLR 126 at [19].

³³¹ Te Ture Whenua Maori Act 1993, s 61.

involves the balancing of values which encompasses both collective and individual world views.

The Family Court is well placed to meet these challenges given its specialised nature and experience in applying the best interests principle. The best interests principle is already the touchstone for family law decision-making in respect to all (including Maori) children. The obligations under UNCROC, General Comment No. 11 and UNDRIP in respect to Maori children's collective cultural rights augment the Family Court's statutory and common law obligations to apply the best interests principle as the first and paramount consideration. The application of the best interests principle will be enhanced if the particular Maori child or children's collective cultural rights are assessed holistically and balanced in partnership with their individual rights.

II The Children, Young Persons, and Their Families Act 1989

In contrast to the common law's incremental approach to the reception of Maori customary law there are numerous references to the collective responsibilities of whanau, hapu and iwi to Maori children within the Children, Young Persons, and Their Families Act 1989. The long title of CYPFA emphasises the collective responsibilities of families, whanau, hapu and iwi for children and young persons in need of care or protection and the States responsibilities to support and assist them. It states CYPFA is:

An Act to reform the law relating to children and young persons who are in need of care or protection or who offend against the law and, in particular,—

- (a) to advance the wellbeing of families and the wellbeing of children and young persons as members of families, whanau, hapu, iwi, and family groups:
- (b) to make provision for families, whanau, hapu, iwi, and family groups to receive assistance in caring for their children and young persons:
- (c) to make provision for matters relating to children and young persons who are in need of care or protection or who have offended against the law to be resolved, wherever possible, by their own family, whanau, hapu, iwi, or family group:

The aim of CYPFA as a whole is to divert care and protection problems away from the Family Court if possible.³³² It sets out to do this by involving wider family and the community in the deliberation and disposition of notifications concerning children and young persons in need of care and protection.³³³ The overall statutory emphasis is on participation, decision-making and empowering of the family, and on cultural sensitivity with special reference to Maori.³³⁴

The welfare and best interests of children and young people is the *first and paramount* consideration in all matters relating to the administration or application of CYPFA.³³⁵ The principles set out within CYPFA must be taken into account when determining what is in the child and young person's welfare and best interests, but do not dilute the force of the paramountcy principle.³³⁶ Section 5 of CYPFA sets out the general principles which guide Court decision-making. Section 13 of CYPFA sets out additional principles which relate specifically to the care and protection of children and young persons. The s 5 principles acknowledge the importance of Maori children's collective cultural rights by promoting whanau, hapu and iwi participation in decision making, and the maintenance and the strengthening of the child's or young person's relationship with his/her family group.³³⁷ Wherever practicable, a child in need of care and protection should remain with his/her family group and where that is not possible, priority must be given to a placement within the child's hapu or iwi.³³⁸

The definition of a child or young person "in need of care and protection" is wide and necessarily encompasses the child's emotional, psychological and physical wellbeing, circumstances and conduct, and the child's parents, guardians or caregivers capacity to meet the child's needs.³³⁹ Whether a child is in need of care and protection and (if so) what the appropriate level of intervention, support, and monitoring should be, will always be a matter of assessment and judgement. A family

³³² M Henaghan, B Aitkin, Clarkson D and Caldwell J *Family Law in New Zealand* (16th ed, LexisNexis, Wellington, 2014) at 913.

³³³ At 913.

³³⁴ At 912.

³³⁵ Children Young Persons and their Families Act, s 6.

³³⁶ Above n 332, at 934.

³³⁷ Above n 335, at s 5(a), (b).

³³⁸ Section 13(c), (d), (g).

³³⁹ Section 14.

group conference convened under CYPFA considers whether a child is in need of care and protection and if so it may make such decisions or recommendations and formulate such plans as necessary and desirable having regard to the Act's principles.³⁴⁰

The family group conference process is integral to CYPFA. Care and Protection Co-ordinators are responsible for convening conferences. Co-ordinators must make all reasonable endeavours to consult with the child or young person's family, whanau, or family group concerning the procedure to be adopted, attendees, date, time, and place of the conference.³⁴¹ Persons entitled to attend a family group conference include members of the family, whanau, or family group unless the Care and Protection Co-ordinator convening the conference is of the opinion that a person's attendance would not be in the child or young person's interests.³⁴² Any plan formulated at a conference must be supported by the Ministry of Social Development. The convening of a conference does not necessarily mean proceedings will be filed however family group conference plans may include agreement to the Ministry seeking inter alia custody, guardianship and support or service orders. In the event of non-agreement the Ministry always has the option of filing proceedings in the Family Court and filing a plan it considers addresses the particular child's needs. The status of the family group conference process within CYPFA is emphasised by a general requirement (subject to limited exceptions) that conferences take place before applications are made to the Family Court for a declaration that a child is in need of care or protection.³⁴³

CYPFA, while premised on a child's family group taking collective responsibility for the welfare of that child, recognises that families may need assistance and support in order to do that. To that end the Act provides for Iwi Social Services, Cultural Social Services, Child and Family Support Services and Community Services to facilitate families fulfilling their goals.³⁴⁴ Interim orders under s 79 of CYPFA, final orders under s101 of CYPFA and agreements for the

³⁴⁰ Section 28(b).

³⁴¹ Section 21(b).

³⁴² Section 22(1) (b).

³⁴³ Section 70.

³⁴⁴ Part 8.

temporary or extended care of children and young people under ss 139 and 140 of CYPFA may be made in favour of an Iwi Social Service, Cultural Social Service or the Director of a Child and Family Support Service. In 2001 Judge Boshier observed (when making a joint guardianship order in favour of the Ngapuhi Iwi) that iwi have a special place within the Act and are recognised in numerous sections and further expressed the hope that iwi would in the future play a more visible part in care and protection outcomes.³⁴⁵

The Family Court also has the ability under s187 of CYPFA to direct cultural and community reports to assist in its determination of what is in a particular child's welfare and best interests. This section provides that a Court may, after making a declaration that a child is in need of care and protection but before making final orders, direct a report to address:

- (a) the heritage and the ethnic, cultural, or community ties and values of the child or young person or the child's or young person's family, whanau, or family group:
- (b) The availability of any resources within the community that would, or would be likely to, assist the child or young person or the child's or young person's family, whanau, or family group:
- (c) where the declaration was made on the ground specified in section 14(1)(a) or (b) of this Act, the availability of any option—
 - (i) that would be an alternative to an order under Part II of this Act relating to the custody or guardianship of the child or young person; and
 - (ii) that would, or would be likely to, ensure that the kind of harm suffered by the child or young person will neither continue nor be repeated.

Cultural or community reports could conceivably be directed to address inter alia a Maori child's collective cultural rights and how those rights might appropriately be exercised individually and with other members of his or her group. A report might also be directed to address what resources are available within the community or within the child's whanau, hapu and iwi to assist the child exercise those rights.

A cultural report and a psychological report were directed in *Department of Child, Youth and Family Services v TSG*.³⁴⁶ The proceedings concerned cross applications

³⁴⁵ *Police v G* (District Court, Whangarei CY 088/24/00, 26 June 2001) at 3.

³⁴⁶ *Department of Child, Youth and Family Services v TSG* FC Nelson FAM 2000-42-154 24 August 2005.

under CYPFA by a child’s caregivers and by Te Runanga O Whangaroa Iwi Social Services. Te Runanga O Whangaroa Iwi Social Services intended placing the child with the paternal grandmother. The cultural report prepared by Mr Sadler, a senior lecturer in Maori Studies at the University of Auckland, criticised the psychological report as being very mono-cultural and not taking account of the child’s Maori familial perspectives.³⁴⁷ His Honour Judge Whitehead noted much of the 30 page report related to the nature and practice of contemporary Maori culture along with an explanation of its relevance to the particular case.³⁴⁸ The report’s conclusions (as paraphrased by Whitehead J) included the following points:³⁴⁹

- The child has “as of right” access to maintaining his cultural identity and cultural integrity and his personal safety.
- The bonding between the child and the caregiver and her daughter should in no way strengthen or legitimise the assertion of the caregiver over the assertions of whanau, hapu and Iwi to their tamariki (children) or mokopuna (grandchildren) who are considered taonga by Maori.
- That scant regard had been given to the objects of the Act by the Department to promote the wellbeing of children and their families, family groups, whanau, hapu and iwi including initial participation in decision-making.

All matters the Court considered relevant were weighed and balanced including the relevant CYPFA principles and the factors enunciated in *D v W*.³⁵⁰ The nature and extent of the child’s collective cultural rights and the child’s need to exercise those rights collectively or individually were not addressed within the judgement. The Court found that both the cultural and psychological report writers had gone beyond their briefs. His Honour accepted Mr Prangley’s (the psychologist) evidence in respect to the psychological effects upon the child of a transition from the caregivers to the paternal grandmother over that of Mr Sadler (the cultural report writer). Mr Prangley’s view was that bonding is cross-cultural and valid for all human beings and cultural issues are just one part of a child’s psychological welfare.³⁵¹

³⁴⁷ At [33].

³⁴⁸ At [33].

³⁴⁹ At [34].

³⁵⁰ Above n 317.

³⁵¹ Above n 346, at [42].

The weight Courts give to evidence addressing the psychological needs of children is unsurprisingly often significant. The decision highlights the need for all specialist report writers to fully appreciate a Maori child's collective cultural rights and the particular child's need to exercise those rights individually and in community with other members of his/her group. It also highlights the need for specificity in the preparation of report writer's briefs and the potential benefit if they specifically address Maori children's collective cultural rights and their exercise.

The Family Court held that the child's best interests were served by the child remaining with the caregivers. The Chief Executive of the Department of Child, Youth and Family Services was appointed an additional guardian of the child. A Services Order was also made to facilitate contact between the child and his whanau and for the child to gain knowledge and participate in his Maori culture. The decision promoted the child's participation in cultural activities and proficiency in his Maori heritage. Those cultural factors were emphasised within the judgement in the absence of a holistic assessment of the child's collective cultural rights and their exercise and the whanau, hapu and iwi responsibilities to the child and their capacity to meet those responsibilities.

III The Care of Children Act 2004

The Care of Children Act 2004 came into force on 1 July 2005.³⁵² It is primarily concerned with guardianship and care arrangements for children and the recognition of certain child rights.³⁵³ The explanatory note to the Care of Children Bill 2003 No 54-2 made it clear that the Bill's principle objectives were to recognise the diversity of family arrangements that exist for the care of children and to promote the rights of children under UNCROC.³⁵⁴ The explanatory note also acknowledged that the traditional view of the nuclear family was not universal and that the cultural dimensions of families (including extended families) posed a particular challenge when it stated:

³⁵² Care of Children Act, s 2.

³⁵³ Section 3.

³⁵⁴ R Ludbrook and L de Jong *Care of Children in New Zealand Analysis and Expert Commentary* (Brookers, Wellington, 2005) at 6.

The 1968 Act is premised upon a traditional nuclear family model that does not reflect the diversity of family arrangements that now exist in New Zealand. More modern legislation must provide a framework that recognises and supports all types of family units that care for children, for *example*, single-parent households, extended families, reconstituted families, and de facto relationships (including those of the same sex). *That challenge is magnified when the varied cultural dimensions of families are considered* (emphasis added).

Section 4 of COCA provides that the welfare and best interests of a child in his/her particular circumstances must be the *first and paramount* consideration in the administration and application of COCA, including proceedings concerning guardianship, care of and contact with a child.³⁵⁵ Section 5 of COCA sets out six principles which Courts must take into account when determining what is in a particular child's best interests.³⁵⁶ The principles provide a statutory framework to guide the Court's determination of what is in a particular child's best interests. The s 5 principles were inserted into the Care of Children Bill 2003 on the recommendation of the Justice and Electoral Committee of the House.³⁵⁷ The Committee said when making its recommendation that:³⁵⁸

The guiding principles encourage the child's parents and guardians to agree to their own arrangements for the child's care, development, and upbringing, whenever possible. We consider the child's parents and guardians should have the primary responsibility in these areas, and that efforts should be made to come to arrangements about the care of children within those families themselves. The principles are also structured in recognition of the fact that *an integral part of the context of a child's best interests is the child's family and culture*, [emphasis added] which may include members of the child's wider family.

The Justice and Electoral Committee structured the s 5 principles in recognition of the fact that the family and culture are integral to the determination of a child's best interests. A further rationale for the inclusion of the principles was to increase the transparency of decision-making and to give families a clearer indication of what matters would be considered relevant when making orders or mediating

³⁵⁵ Care of Children Act, s 4(1).

³⁵⁶ Section 4(2)(a)(ii).

³⁵⁷ Care of Children Bill 2003 (54-2), Cls 4A.

³⁵⁸ Care of Children Bill 2003 (54-2) (Select Committee Report) at 3.

agreements.³⁵⁹ The principles link with other guiding principles within family law statutes affecting children such as CYPFA. The principles establish a non-exhaustive list, strongly influenced by the rights conferred on children by UNCROC.³⁶⁰ Section 5 of COCA is as follows:

5 Principles relating to child's welfare and best interests

The principles relating to a child's welfare and best interests are that—

- (a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in section 3(2) to (5) of the Domestic Violence Act 1995) from all persons, including members of the child's family, family group, whānau, hapū, and iwi:
- (b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:
- (c) a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:
- (d) a child should have continuity in his or her care, development, and upbringing:
- (e) a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:
- (f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

The s 5 principles are fundamental in the assessment and ultimate determination of what is in a particular child's best interests. The Supreme Court in *Kacem v Bashir* encapsulated the approach to be taken when applying the best interests principle under COCA when Blanchard, Tipping and McGrath JJ said at [19]:³⁶¹

It can therefore be seen quite clearly that the ultimate objective is to determine what will best serve the welfare and best interests of the particular child in his, her or their particular circumstances. In making that determination the s 5 principles must each be examined to see if they are relevant, and if they are, must be taken into account along with any other relevant matters. It is self-evident that individual principles may have a greater or lesser significance in

³⁵⁹ Above n 354 at 3.

³⁶⁰ At 4.

³⁶¹ *Kacem v Bashir* SCNZ [2010] NZFLR 884.

the decision-making process, depending on the circumstances of individual cases.

A Collective Cultural Rights and the Section 5 Principles

The guiding principles under s 5 of COCA establish a non-exhaustive list of considerations which if relevant must be taken into account when determining what is in a particular child's best interests. The principles within ss 5(e) and (f) concern a child's relationship with his/her whanau, hapu and iwi and a child's cultural identity. In the writer's view, the inclusion of these specific principles within a list of six principles to guide decision-makers in determining a child's best interests, obscures the holistic nature of Maori children's collective cultural rights. A natural tendency is to compartmentalise cultural rights as discrete factors within those individual principles. Maori children's collective cultural rights concern (to a greater or lesser extent) all aspects of a child's life, and cannot be assessed by reference to just two principles within s 5 of COCA. The reference to cultural rights within ss 5(e) and (f) does not preclude the assessment of a child's collective cultural rights within the balance of the s5 principles when determining what is in a Maori child's best interests. As already noted, a collective rights perspective can, and if applicable should, be applied in respect to all of the guiding principles and any other relevant consideration.

To illustrate that a collective rights perspective can be applied to all of the s 5 principles, ss 5(b), (c), and (d) of COCA are briefly considered. Those principles concern children's rights in respect to their care, development, and upbringing. While a child's upbringing should primarily be the responsibility of the child's parents as set out in s 5(b) of COCA, a Maori child's collective cultural rights may warrant weight being placed on his/her extended family or collective group's responsibilities and capacity to provide care and contribute to the child's upbringing and development. Similarly, ss 5(c) and (d) (which concern the responsibilities of parents, guardians and other persons having a role in the child's care to consult, co-operate, and maintain continuity in respect to care, development and upbringing) can also be assessed from a collective cultural rights perspective. Members of a child's collective group or the child's collective group as a whole may have responsibilities associated with the child's care, protection, upbringing or development, which contribute to the welfare and best interests of the child and therefore should be assessed. If a Maori

child's collective cultural rights are assessed within all of the relevant s 5 principles (and any other relevant matters), the weight each principle is given and the balancing of all relevant considerations to determine the child's best interests will be enhanced. Such assessment should in the writer's view consider the exercise of the child's collective rights both individually and collectively, and the responsibilities of the child's group to the child and its capacity to meet its responsibilities.

The s 5 principles do not expressly address Maori children's collective cultural rights but neither did the Guardianship Act 1968. The general principles and obiter enunciated by the High Court in *B v Director-General of Social Welfare* remain available to the Courts and counsel to develop. The development of a robust, coherent and holistic approach to determining a Maori child's best interests which incorporates the child's collective cultural rights under all of the s5 principles will also be assisted by reference to General Comment No. 11, the Treaty and UNDRIP. The Treaty and UNDRIP were both acknowledged by the High Court in *B v Director-General of Social Welfare* as authoritative in formalising what might otherwise be perceived as vague generalities associated with the practical assessment of Maori children's collective cultural rights. The Committee on the Rights of the Child, by issuing General Comment No. 11, has provided further authoritative guidance in the application of the best interests principle to indigenous children's collective cultural rights.

B Ascertaining Collective Cultural Rights under COCA

There other provisions of COCA which acknowledge the collective nature of Maori familial relationships and further facilitate the provision of relevant evidence to assist in the application of the best interests principle to Maori children's collective cultural rights. They include:

- Persons eligible to apply for a parenting order in relation to a child are defined as including a person who is a member of the child's family, whanau, or other culturally recognised group, and who is granted leave to apply.³⁶²
- A Court may order a cultural report to cover an aspect or aspects of a child's cultural background.³⁶³

³⁶² Care of Children Act, s 47.

³⁶³ Section 133(1).

- A party may ask the Court to hear a person to speak on a child’s cultural background or any aspects of the particular child’s cultural background that may be relevant to a matter in issue in the proceedings.³⁶⁴ The Court may adjourn proceedings to enable arrangements to be made to hear such a person and ³⁶⁵
- Despite no party making such a request, the Court may, at any time during the proceedings, suggest to a party to the proceedings that it may be of assistance to the Court to hear a person or persons called by the party on any matter concerning the child’s cultural background or aspect of the child’s particular cultural background that may be relevant to a matter in issue in the proceedings.³⁶⁶

Historically, cultural reports are seldom sought as illustrated in the table below which sets out the number of specialist reports (including cultural reports) directed by the Family Court under s 133 of COCA from July 2010 to December 2013. The data for 2013/14 is for the six months from July to December 2013.³⁶⁷

Report Type	2010/2011	2011/2012	2012/201	Jul – Dec
			3	2013
Specialist Report – New	900	642	686	414
Specialist Report – Updated	388	322	268	129
Cultural Report	7	3	7	2
Total	1295	967	961	545

A total of 19 cultural reports were directed under s 133 of COCA from 2010/11 to December 2013; of those six were in respect to Maori.³⁶⁸ The reason for the limited number of Family Court directed cultural reports is unknown but insofar as the reports pertain to Maori, may reflect a paucity of evidence addressing Maori

³⁶⁴ Section 136(1)(a), (b).

³⁶⁵ Section 136(2).

³⁶⁶ Section 136(3).

³⁶⁷ Letter from Toni Fisher (General Manager, District Courts, Ministry of Justice) to the author pursuant to an Official Information Act 1982 (16 June 2014).

³⁶⁸ Letter from Toni Fisher (General Manager, District Courts, Ministry of Justice) to the author pursuant to an Official Information Act 1982 (10 March 2015).

children's cultural rights and/or the absence of an appreciation of the collective cultural rights of Maori children within the Family Court.

Cultural reports if directed by the Family Court ideally should not constitute the initial or sole source of evidence in respect to cultural matters including collective cultural rights. Once an evidential foundation has been established and a Court is satisfied that a cultural report will assist in its determination, a Court may entertain directing one.

Guidelines to assist Maori Cultural Report-Writers to prepare, structure and compose reports have been produced by the Ministry of Justice.³⁶⁹ The guidelines refer to Maori cultural reports as being a holistic assessment of the child's cultural heritage, environment, affiliation, needs and wishes, within the context of their whānau and providing:³⁷⁰

ordered, objective information about whānau, hapū and iwi kaupapa and tikanga as they affect the child's life. This will include information about the child's perception of his or her cultural identity and place in Māori society.

In contrast to the guidelines provided to cultural report-writers, the judicial direction that a cultural report be obtained and the approval of the brief for the report-writer is Judge and counsel led. The presiding Judge is responsible for approving the brief of the report-writer, which is prepared in consultation with counsel for the parties and lawyer for the child.³⁷¹ The appointment of cultural report-writers is ultimately the responsibility of the Ministry of Justice's National Office which identifies an appropriate report-writer by making contact with professional intermediaries.³⁷² If a Court has identified a potential report-writer or made enquiries to find a suitable report-writer, those suggestions are provided to the Ministry Justice's National Office with the request to engage a report-writer.³⁷³

The knowledge and skill of the presiding Judge and the particular counsel in respect to cultural issues and their ability to identify an appropriate report-writer,

³⁶⁹ Ministry of Justice Guidelines for writers of Maori Cultural Reports for the Family Court: He Aratohu mo nga Kaituhi Ripoata Tikanga maori mo te kotahi Whanau (Ministry of Justice, (October 2006) at 4.

³⁷⁰ At 12.

³⁷¹ Above n 368.

³⁷² Above n 368.

³⁷³ Above n 368.

guide the report-writer appointment and approval of the brief processes. The preparation of the briefs and the appointment of report-writers are matters in the writer's view which require further consideration if Court-directed cultural reports addressing Maori children's collective cultural rights are to assist to the greatest extent possible. The practical application of the best interests principle to Maori children's collective rights relies upon evidence and the knowledge and skills of those engaged in the determination process. It must also take account of the realities the Family Court inevitably faces when applying the best interests principle.

CHAPTER SEVEN:
Maori Children’s Collective Cultural Rights and New Zealand
Family Law –the Practical Realities

The nature and complexity of the issues determined by the Family Court are immense. The Family Court’s assessment of what is in the welfare and best interests of a child is a fact and circumstance-specific exercise, and the solution has to be “custom designed to suit the needs of the particular and individual child”.³⁷⁴ If a Maori child’s collective cultural rights are pleaded and recognised by the Court, the reality of the child’s circumstances will ultimately dictate the outcome. That may mean the child’s immediate whanau are unable to discharge their responsibilities to the child. In the absence of hapu or iwi being aware, able or willing to address the child’s collective cultural rights, the Court will have limited capacity to assist. It is therefore incumbent upon counsel and the judiciary to ensure that if a Maori child’s collective cultural rights are in issue, they are pleaded and all evidence relevant to the determination of what is in that particular child’s best interests is before the Court.

I The Best Interests Principle in Theory and in Practice

The decision-making process is the point at which the best interests theory and reality meet. The reality of a particular child’s circumstances and all matters relevant to the determination of the issue(s) should be assessed and balanced, and a decision made which is in the best interests of the child.

Zermatten refers to the best interests principle as having two “traditional” roles.³⁷⁵ The first is to “control” behaviour to ensure children are fully able to exercise their rights and all of the obligations towards children are fulfilled. The second is to “facilitate solutions” by helping decision-makers render the most appropriate decision. Zermatten refers to the best interests principle facilitating solutions because whenever a decision-maker must:³⁷⁶

³⁷⁴ *B v M* 14 FRNZ (1996), 690 at 693 [29].

³⁷⁵ Jean Zermatten, “The Best Interests of the Child Principle; Literal Analysis and Function” (2010) 18 *International Journal of Children’s Rights* 483 at 492.

³⁷⁶ At 493.

... decide on an issue that will affect a child or a group of children, s/he must systematically look for solutions that will have the most positive, or least negative impact. The chosen solution will ideally be selected because it is in ‘the best interests of the child.’ This function is essential because it represents the bridge between the theory and its practical exercise in the field.

The application of the best interests principle to facilitate solutions in practice presents numerous challenges for decision-makers. While the best interests principle facilitates decision-making, any particular decision is vulnerable to criticism that it is not in fact, in a particular child’s best interests. That is a consequence of personal subjectivity inherent in all such human endeavours. Family disputes are highly emotive. Not surprisingly, the subjective view of what is in a particular child’s best interests will vary amongst: parents, caregivers, legal representatives; the child or children; the Judge;³⁷⁷ and other interested persons.

The best interests principle is not capable of precise definition and inherently contains an abundance of subjectivity.³⁷⁸ The weaknesses inherent in applying a general principle such as the best interests of the child are, however, offset by the richness and flexibility of the principle which includes its ability to adapt to diverse cultural and socio-economic differences. The Family Court is well aware of these attributes and that the best interests principle develops over time as social circumstances change. The Family Court is also well aware of the realities it confronts when determining what is in a particular child’s best interests.

II Practical Realities and the Best Interests Principle.

The realities and dynamics which confront the Family Court when determining what is in a particular child’s best interests are many and varied and include dysfunctional families and relationships, poor parenting, violence, mental health issues and substance abuse, to name but a few. The Family Court is also a forum which some litigants use to promote their particular causes or agenda. These realities and dynamics are not unique to Maori, but if relevant will be significant when assessing and determining what is in any particular Maori child’s best interests. Whilst the Family Court must take account of the opportunities the collective responsibilities of

³⁷⁷ At 494.

³⁷⁸ At 494.

whanau, hapu and iwi represent to promote Maori children's best interests and embrace it, it must equally appreciate that the recognition of Maori children's collective cultural rights must take account of the realities for some children and their whanau.

A Whanau Dysfunction

The reality that some whanau are extremely dysfunctional, neglect the values espoused within tikanga, and lack the necessary skills to nurture children must be acknowledged. Again, these realities are not unique to Maori. In *Pita v Putahi* the applicant (paternal grandmother Mrs Pita) sought access to her six year old grandchild.³⁷⁹ Mrs Pita's son had been convicted of the murder of the child's mother. At the time of the murder the child and her parents were living with the father's parents (Mrs Pita and her family) in an environment where alcohol, cannabis and violence were an engrained lifestyle. Mrs Pita sought access to ensure the child would not lose contact with her Te Arawa heritage.

The child's right to learn her Te Arawa ancestry and tikanga were acknowledged, however the Family Court determined that members of her father's family had neglected such values and had failed to stop the violence. The evidence indicated the paternal family's priority was to support the father, even to the extent of not allowing the child to be collected so she could attend her mother's tangi (funeral) on her home marae. The child's experiences within the paternal family's home had seriously damaged the child who remained vulnerable. Judge Inglis QC, while endorsing the general principles enunciated in *B v Director-General of Social Welfare*, also cited the High Court's qualification that:³⁸⁰

While there are still many whanau which do accept and in their own ways exemplify...[ideal] standards and values...it is also true that there are dysfunctional whanau amongst Maori, as well as amongst the other communities within our society. There are also situations where, whatever the circumstances of the whanau may be, the circumstances under which they live or operate prevent them from providing the nurture which is desirable.

³⁷⁹ Above n 322.

³⁸⁰ At [12].

While not as extreme, similar issues confronted the Family Court in *Department of Child, Youth and Family Services v TSG*.³⁸¹ The Runanga sought the custody of a child with the intention of placing the child with his paternal grandmother. The Department opposed the application on the grounds that the grandmother was not an appropriate caregiver and supported the permanent placement of the child with the caregivers with whom they had placed him. The grandmother (Ms H) had abused drugs in the past and had a criminal record. Ms H acknowledged these matters and that she had experienced problems with one of her daughters which had resulted in the daughter receiving “the rod” and being slapped across the face by her partner.³⁸² The daughter had been involved with Youth Justice although the offences were not disclosed. Ms H had applied to be approved as a Departmental caregiver for her grandson however for the aforementioned reasons, and her failure to disclose her relationship with her partner who had a history of alleged gang involvement, the application was declined. The application by the Runanga was ultimately dismissed.

If the reality for a child is that his/her whanau is dysfunctional, the wider whanau, hapu or iwi may be in a position to provide support or alternative care, meet the child’s needs and recognise his/her individual and collective rights. If the parents and/or immediate whanau are unwilling or unable to engage with wider whanau, hapu or iwi, or those groups are unable to provide the assistance required, counsel and the Court must appreciate those realities. In the writer’s view, if such relevant evidence is not set out in the pleadings, the Court should enquire of counsel and make further directions as required to remedy the omission.

B Abstract or Cause Driven Proceedings

General propositions and politically driven ideals must be subordinate to the specific needs and interests of the particular child who is the subject of the Family Court proceeding. The Family Court was confronted with that very issue in *B v M*³⁸³ (which on appeal was reported inter alia as *B v Director-General of Social Welfare*). The Family Court traversed the background to the relationship between B (grandmother) and her daughter, and B’s attributes. His Honour Judge Inglis QC described B as a

³⁸¹ Above n 346.

³⁸² At [25].

³⁸³ Above n 374, at 693.

“formidably powerful woman,” “fired by the Maori renaissance”; “strongly individualistic, she is a person who is not tolerant of convention unless it suits her immediate purpose”.³⁸⁴ B was considered a “vigorous and powerful advocate for her own cause”.³⁸⁵ B’s position in the Family Court was that tikanga Maori provided the exclusive answer to the baby’s future and that her application was on behalf of her whanau.³⁸⁶

The mother’s evidence given in the Family Court was clear; she did not wish her baby to be brought up by B and have the same upbringing that she had.³⁸⁷ The mother pointed out in her evidence that “if questions of tikanga and Maoritanga are so important to the grandmother, how is it that no knowledge of these things was ever passed on to her during her childhood?”³⁸⁸

Judge Inglis QC cautioned the giving of undue weight to generalised perceptions and assumptions where the grandmother’s case was essentially based on the need not to disrupt whanau links.³⁸⁹ He did so while acknowledging that tikanga Maori, to the extent that it is relevant to the welfare and interests of a child of Maori ancestry, must be taken into account.³⁹⁰ The Family Court was not satisfied B would find it possible to alter her priorities so that her full attention could be given to the child’s nurturing and it had not been suggested that any other member of the whanau was in a position to offer the baby long-term and stable care.³⁹¹ In concluding, Judge Inglis QC expressed the hope that the child would not become a political football, the victim of “abstracted, cause-driven cultural considerations”.³⁹²

III The role of the Judiciary and of Counsel

The role of the judiciary and counsel to ensure Maori children’s collective cultural rights in addition to their individual rights are assessed when determining their best interests is crucial. The development of a coherent and robust approach to the

³⁸⁴ At 693 [9], [10] and [14].

³⁸⁵ At [21].

³⁸⁶ At 699 [12].

³⁸⁷ At 694 [46].

³⁸⁸ At 695 [3].

³⁸⁹ At 697 [30].

³⁹⁰ At 698 [42].

³⁹¹ At 701 [4].

³⁹² At 704 [13].

assessment of Maori children's collective cultural rights requires more than the judiciary and counsel being conversant with the relevant domestic and international authority. The Family Court decision-making process is reliant upon the evidence the parties adduce to support their positions. There is an onus on parties, with the assistance of counsel, to file cogent evidence in the first instance. The corollary to that is that the judiciary must recognise its responsibility to assess Maori children's collective cultural rights in addition to their individual rights when determining what is in their best interests.

In the writer's view, counsel ideally should address with their clients at the earliest opportunity whether collective rights are to be advocated. If so, matters such as the extent of engagement a party or child have with their culture, whanau, hapu and iwi, and those groups' functionality and capacity to address or support a child's collective cultural needs, must be ascertained. If collective cultural rights are pleaded, the evidence to support the claims made and to assist the Court to make any specific orders or directions sought is essential. Pleadings should address the relevant collective cultural right/s and the particular child's need to exercise them individually and with members of his/her group. The relevant tikanga may need to be established and if so, appropriate expert evidence filed.

Counsel will need to consider (following an evidential foundation being laid) whether a cultural report would assist the Court. If so, an appropriately qualified report-writer who is able to accept an appointment from the Court will need to be identified. Any report-writer must fully appreciate they provide non-partisan evidence and are appointed by the Court to assist the Court. The report-writer must be conversant with the relevant tikanga. The preparation of an appropriate report-writer's brief which adequately addresses the relevant collective cultural rights and the child's need to exercise those rights individually and collectively, will need to be drafted for the Court's and opposing counsel's consideration. The specific orders or directions ultimately sought, the authority upon which the collective cultural rights of the particular child are advanced, and whether an adjournment for whanau, hapu or iwi hui (meeting) is required, are examples of the types of matters counsel and the Court must also apprehend.

To emphasise the importance of the role of counsel, in *Pita v Putahi* the collective cultural rights argument advanced on behalf of Mrs Pita does not appear

to have been supported by any expert evidence or third party evidence, be it from her hapu, iwi or otherwise. That may simply indicate the dysfunction and a lack of engagement of Mrs Pita's whanau with their hapu and iwi. If so, that does not necessarily mean that the child's wider collective group did not have an interest in the child's welfare or the proceeding. The child's paternal hapu or iwi may have been able to provide further options to the Court to facilitate the child exercising her collective cultural rights according to Te Arawa tikanga. The judgement makes no reference to evidence concerning the respective whanau, hapu or iwi collective responsibilities to the child, be it any form of muru or otherwise.

Similarly, in *Department of Child, Youth and Family Services v TSG* the judgement makes no reference to the child's particular collective cultural rights or the child's need to exercise those rights, notwithstanding a cultural report had been directed and expert evidence given. The willingness and capacity of the paternal whanau, hapu or iwi to address their collective responsibilities or meet any particular needs of the child was not referred to. It therefore appears from the judgement that there was either a paucity of specific evidence addressing those matters or that any such evidence was not considered relevant in the particular circumstances.

Counsel and the judiciary, in the writer's view, are obliged to utilise the discretion available and respectively seek and make orders and directions which facilitate the application of the best interests principle to Maori children's collective cultural rights. While it is in the first instance the responsibility of the parties to file the relevant evidence and to seek appropriate directions, the Family Court has the ability to make directions including the filing and giving of evidence, and directing of specialist reports. The capacity of counsel and the judiciary to apprehend Maori children's collective cultural rights appropriately is crucial. In the sage words of Joseph:³⁹³

While tikanga Maori customary law has now re-entered the legal system, there is evidence that the system may not yet have the tools, capacity, or to have developed a sufficiently informed approach to dealing appropriately with those customary laws.

³⁹³ Above n 7, at 96.

IV A Way Forward

If the Family Court is to develop a coherent and robust approach to the application of the best interests principle to Maori children which recognises their collective cultural rights, counsel and the judiciary must build upon their existing skill and knowledge base, and use the tools they already have at their disposal. That process will be facilitated by:

1. The judiciary and counsel (including lawyer for the child/ren) receiving training in respect to the collective cultural rights of Maori children and the child's need to exercise those rights individually and collectively with members of his/her group. Any training should be developed in consultation with and delivered in partnership with Maori and take account of regional/iwi differences.
2. The judiciary and counsel identifying at the earliest opportunity whether a Maori child's collective cultural rights are relevant or in issue. If so detailed evidence should be filed which addresses the nature and extent of the right/s or issue/s. Evidence and supporting submissions addressing such matters should be specific to the particular child and his/her group and include inter alia:
 - a. The extent to which a party or child engages with their culture and their whanau, hapu and iwi and those group's functionality and capacity to address a child's collective cultural needs;
 - b. The relevant tikanga;
 - c. Whether a cultural report would assist the Court;
 - d. The specific orders or directions ultimately sought and why;
 - e. Identification of (and evidence from) the persons, associations or groups who will be responsible or participate in the exercise, oversight, or provision of any collective cultural rights;
 - f. The authority upon which the collective cultural rights of the particular child are advanced;
 - g. Whether an adjournment for whanau, hapu or iwi hui is required; and
 - h. Consideration of any issues of procedure concerning the giving of evidence, forum matters or otherwise which impact on the ability to

assess a child's collective cultural rights or the application of the best interests principle to a Maori child.

3. The Family Court (in consultation with whanau, hapu and iwi) identifying appropriately qualified cultural report-writers who are able to accept appointments to assist the Court as non-partisan experts and who appreciate the relevant tikanga. In the same consultative way, guidelines for the preparation of briefs for cultural reports should be developed which address a child's collective cultural rights and the child's need to exercise those rights individually and collectively with his/her group and the collective groups capacity to meet its responsibilities to the child.
4. The Family Court when issuing judgements, making express reference to whether a Maori child's collective cultural rights are in issue or relevant to the proceeding. If so, the Court then addressing within its judgement its assessment of the child's collective cultural rights in addition to the child's individual rights within all of the statutory principles and factors relevant when determining what is in that particular child's best interests.
5. Counsel seeking and the judiciary making orders and directions under the relevant legislation to give effect to a Maori child's collective cultural rights. That may encompass the exercise of a child's collective cultural rights individually and collectively with members of his/her group and/or the promotion of a child's collective group to meet their responsibilities to the child. Options include:
 - a. Conditions attaching to Court Orders which recognise a Maori child's collective cultural rights (general or specific) and the exercise of those rights individually and collectively with the child's group;
 - b. Appointment of additional guardian/s for specific purposes to facilitate the exercise of a child's collective cultural rights individually and collectively with the child's group;
 - c. Referral or re-referral to family group conference, family dispute resolution, or the adjournment of proceedings for whanau hapu or iwi hui if collective consultation has not occurred or the representation was inadequate and can be addressed; and

- d. Declining to approve plans filed under CYPFA (or directing hearings) if they do not address whanau, hapu or iwi participation or consultation which facilitate a Maori child's collective cultural rights and the exercise of those rights individually and collectively with the child's group.

V Neglecting Collective Cultural Rights

The Family Court is obliged to apply the best interests principle as the first and paramount consideration in proceedings under CYPFA and COCA. It is that statutory obligation augmented by international human rights authority which obliges the Family Court to develop the approach advocated within this paper. The common law which developed under the Guardianship Act 1968 provides further authority upon which counsel and the Court may rely.

This paper has not considered in detail additional grounds which support the recognition of Maori children's collective cultural rights. They include the Crown's obligations under the Treaty of Waitangi and the general obligation to interpret legislation in a manner which is consistent with the principles of the Treaty. Similarly, tikanga concerning Maori children's collective rights which may already constitute part of the common law of New Zealand has not been considered in any detail. They are further grounds which might be advanced to support what is already a compelling argument that the Family Court of New Zealand is obliged to develop an approach to the application of the best interests principle to Maori children which recognises their collective cultural rights in addition to their individual rights.

The Family Court has (subject to appeal) the ultimate responsibility to determine what is in a particular Maori child's best interests. The process to determine what is in a particular Maori child's best interests requires the assessment and balancing of factors, all of which have collective rights and individual rights dimensions. An approach to the assessment of a Maori child's best interests needs to be robust, coherent and recognise the collective cultural rights, and individual rights of that particular child. Counsel and the judiciary need to be conversant with the domestic and international authority, and the relevant evidence must be available to the Court. Only then can the Family Court apply the best interests principle to a particular Maori child in a manner which is consistent with New Zealand's obligations under UNCROC, UNDRIP, General Comment No. 11.

Given the domestic and international authority and social context within New Zealand, if the Family Court fails to recognise Maori children's collective cultural rights, the consequences may be much more than simply academic. They include the following:

1. The failure to consider UNCROC, General Comment No. 11 and UNDRIP as relevant and/or mandatory considerations (including statutory interpretation) may constitute grounds to apply for judicial review or appeal on points of law.³⁹⁴
2. The Family Court's failure to apply the best interests principle to recognise Maori children's collective cultural rights may be the subject of adverse comment by the Committee on the Rights of the Child at Periodic Review of New Zealand's compliance with UNCROC.
3. When New Zealand adopts the Third Optional Protocol on an individual communications procedure under UNCROC, the failure by the Family Court to appropriately consider Maori children's collective cultural rights may result in the communication of complaints alleging breaches of the UNCROC.
4. The Family Court may increasingly be regarded by Maori as being out of touch with Maori values, and with New Zealand's social policy and social context which already recognise Maori children's collective cultural rights within a familial setting. In particular, the Court's ability to appropriately assess what is in a Maori child's best interests will be vulnerable to criticism and the Court's relevance to Maori may diminish over time.

³⁹⁴ Above, n 149 at 261-3 (in respect to UNDRIP).

CONCLUSION

This paper has looked beyond children's individual rights and their universal application under UNCROC. The recognition of Indigenous Peoples collective rights within international human rights law (in particular UNDRIP and General Comment No. 11) provides authoritative guidance to the Family Court of New Zealand that Maori children's collective cultural rights must be assessed when determining their best interests. New Zealand as a State Party to UNCROC is obliged to implement the Convention's provisions within its legislation, judicial determinations and administrative processes. The Family Court accordingly must be conversant with the relevant international law and authority if it is to discharge its responsibilities to Maori children when determining what is in their best interests.

This paper also addresses the conceptual shift required by the Family Court of New Zealand when determining Maori children's best interests under CYPFA and COCA. The recognition of Maori children's collective cultural rights in addition to their individual rights is underpinned by legal authority, principle and policy. The strengthening Maori social services sector (including Whanau Ora and iwi social services) and the continued political and economic growth of iwi require recognition. They mirror the resurgence and pervasive nature of collective values within contemporary Maori society. The common law recognition of Maori children's collective cultural rights will reflect New Zealand's unique history and circumstances. The determination of what is in a particular Maori child's best interests will be enhanced.

The approach advocated requires a Maori child's collective cultural rights and individual rights to be taken into account within all of the relevant principles and factors assessed under COCA or CYPFA. The weight each principle or factor is given and the balancing of relevant considerations would recognise and take account of Maori children's collective cultural rights in addition their individual rights in the child's particular circumstances. This approach is supported by reference to UNDRIP and UNCROC General Comment No. 11 which augment New Zealand's existing common law and statutory frameworks under CYPFA and COCA. The principles enunciated in *B v Director-General of Social Welfare* provide authoritative guidance to the Family Court of New Zealand when developing a coherent, robust and holistic

approach to the application of the best interests principle to Maori children which recognises their collective cultural rights.

The nature and complexity of the issues the Family Court is required to determine is immense. They often concern lifestyle or parenting decisions of the parents or caregivers which are the subject of dispute. Family Court outcomes may have profound effects for children and their families. The practical application of the best interests principle must accommodate these realities within the context of the particular child's circumstances. In some circumstances a family/whanau cannot discharge their individual or collective responsibilities to a child. Notwithstanding the righteousness (and the Court's acceptance) of any general proposition a party might advance in respect to the collective rights of and responsibilities to Maori children, if it does not advance the best interests of the child, or a party lacks the attributes to promote the best interests of a child, that party will not succeed.

If collective cultural rights are advocated, it is essential parties (with the assistance of counsel) file specific evidence addressing the child's collective cultural rights and his/her need to exercise those rights individually and collectively. The evidence will depend upon the child and his/her family/whanau circumstances. In most cases the extent of engagement in whanau, hapu or iwi life and how any collective cultural rights are or might be exercised are likely to be relevant considerations. Whanau, hapu and iwi collective responsibilities to the child and their capacity to meet their responsibilities are also likely to be relevant.

Maori who choose to have recourse to the Family Court, those named as parties who have no choice and all Maori children are entitled to have Maori children's collective cultural rights recognised within the best interests principle. The Family Court must embrace its responsibility to recognise Maori children's collective cultural rights and in keeping with international human rights law and domestic law and social policy which already recognises Maori collective rights. If it does not embrace the opportunity, it risks being the subject of domestic and international criticism and losing relevancy over time.

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APPENDICES

APPENDIX A: CONVENTION ON THE RIGHTS OF THE CHILD

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of

specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such

determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.
2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others; or
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.
2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of

applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, cooperation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations cooperating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.
3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.
4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
 - (a) To diminish infant and child mortality;
 - (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
 - (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
 - (d) To ensure appropriate pre-natal and post-natal health care for mothers;
 - (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
 - (f) To develop preventive health care, guidance for parents and family planning education and services.
3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.
4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (f) Make primary education compulsory and available free to all;
 - (g) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - (h) Make higher education accessible to all on the basis of capacity by every appropriate means;
 - (i) Make educational and vocational information and guidance available and accessible to all children;
 - (j) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
3. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
4. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:
 - (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
 - (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
 - (e) The development of respect for the natural environment.
2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
3. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
 - (a) Provide for a minimum age or minimum ages for admission to employment;
 - (b) Provide for appropriate regulation of the hours and conditions of employment;

- (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (d) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (e) The exploitative use of children in prostitution or other unlawful sexual practices;
- (f) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

- (g) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (h) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (i) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right

to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

- (j) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
 - (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not

prohibited by national or international law at the time they were committed;

- (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
- (i) To be presumed innocent until proven guilty according to law;
 - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
 - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
 - (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
 - (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
 - (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
 - (vii) To have his or her privacy fully respected at all stages of the proceedings.
3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
- (k) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
 - (l) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

- (m) The law of a State party; or
- (n) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.
2. The Committee shall consist of eighteen experts of high moral standing and recognized competence in the field covered by this Convention.^{1/} The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.
3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.
5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.
8. The Committee shall establish its own rules of procedure.
9. The Committee shall elect its officers for a period of two years.
10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.
11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.
12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights
 - (a) Within two years of the entry into force of the Convention for the State Party concerned;
 - (b) Thereafter every five years.
2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.
3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.
4. The Committee may request from States Parties further information relevant to the implementation of the Convention.
5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.
6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

- (a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;
- (b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;
- (c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;
- (d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.
2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.
3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. In witness thereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

APPENDIX B : COMMITTEE ON THE RIGHTS OF THE CHILD GENERAL COMMENT No. 11 (2009)

Indigenous children and their rights under the Convention

Introduction

1. In the preamble of the Convention on the Rights of the Child, States parties take “*due account of the importance and cultural values of each people for the protection and harmonious development of the child*”. While all the rights contained in the Convention apply to all children, whether indigenous or not, the Convention on the Rights of the Child was the first core human rights treaty to include specific references to indigenous children in a number of provisions.
2. Article 30 of the Convention states that “*In those States in which ethnic, religious, or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion or to use his or her own language.*”
3. Furthermore, article 29 of the Convention provides that “*education of the child shall be directed to the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin*”.
4. Article 17 of the Convention also makes specific mention as States parties shall “*encourage the mass media to have particular regard for the linguistic needs of the child who belongs to a minority group or who is indigenous*”.
5. The specific references to indigenous children in the Convention are indicative of the recognition that they require special measures in order to fully enjoy their rights. The Committee on the Rights of the Child has consistently taken into account the situation of indigenous children in its reviews of periodic reports of States parties to the Convention. The Committee has observed that indigenous children face significant challenges in exercising their rights and has issued specific recommendations to this effect in its concluding observations. Indigenous children continue to experience serious discrimination contrary to article 2 of the Convention in a range of areas, including in their access to health care and education, which has prompted the need to adopt this general comment.
6. In addition to the Convention on the Rights of the Child, various human rights treaties, have played an important role in addressing the situation of indigenous children and their right not to be discriminated, namely, the International Convention on the Elimination of All Forms of Racial Discrimination, 1965, the International Covenant on Civil and Political

Rights, 1966, and the International Covenant on Economic, Social and Cultural Rights, 1966.

7. The International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, 1989 contains provisions which advance the rights of indigenous peoples and specifically highlights the rights of indigenous children in the area of education.
8. In 2001, the United Nations Commission on Human Rights appointed a Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, subsequently confirmed by the Human Rights Council in 2007. The Council has requested the Special Rapporteur to pay particular attention to the situation of indigenous children and several recommendations included in his annual and mission reports have focused on their specific situation.
9. In 2003, the United Nations Permanent Forum on Indigenous Issues held its second session on the theme indigenous children and youth and the same year the Committee on the Rights of the Child held its annual Day of General Discussion on the rights of indigenous children and adopted specific recommendations aimed primarily at States parties but also United Nations entities, human rights mechanisms, civil society, donors, the World Bank and regional development banks.
10. In 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples which provides important guidance on the rights of indigenous peoples, including specific reference to the rights of indigenous children in a number of areas.

Objectives and structure

11. This general comment on the rights of indigenous children as provided for by the Convention on the Rights of the Child draws on the legal developments and initiatives outlined above.
12. The primary objective of this general comment is to provide States with guidance on how to implement their obligations under the Convention with respect to indigenous children. The Committee bases this general comment on its experience in interpreting the provisions of the Convention in relation to indigenous children. Furthermore, the general comment is based upon the recommendations adopted following the Day of General Discussion on indigenous children in 2003 and reflects a consultative process with relevant stakeholders, including indigenous children themselves.
13. The general comment aims to explore the specific challenges which impede indigenous children from being able to fully enjoy their rights and highlight special measures required to be undertaken by States in order to guarantee the effective exercise of indigenous children's rights. Furthermore, the general comment seeks to encourage good practices and highlight positive approaches in the practical implementation of rights for indigenous children.

14. Article 30 of the Convention and the right to the enjoyment of culture, religion and language are key elements in this general comment; however the aim is to explore the various provisions which require particular attention in their implementation in relation to indigenous children. Particular emphasis is placed on the interrelationship between relevant provisions, notably with the general principles of the Convention as identified by the Committee, namely, non-discrimination, the best interests of the child, the right to life, survival and development and the right to be heard.
15. The Committee notes that the Convention contains references to both minority and indigenous children. Certain references in this general comment may be relevant for children of minority groups and the Committee may decide in the future to prepare a general comment specifically on the rights of children belonging to minority groups.

Article 30 and general obligations of States

16. The Committee recalls the close linkage between article 30 of the Convention on the Rights of the Child and article 27 of the International Covenant on Civil and Political Rights. Both articles specifically provide for the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion or to use his or her own language. The right established is conceived as being both individual and collective and is an important recognition of the collective traditions and values in indigenous cultures. The Committee notes that the right to exercise cultural rights among indigenous peoples may be closely associated with the use of traditional territory and the use of its resources.³⁹⁵
17. Although article 30 is expressed in negative terms, it nevertheless recognizes the existence of a “right” and requires that it “shall not be denied”. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. The Committee concurs with the Human Rights Committee that positive measures of protection are required, not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.³⁹⁶
18. In this context, the Committee also supports the Committee on the Elimination of Racial Discrimination in its call upon States parties *to recognize and respect indigenous distinct cultures, history, language and way*

³⁹⁵ Human Rights Committee, general comment No. 23 on article 27, CCPR/C/Rev.1/Add.5, 1994, paras. 3.2, 7. Recommendations of CRC Day of General Discussion on the Rights of Indigenous Children, 2003, para. 4.

³⁹⁶ Human Rights Committee, general comment No. 23 on article 27, CCPR/C/Rev.1/Add.5, 1994, para. 6.1.

*of life as an enrichment of the State's cultural identity and to promote its preservation.*³⁹⁷

19. The presence of indigenous peoples is established by self-identification as the fundamental criterion for determining their existence.³⁹⁸ There is no requirement for States parties to officially recognize indigenous peoples in order for them to exercise their rights.
20. Based on its reviews of States parties reports, the Committee on the Rights of the Child has observed that in implementing their obligations under the Convention many States parties give insufficient attention to the rights of indigenous children and to promotion of their development. The Committee considers that special measures through legislation and policies for the protection of indigenous children should be undertaken in consultation with the communities concerned³⁹⁹ and with the participation of children in the consultation process, as provided for by article 12 of the Convention. The Committee considers that consultations should be actively carried out by authorities or other entities of States parties in a manner that is culturally appropriate, guarantees availability of information to all parties and ensures interactive communication and dialogue.
21. The Committee urges States parties to ensure that adequate attention is given to article 30 in the implementation of the Convention. States parties should provide detailed information in their periodic reports under the Convention on the special measures undertaken in order to guarantee that indigenous children can enjoy the rights provided in article 30.
22. The Committee underlines that cultural practices provided by article 30 of the Convention must be exercised in accordance with other provisions of the Convention and under no circumstances may be justified if deemed prejudicial to the child's dignity, health and development.⁴⁰⁰ Should harmful practices be present, inter alia early marriages and female genital mutilation, the State party should work together with indigenous communities to ensure their eradication. The Committee strongly urges States parties to develop and implement awareness-raising campaigns, education programmes and legislation aimed at changing attitudes and address gender roles and stereotypes that contribute to harmful practices.⁴⁰¹

**General principles
(arts. 2, 3, 6 and 12 of the Convention)**

³⁹⁷ Committee on the Elimination of Racial Discrimination, general recommendation No. 23 on Indigenous Peoples, 1997, contained in A/52/18, Annex V.

³⁹⁸ ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries No. 169, article 1 (2).

³⁹⁹ ILO Convention No. 169, articles 2, 6, 27.

⁴⁰⁰ UNICEF Innocenti Digest No. 11, Ensuring the Rights of Indigenous Children, 2004, p. 7.

⁴⁰¹ CRC, general comment No. 4 on Adolescent Health, 2003, para. 24.

Non-discrimination

23. Article 2 sets out the obligation of States parties to ensure the rights of each child within its jurisdiction without discrimination of any kind. Non-discrimination has been identified by the Committee as a general principle of fundamental importance for the implementation of all the rights enshrined in the Convention. Indigenous children have the inalienable right to be free from discrimination. In order to effectively protect children from discrimination, it is a State party obligation to ensure that the principle of non-discrimination is reflected in all domestic legislation and can be directly applied and appropriately monitored and enforced through judicial and administrative bodies. Effective remedies should be timely and accessible. The Committee highlights that the obligations of the State party extend not only to the public but also to the private sector.
24. As previously stated in the Committee's general comment No. 5 on general measures of implementation, the non-discrimination obligation requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures. For example, the Committee highlights, in particular, the need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified. Addressing discrimination may furthermore require changes in legislation, administration and resource allocation, as well as educational measures to change attitudes.⁴⁰²
25. The Committee, through its extensive review of State party reports, notes that indigenous children are among those children who require positive measures in order to eliminate conditions that cause discrimination and to ensure their enjoyment of the rights of the Convention on equal level with other children. In particular, States parties are urged to consider the application of special measures in order to ensure that indigenous children have access to culturally appropriate services in the areas of health, nutrition, education, recreation and sports, social services, housing, sanitation and juvenile justice.⁴⁰³
26. Among the positive measures required to be undertaken by States parties is disaggregated data collection and the development of indicators for the purposes of identifying existing and potential areas of discrimination of indigenous children. The identification of gaps and barriers to the enjoyment of the rights of indigenous children is essential in order to implement appropriate positive measures through legislation, resource allocation, policies and programmes.⁴⁰⁴

⁴⁰² CRC, general comment No. 5 on General Measures of Implementation, 2003, para. 12.

⁴⁰³ Recommendations of CRC Day of General Discussion on the Rights of Indigenous Children, 2003, para. 9.

⁴⁰⁴ *Ibid.*, para. 6.

27. States parties should ensure that public information and educational measures are taken to address the discrimination of indigenous children. The obligation under article 2 in conjunction with articles 17, 29.1 (d) and 30 of the Convention requires States to develop public campaigns, dissemination material and educational curricula, both in schools and for professionals, focused on the rights of indigenous children and the elimination of discriminatory attitudes and practices, including racism. Furthermore, States parties should provide meaningful opportunities for indigenous and non-indigenous children to understand and respect different cultures, religions, and languages.
28. In their periodic reports to the Committee, States parties should identify measures and programmes undertaken to address discrimination of indigenous children in relation to the Declaration and Programme of Action adopted at the 2001 World Conference against Racism, Discrimination, Xenophobia and Related Intolerance.⁴⁰⁵
29. In the design of special measures, States parties should consider the needs of indigenous children who may face multiple facets of discrimination and also take into account the different situation of indigenous children in rural and urban situations. Particular attention should be given to girls in order to ensure that they enjoy their rights on an equal basis as boys. States parties should furthermore ensure that special measures address the rights of indigenous children with disabilities.⁴⁰⁶

Best interests of the child

30. The application of the principle of the best interests of the child to indigenous children requires particular attention. The Committee notes that the best interests of the child is conceived both as a collective and individual right, and that the application of this right to indigenous children as a group requires consideration of how the right relates to collective cultural rights. Indigenous children have not always received the distinct consideration they deserve. In some cases, their particular situation has been obscured by other issues of broader concern to indigenous peoples, (including land rights and political representation).⁴⁰⁷ In the case of children, the best interests of the child cannot be neglected or violated in preference for the best interests of the group.
31. When State authorities including legislative bodies seek to assess the best interests of an indigenous child, they should consider the cultural rights of the indigenous child and his or her need to exercise such rights collectively with

⁴⁰⁵ Recommendations of CRC Day of General Discussion on the Rights of Indigenous Children, 2003, para. 12.

⁴⁰⁶ Convention on the Rights of Persons with Disabilities, preamble. United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295, articles 21, 22.

⁴⁰⁷ UNICEF Innocenti Digest No. 11, Ensuring the Rights of Indigenous Children, 2004, p. 1.

members of their group. As regards legislation, policies and programmes that affect indigenous children in general, the indigenous community should be consulted and given an opportunity to participate in the process on how the best interests of indigenous children in general can be decided in a culturally sensitive way. Such consultations should, to the extent possible, include meaningful participation of indigenous children.

32. The Committee considers there may be a distinction between the best interests of the individual child, and the best interests of children as a group. In decisions regarding one individual child, typically a court decision or an administrative decision, it is the best interests of the specific child that is the primary concern. However, considering the collective cultural rights of the child is part of determining the child's best interests.
33. The principle of the best interests of the child requires States to undertake active measures throughout their legislative, administrative and judicial systems that would systematically apply the principle by considering the implication of their decisions and actions on children's rights and interests.⁴⁰⁸ In order to effectively guarantee the rights of indigenous children such measures would include training and awareness-raising among relevant professional categories of the importance of considering collective cultural rights in conjunction with the determination of the best interests of the child.

The right to life, survival and development

34. The Committee notes with concern that disproportionately high numbers of indigenous children live in extreme poverty, a condition which has a negative impact on their survival and development. The Committee is furthermore concerned over the high infant and child mortality rates as well as malnutrition and diseases among indigenous children. Article 4 obliges States parties to address economic, social and cultural rights to the maximum extent of their available resources and where needed with international cooperation. Articles 6 and 27 provide the right of children to survival and development as well as an adequate standard of living. States should assist parents and others responsible for the indigenous child to implement this right by providing culturally appropriate material assistance and support programmes, particularly with regard to nutrition, clothing and housing. The Committee stresses the need for States parties to take special measures to ensure that indigenous children enjoy the right to an adequate standard of living and that these, together with progress indicators, be developed in partnership with indigenous peoples, including children.
35. The Committee reiterates its understanding of development of the child as set out in its general comment No. 5, as a "holistic concept embracing the child's

⁴⁰⁸ CRC, general comment No. 5 on General Measures of Implementation, 2003, para. 12.

physical, mental, spiritual, moral, psychological and social development”⁴⁰⁹. The Preamble of the Convention stresses the importance of the traditions and cultural values of each person, particularly with reference to the protection and harmonious development of the child. In the case of indigenous children whose communities retain a traditional lifestyle, the use of traditional land is of significant importance to their development and enjoyment of culture.⁴¹⁰ States parties should closely consider the cultural significance of traditional land and the quality of the natural environment while ensuring the children’s right to life, survival and development to the maximum extent possible.

36. The Committee reaffirms the importance of the Millennium Development Goals (MDGs) and calls on States to engage with indigenous peoples, including children, to ensure the full realization of the MDGs with respect to indigenous children.

Respect for the views of the child

37. The Committee considers that, in relation to article 12, there is a distinction between the right of the child as an individual to express his or her opinion and the right to be heard collectively, which allows children as a group to be involved in consultations on matters involving them.
38. With regard to the individual indigenous child, the State party has the obligation to respect the child’s right to express his or her view in all matters affecting him or her, directly or through a representative, and give due weight to this opinion in accordance with the age and maturity of the child. The obligation is to be respected in any judicial or administrative proceeding. Taking into account the obstacles which prevent indigenous children from exercising this right, the State party should provide an environment that encourages the free opinion of the child. The right to be heard includes the right to representation, culturally appropriate interpretation and also the right not to express one’s opinion.
39. When the right is applied to indigenous children as a group, the State party plays an important role in promoting their participation and should ensure that they are consulted on all matters affecting them. The State party should design special strategies to guarantee that their participation is effective. The State party should ensure that this right is applied in particular in the school environment, alternative care settings and in the community in general. The Committee recommends States parties to work closely with indigenous children and their communities to develop, implement and evaluate programmes, policies and strategies for implementation of the Convention.

⁴⁰⁹ Ibid.

⁴¹⁰ UNICEF Innocenti Digest No. 11, Ensuring the Rights of Indigenous Children, 2004, p. 8.

Civil rights and freedoms
(arts. 7, 8, 13-17 and 37 (a) of the Convention)

Access to information

40. The Committee underlines the importance that the media have particular regard for the linguistic needs of indigenous children, in accordance with articles 17 (d) and 30 of the Convention. The Committee encourages States parties to support indigenous children to have access to media in their own languages. The Committee underlines the right of indigenous children to access information, including in their own languages, in order for them to effectively exercise their right to be heard.

Birth registration, nationality and identity

41. States parties are obliged to ensure that all children are registered immediately after birth and that they acquire a nationality. Birth registration should be free and universally accessible. The Committee is concerned that indigenous children, to a greater extent than non-indigenous children, remain without birth registration and at a higher risk of being stateless.
42. Therefore, States parties should take special measures in order to ensure that indigenous children, including those living in remote areas, are duly registered. Such special measures, to be agreed following consultation with the communities concerned, may include mobile units, periodic birth registration campaigns or the designation of birth registration offices within indigenous communities to ensure accessibility.
43. States parties should ensure that indigenous communities are informed about the importance of birth registration and of the negative implications of its absence on the enjoyment of other rights for non-registered children. States parties should ensure that information to this effect is available to indigenous communities in their own languages and that public awareness campaigns are undertaken in consultation with the communities concerned.⁴¹¹
44. Furthermore, taking into account articles 8 and 30 of the Convention, States parties should ensure that indigenous children may receive indigenous names of their parents' choice in accordance with their cultural traditions and the right to preserve his or her identity. States parties should put in place national legislation that provides indigenous parents with the possibility of selecting the name of their preference for their children.
45. The Committee draws the attention of States to article 8 (2) of the Convention which affirms that a child who has been illegally deprived of some or all of the elements of his or her identity shall be provided with appropriate assistance and protection in order to re-establish speedily his or her identity. The Committee encourages States parties to bear in mind article 8 of the

⁴¹¹ UNICEF Innocenti Digest No. 11, Ensuring the Rights of Indigenous Children, 2004, p. 9.

United Nations Declaration on the Rights of Indigenous Peoples which sets out that effective mechanisms should be provided for prevention of, and redress for, any action which deprives indigenous peoples, including children, of their ethnic identities.

**Family environment and alternative care
(arts. 5, 18 (paras. 1-2), 9-11, 19-21, 25, 27 (para. 4) and 39 of the Convention)**

46. Article 5 of the Convention requires States parties to respect the rights, responsibilities and duties of parents or where applicable, the members of the extended family or community to provide, in a manner consistent with the evolving capacities of all children, appropriate direction and guidance in the exercise by the child of the rights recognized in the Convention. States parties should ensure effective measures are implemented to safeguard the integrity of indigenous families and communities by assisting them in their child-rearing responsibilities in accordance with articles 3, 5, 18, 25 and 27 (3) of the Convention.⁴¹²
47. States parties should, in cooperation with indigenous families and communities, collect data on the family situation of indigenous children, including children in foster care and adoption processes. Such information should be used to design policies relating to the family environment and alternative care of indigenous children in a culturally sensitive way. Maintaining the best interests of the child and the integrity of indigenous families and communities should be primary considerations in development, social services, health and education programmes affecting indigenous children.⁴¹³
48. Furthermore, States should always ensure that the principle of the best interests of the child is the paramount consideration in any alternative care placement of indigenous children and in accordance with article 20 (3) of the Convention pay due regard to the desirability of continuity in the child's upbringing and to the child's ethnic, religious, cultural and linguistic background. In States parties where indigenous children are overrepresented among children separated from their family environment, specially targeted policy measures should be developed in consultation with indigenous communities in order to reduce the number of indigenous children in alternative care and prevent the loss of their cultural identity. Specifically, if an indigenous child is placed in care outside their community, the State party should take special measures to ensure that the child can maintain his or her cultural identity.

⁴¹² Recommendations of CRC Day of General Discussion on the Rights of Indigenous Children, 2003, para. 17.

⁴¹³ Ibid.

Basic health and welfare
(arts. 6, 18 (para. 3), 23, 24, 26, 27 (paras. 1-3) of the Convention)

49. States parties shall ensure that all children enjoy the highest attainable standard of health and have access to health-care service. Indigenous children frequently suffer poorer health than non-indigenous children due to inter alia inferior or inaccessible health services. The Committee notes with concern, on the basis of its reviews of States parties' reports, that this applies both to developing and developed countries.
50. The Committee urges States parties to take special measures to ensure that indigenous children are not discriminated against enjoying the highest attainable standard of health. The Committee is concerned over the high rates of mortality among indigenous children and notes that States parties have a positive duty to ensure that indigenous children have equal access to health services and to combat malnutrition as well as infant, child and maternal mortality.
51. States parties should take the necessary steps to ensure ease of access to health-care services for indigenous children. Health services should to the extent possible be community based and planned and administered in cooperation with the peoples concerned.⁴¹⁴ Special consideration should be given to ensure that health-care services are culturally sensitive and that information about these is available in indigenous languages. Particular attention should be given to ensuring access to health care for indigenous peoples who reside in rural and remote areas or in areas of armed conflict or who are migrant workers, refugees or displaced. States parties should furthermore pay special attention to the needs of indigenous children with disabilities and ensure that relevant programmes and policies are culturally sensitive.⁴¹⁵
52. Health-care workers and medical staff from indigenous communities play an important role by serving as a bridge between traditional medicine and conventional medical services and preference should be given to employment of local indigenous community workers.⁴¹⁶ States parties should encourage the role of these workers by providing them with the necessary means and training in order to enable that conventional medicine be used by indigenous communities in a way that is mindful of their culture and traditions. In this context, the Committee recalls article 25 (2) of the ILO Convention No. 169 and articles 24 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples on the right of indigenous peoples to their traditional medicines.⁴¹⁷

⁴¹⁴ ILO Convention No. 169, article 25 (1, 2).

⁴¹⁵ CRC, general comment No. 9 on The Rights of Children with Disabilities, 2006.

⁴¹⁶ ILO Convention No. 169, article 25 (3).

⁴¹⁷ United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295, articles 24, 31.

53. States should take all reasonable measures to ensure that indigenous children, families and their communities receive information and education on issues relating to health and preventive care such as nutrition, breastfeeding, pre- and postnatal care, child and adolescent health, vaccinations, communicable diseases (in particular HIV/AIDS and tuberculosis), hygiene, environmental sanitation and the dangers of pesticides and herbicides.
54. Regarding adolescent health, States parties should consider specific strategies in order to provide indigenous adolescents with access to sexual and reproductive information and services, including on family planning and contraceptives, the dangers of early pregnancy, the prevention of HIV/AIDS and the prevention and treatment of sexually transmitted infections (STIs). The Committee recommends States parties to take into account its general comments No. 3 on HIV/AIDS and the rights of the child (2003) and No. 4 on adolescent health (2003) for this purpose.⁴¹⁸
55. In certain States parties suicide rates for indigenous children are significantly higher than for non-indigenous children. Under such circumstances, States parties should design and implement a policy for preventive measures and ensure that additional financial and human resources are allocated to mental health care for indigenous children in a culturally appropriate manner, following consultation with the affected community. In order to analyse and combat the root causes, the State party should establish and maintain a dialogue with the indigenous community.

Education
(arts. 28, 29 and 31 of the Convention)

56. Article 29 of the Convention sets out that the aims of education for all children should be directed to, among other objectives, the development of respect for the child's cultural identity, language and values and for civilizations different from his or her own. Further objectives include the preparation of the child for responsible life in a free society, in the spirit of understanding peace, tolerance, equality of sexes and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin. The aims of education apply to education for all children and States should ensure these are adequately reflected in the curricula, content of materials, teaching methods and policies. States are encouraged to refer to the Committee's general comment No. 1 on the aims of education for further guidance.⁴¹⁹
57. The education of indigenous children contributes both to their individual and community development as well as to their participation in the wider society.

⁴¹⁸ CRC, general comment No. 3 on HIV/AIDS and the Rights of the Child, 2003 and general comment No. 4 on Adolescent Health, 2003.

⁴¹⁹ CRC, general comment No. 1 on the Aims of Education, 2001.

Quality education enables indigenous children to exercise and enjoy economic, social and cultural rights for their personal benefit as well as for the benefit of their community. Furthermore, it strengthens children's ability to exercise their civil rights in order to influence political policy processes for improved protection of human rights. Thus, the implementation of the right to education of indigenous children is an essential means of achieving individual empowerment and self-determination of indigenous peoples.

58. In order to ensure that the aims of education are in line with the Convention, States parties are responsible for protecting children from all forms of discrimination as set out in article 2 of the Convention and for actively combating racism. This duty is particularly pertinent in relation to indigenous children. In order to effectively implement this obligation, States parties should ensure that the curricula, educational materials and history textbooks provide a fair, accurate and informative portrayal of the societies and cultures of indigenous peoples.⁴²⁰ Discriminatory practices, such as restrictions on the use of cultural and traditional dress, should be avoided in the school setting.
59. Article 28 of the Convention sets out that States parties shall ensure that primary education is compulsory and available to all children on the basis of equal opportunity. States parties are encouraged to make secondary and vocational education available and accessible to every child. However, in practice, indigenous children are less likely to be enrolled in school and continue to have higher drop out and illiteracy rates than non-indigenous children. Most indigenous children have reduced access to education due to a variety of factors including insufficient educational facilities and teachers, direct or indirect costs for education as well as a lack of culturally adjusted and bilingual curricula in accordance with article 30. Furthermore, indigenous children are frequently confronted with discrimination and racism in the school setting.
60. In order for indigenous children to enjoy their right to education on equal footing with non-indigenous children, States parties should ensure a range of special measures to this effect. States parties should allocate targeted financial, material and human resources in order to implement policies and programmes which specifically seek to improve the access to education for indigenous children. As established by article 27 of the ILO Convention No. 169, education programmes and services should be developed and implemented in cooperation with the peoples concerned to address their specific needs. Furthermore, governments should recognize the right of indigenous peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established

⁴²⁰ ILO Convention No. 169, article 31, United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295, article 15.

by the competent authority in consultation with these peoples.⁴²¹ States should undertake all reasonable efforts to ensure that indigenous communities are aware of the value and importance of education and of the significance of community support for school enrolment.

61. States parties should ensure that school facilities are easily accessible where indigenous children live. If required, States parties should support the use of media, such as radio broadcasts and long distance education programmes (internet-based) for educational purposes and establish mobile schools for indigenous peoples who practice nomadic traditions. The school cycle should take into account and seek to adjust to cultural practices as well as agricultural seasons and ceremonial periods. States parties should only establish boarding schools away from indigenous communities when necessary as this may be a disincentive for the enrolment of indigenous children, especially girls. Boarding schools should comply with culturally sensitive standards and be monitored on a regular basis. Attempts should also be made to ensure that indigenous children living outside their communities have access to education in a manner which respects their culture, languages and traditions.
62. Article 30 of the Convention establishes the right of the indigenous child to use his or her own language. In order to implement this right, education in the child's own language is essential. Article 28 of ILO Convention No. 169 affirms that indigenous children shall be taught to read and write in their own language besides being accorded the opportunity to attain fluency in the official languages of the country.⁴²² Bilingual and intercultural curricula are important criteria for the education of indigenous children. Teachers of indigenous children should to the extent possible be recruited from within indigenous communities and given adequate support and training.
63. With reference to article 31 of the Convention, the Committee notes the many positive benefits of participation in sports, traditional games, physical education, and recreational activities and calls on States parties to ensure that indigenous children enjoy the effective exercise of these rights.

**Special protection measures
(arts. 22, 30, 38, 39, 40, 37 (b)-(d), 32-36 of the Convention)**

Children in armed conflict and refugee children

64. Through its periodic reviews of States parties' reports, the Committee has concluded that indigenous children are particularly vulnerable in situations of armed conflict or in situations of internal unrest. Indigenous communities often reside in areas which are coveted for their natural resources or that,

⁴²¹ ILO Convention No. 169, article 27.

⁴²² ILO Convention No. 169, article 28.

because of remoteness, serve as a base for non-State armed groups. In other situations, indigenous communities reside in the vicinity of borders or frontiers which are disputed by States.⁴²³

65. Indigenous children in such circumstances have been, and continue to face risks of being, victims of attacks against their communities, resulting in death, rape and torture, displacement, enforced disappearances, the witnessing of atrocities and the separation from parents and community. Targeting of schools by armed forces and groups has denied indigenous children access to education. Furthermore, indigenous children have been recruited by armed forces and groups and forced to commit atrocities, sometimes even against their own communities.
66. Article 38 of the Convention obliges States parties to ensure respect for the rules of humanitarian law, to protect the civilian population and to take care of children who are affected by armed conflict. States parties should pay particular attention to the risks indigenous children face in hostilities and take maximum preventive measures in consultation with the communities concerned. Military activities on indigenous territories should be avoided to the extent possible, the Committee recalls article 30 of the United Nations Declaration on the Rights of Indigenous Peoples in this regard.⁴²⁴ States parties should not require military conscription of indigenous children under the age of 18 years. States parties are encouraged to ratify and implement the Optional Protocol on the Involvement of Children in Armed Conflict.
67. Indigenous children who have been victims of recruitment in armed conflict should be provided with the necessary support services for reintegration into their families and communities. Consistent with article 39 of the Convention, States parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment or armed conflicts. In the case of indigenous children, this should be done giving due consideration to the child's cultural and linguistic background.
68. Indigenous children who have been displaced or become refugees should be given special attention and humanitarian assistance in a culturally sensitive manner. Safe return and restitution of collective and individual property should be promoted.

Economic exploitation

69. Article 32 of the Convention provides that all children should be protected from economic exploitation and from performing any work that is likely to be

⁴²³ UNICEF Innocenti Digest No. 11, Ensuring the Rights of Indigenous Children, 2004, p. 13.

⁴²⁴ United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295, article 30.

hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. In addition, ILO Convention No. 138 (Minimum Age Convention) and Convention No. 182 (Worst Forms of Child Labour Convention) set parameters for distinguishing child labour that needs abolition, on the one hand, and acceptable work done by children, including such activities that allow indigenous children to acquire livelihood skills, identity and culture, on the other. Child labour is work that deprives children of their childhood, their potential and dignity and that is harmful to their physical and mental development.⁴²⁵

70. Provisions in the Convention on the Rights of the Child refer to the use of children in illicit production and trafficking of drugs (art. 33), sexual exploitation (art. 34), trafficking in children (art. 35), children in armed conflicts (art. 38). These provisions are closely related to the definition of the worst forms of child labour under ILO Convention No. 182. The Committee notes with grave concern that indigenous children are disproportionately affected by poverty and at particular risk of being used in child labour, especially its worst forms, such as slavery, bonded labour, child trafficking, including for domestic work, use in armed conflict, prostitution and hazardous work.
71. The prevention of exploitative child labour among indigenous children (as in the case of all other children) requires a rights-based approach to child labour and is closely linked to the promotion of education. For the effective elimination of exploitative child labour among indigenous communities, States parties must identify the existing barriers to education and the specific rights and needs of indigenous children with respect to school education and vocational training. This requires that special efforts be taken to maintain a dialogue with indigenous communities and parents regarding the importance and benefits of education. Measures to combat exploitative child labour furthermore require analysis of the structural root causes of child exploitation, data collection and the design and implementation of prevention programmes, with adequate allocation of financial and human resources by the State party, to be carried out in consultation with indigenous communities and children.

Sexual exploitation and trafficking

72. Articles 34 and 35 of the Convention with consideration to the provisions of article 20, call on States to ensure that children are protected against sexual exploitation and abuse as well as the abduction, sale or traffic of children for any purposes. The Committee is concerned that indigenous children whose communities are affected by poverty and urban migration are at a high risk of

⁴²⁵ ILO, Handbook on Combating Child Labour among Indigenous and Tribal Peoples, 2006, p. 9.

becoming victims of sexual exploitation and trafficking. Young girls, particularly those not registered at birth, are especially vulnerable. In order to improve the protection of all children, including indigenous, States parties are encouraged to ratify and implement the Optional Protocol on the sale of children, child prostitution and child pornography.

73. States should, in consultation with indigenous communities, including children, design preventive measures and allocate targeted financial and human resources for their implementation. States should base preventive measures on studies which include documentation of the patterns of violations and analysis of root causes.

Juvenile justice

74. Articles 37 and 40 of the Convention ensure the rights of children within, and in interaction with, State judicial systems. The Committee notes with concern that incarceration of indigenous children is often disproportionately high and in some instances may be attributed to systemic discrimination from within the justice system and/or society.⁴²⁶ To address these high rates of incarceration, the Committee draws the attention of States parties to article 40 (3) of the Convention requiring States to undertake measures to deal with children alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings, whenever appropriate. The Committee, in its general comment No. 10 on children's rights in juvenile justice (2007) and in its concluding observations, has consistently affirmed that the arrest, detention or imprisonment of a child may be used only as a measure of last resort.⁴²⁷
75. States parties are encouraged to take all appropriate measures to support indigenous peoples to design and implement traditional restorative justice systems as long as those programmes are in accordance with the rights set out in the Convention, notably with the best interests of the child.⁴²⁸ The Committee draws the attention of States parties to the United Nations Guidelines for the Prevention of Juvenile Delinquency, which encourage the development of community programmes for the prevention of juvenile delinquency.⁴²⁹ States parties should seek to support, in consultation with indigenous peoples, the development of community-based policies, programmes and services which consider the needs and culture of indigenous children, their families and communities. States should provide adequate

⁴²⁶ CRC, general comment No. 1 on Children's Rights in Juvenile Justice, 2007, para. 6.

⁴²⁷ Ibid. para. 23.

⁴²⁸ Recommendations of Day of General Discussion on the Rights of Indigenous Children, 2003, para. 13.

⁴²⁹ United Nations Guidelines for the Prevention of Juvenile Delinquency, "the Riyadh Guidelines", 1990.

resources to juvenile justice systems, including those developed and implemented by indigenous peoples.

76. States parties are reminded that pursuant to article 12 of the Convention, all children should have an opportunity to be heard in any judicial or criminal proceedings affecting them, either directly or through a representative. In the case of indigenous children, States parties should adopt measures to ensure that an interpreter is provided free of charge if required and that the child is guaranteed legal assistance, in a culturally sensitive manner.
77. Professionals involved in law enforcement and the judiciary should receive appropriate training on the content and meaning of the provisions of the Convention and its Optional Protocols, including the need to adopt special protection measures for indigenous children and other specific groups.⁴³⁰

States parties' obligations and monitoring of the implementation of the Convention

78. The Committee reminds States parties that ratification of the Convention on the Rights of the Child obliges States parties to take action to ensure the realization of all rights in the Convention for all children within their jurisdiction. The duty to respect and protect requires each State party to ensure that the exercise of the rights of indigenous children is fully protected against any acts of the State party by its legislative, judicial or administrative authorities or by any other entity or person within the State party.
79. Article 3 of the Convention requires States parties to ensure that in all actions concerning children, the best interests of the child shall be a primary consideration. Article 4 of the Convention requires States parties to undertake measures to implement the Convention to the maximum extent of their available resources. Article 42 sets out that States parties are further required to ensure that children and adults are provided information on the principles and provisions of the Convention.
80. In order to effectively implement the rights of the Convention for indigenous children, States parties need to adopt appropriate legislation in accordance with the Convention. Adequate resources should be allocated and special measures adopted in a range of areas in order to effectively ensure that indigenous children enjoy their rights on an equal level with non-indigenous children. Further efforts should be taken to collect and disaggregate data and develop indicators to evaluate the degree of implementation of the rights of indigenous children. In order to develop policy and programming efforts in a culturally sensitive manner, States parties should consult with indigenous communities and directly with indigenous children. Professionals working

⁴³⁰ CRC, general comment No. 1 on Children's Rights in Juvenile Justice, 2007, para. 97.

with indigenous children should be trained on how consideration should be given to cultural aspects of children's rights.

81. The Committee calls for States parties to, when applicable, better integrate information in their periodic reports to the Committee on the implementation of indigenous children's rights and on the adoption of special measures in this regard. Furthermore, the Committee requests States parties to strengthen efforts to translate and disseminate information about the Convention and its Optional Protocols and the reporting process among indigenous communities and children, in order for them to actively participate in the monitoring process. Furthermore, indigenous communities are encouraged to utilize the Convention as an opportunity to assess the implementation of the rights of their children.
82. Finally, the Committee urges States parties to adopt a rights-based approach to indigenous children based on the Convention and other relevant international standards, such as ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples. In order to guarantee effective monitoring of the implementation of the rights of indigenous children, States parties are urged to strengthen direct cooperation with indigenous communities and, if required, seek technical cooperation from international agencies, including United Nations entities. Empowerment of indigenous children and the effective exercise of their rights to culture, religion and language provide an essential foundation of a culturally diverse State in harmony and compliance with its human rights obligations.

APPENDIX C: UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

General Assembly

A/RES/61/295

Adopted on 13 September 2007

Sixty-first session

Agenda item 68

61/295: United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

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

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

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

107th plenary meeting

13 September 2007

Annex: United Nations Declaration on the Rights of Indigenous Peoples

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights² and the International Covenant on Civil and Political Rights,² as well as the Vienna Declaration and Programme of Action,³ affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

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

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and

indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

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

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

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

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

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

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

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights⁴ and international human rights law.

Article 2

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

Article 3

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

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

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

Article 8

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

Article 9

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

Article 10

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

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.
3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions.

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

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

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

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

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

Article 26

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

Article 27

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

Article 28

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

Article 29

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

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

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

and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

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

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

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

Article 34

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

Article 35

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

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.
3. Article 38 States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

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

Article 40

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

Article 41

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

Article 42

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

Article 43

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

Article 44

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

Article 45

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

Article 46

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

¹ See Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53), part one, chap. II, sect. A.

² See resolution 2200 A (XXI), annex.

³ A/CONF.157/24 (Part I), chap. III.

⁴ Resolution 217 A (III).