

# MĀORI SEEKING SELF-DETERMINATION OR TINO RANGATIRATANGA? A NOTE

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## I. Introduction

Dr Nin Tomas wrote a considered and substantial piece entitled “Indigenous Peoples and the Māori: The Right to Self-Determination in International Law - From Woe to Go” for the New Zealand Law Review published in 2008.<sup>2</sup> In her conclusion she notes two ways in which self-determination has been implemented by the state: first, by “greater tolerance and benevolence along a series of principled guidelines”,<sup>3</sup> and, second, as a “peoples-centred, enabling principle that allows Indigenous peoples to re-establish their social, economic and political institutions”.<sup>4</sup>

In 2010, New Zealand reversed its position and supported the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration).<sup>5</sup> With this in mind, this short piece revisits the notion of self-determination by examining the differing dynamics of concepts of external and internal self-determination before a short discussion on pluralism and the relationship between tino rangatiratanga and self-determination. In conclusion some thoughts are offered on a potential form of self-determination that could be consistent with the exercise of tino rangatiratanga.

## II. United Nations Declaration on the Rights of Indigenous Peoples

The Declaration is the only United Nations instrument dedicated to Indigenous peoples’ human rights and to addressing Indigenous-specific concerns. The Declaration does

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<sup>2</sup> Nin Tomas “Indigenous Peoples and the Māori: The Right to Self-Determination in International Law - From Woe to Go” (2008) NZ L Rev 639.

<sup>3</sup> At 681.

<sup>4</sup> At 681.

<sup>5</sup> United Nations Declaration on the Rights of Indigenous Peoples (2007) UN GAOR, 61st sess, GA Res 61/295, UN Doc A/RES/47/1. Australia, Canada and the United States have also changed their initial vote and signalled their support for the Declaration.

not create new rights. Despite the compromises made,<sup>6</sup> it is the only international instrument that views human rights through an Indigenous lens.<sup>7</sup>

The Declaration promotes measures to remedy the historical and systemic denial of Indigenous people's rights<sup>8</sup> and affirms rights derived from human rights principles such as equality and self-determination. These basic rights have been denied to Indigenous peoples and the Declaration recognises such rights and contextualises them in light of their particular characteristics and circumstances.<sup>9</sup> To this end, the Declaration seeks to restore equality with the relevant form of self-determination, for example, for Indigenous peoples who have been forcibly and violently alienated from their lands territories and resources, a form of self-determination that could attach could be an external form. Subsequently for those Indigenous peoples where the alienation is perceived as less violent or where assimilation has occurred, perhaps more of an internal form of self-determination could attach to restore equality.

### III. External Self-Determination

The Declaration couches the right of self-determination as a fundamental human right for Indigenous peoples. Article 3 of the Declaration states:

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

Brookfield acknowledges that a right of self-determination exists for Indigenous peoples. However, contrary to international law, he was less certain as to whether this right would extend to include a right of external self-determination for Indigenous

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<sup>6</sup> For example, the article providing for the right of self-determination was progressively watered down during the text negotiations and for some Indigenous peoples this compromise was too great. See Moana Jackson "The Face Behind the Law: the United Nations and the Rights of Indigenous Peoples" [2005] 9(2) Yearbook of NZ Jurisprudence 10. See also Kiri Toki "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 248 for discussion on the weakening provisions of military action in article 30(1) of the Declaration.

<sup>7</sup> S James Anaya *International Human Rights and Indigenous Peoples* (Aspen Publishers, New York, 2009) at 63.

<sup>8</sup> Anaya, above n 7.

<sup>9</sup> Anaya, above n 7.

peoples.<sup>10</sup> Some states considered that the Declaration would provide Indigenous peoples with a right to secede from the State, thereby impacting on their state sovereignty and political unity.<sup>11</sup> But according to Professor James Anaya:<sup>12</sup>

... for most peoples, especially in light of cross cultural diverse identities, full self-determination, in a real sense, does not justify a separate state and may even be impeded by a separate state. It is a rare case in the post-colonial world in which self-determination, understood from a human rights perspective, will require secession or the dismemberment of states.

Anaya views self-determination as a human right and when self-determination is denied, a breach occurs, requiring a remedy. This remedial form of self-determination is proportionate to the nature of the breach or violation.<sup>13</sup> Following this reasoning, external self-determination would only be invoked when the nature of the violation was so great that external self-determination is the only adequate remedy.

From Anaya's perspective, for Māori to claim external self-determination, the violations and actions, or inactions, by the Crown would need to be viewed as so harmful that external self-determination is a justified remedy. In view of the violations suffered by Māori, such as Tūhoe,<sup>14</sup> it is plausible that when applying this narrative external self-determination could be a potential remedy. It is acknowledged that Tūhoe have always sought an external form of self-determination.<sup>15</sup>

As it is uncertain when, and if, external self-determination would be achieved, alternatives such as self-government, internal self-determination or legal pluralism

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<sup>10</sup> FM (Jock) Brookfield *Waitangi & Indigenous Rights* (2ed ed, Auckland University Press, Auckland, 2006) at 77.

<sup>11</sup> Brookfield, above n 10.

<sup>12</sup> Anaya, above n 7, at 60.

<sup>13</sup> At 189.

<sup>14</sup> See Judith Binney *Encircled Lands: Te Urewera, 1820-1921* (Bridget Williams Books, Wellington, 2008) at 68. See also Waitangi Tribunal *Taranaki Kaupapa Tuatahi Report* (Wai 143, 1996) for the violations and alienations against the peoples of Taranaki.

<sup>15</sup> For example, the Urewera District Native Reserve Act 1896 that provided for the "ownership and local government of the native lands in the Te Urewera district" and allowed tino raNgātiratanga for the Tūhoe people. However, this was eventually to result in the opening up of traditional lands to settlers. See also Tūhoe Claims Settlement Act 2014; Te Urewera Act 2014, ss 17-18 (management of Te Urewera).

may be appropriate. Many Māori commentators, such as Andrea Tunks,<sup>16</sup> have argued that Māori do not seek external self-determination but rather tino rangatiratanga. According to Moana Jackson, tino rangatiratanga is more akin to sovereignty.<sup>17</sup> For instance, Māori follow their own tikanga within their own marae. Potentially this practice of tikanga could extend to determining their own form of justice, thereby exercising tino rangatiratanga.

#### **IV. Internal Self-determination**

The key distinction between internal and external self-determination is that internal self-determination operates within the existing state's legal framework.<sup>18</sup> It is viewed as the right for people to freely choose their own political and economic regime.<sup>19</sup> Internal self-determination is consistent with article 46 of the Declaration:

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.

And, also 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.

Thus, article 4 recognises the right of Indigenous peoples to realise their autonomy or self-government over their internal and local affairs. Read together with articles 5, 18 and 19, the Declaration provides for Indigenous peoples the right to participate fully, if they so choose, in the political, economic, social and cultural life of the State and to participate in all decisions affecting them or their rights.

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<sup>16</sup> Andrea Tunks "Pushing the Sovereign Boundaries in Aotearoa" (1999) 4(23) *Indigenous Law Bulletin* 15 at 69.

<sup>17</sup> Moana Jackson "Where Does Sovereignty Lie?" in Colin James (ed) *Building the Constitution* (Institute of Policy Studies, Wellington, 2000) at 196 – 197.

<sup>18</sup> Toki "What a Difference a DRIP Makes", above n 6, at 243–273.

<sup>19</sup> See Antonio Cassese *Self Determination of Peoples* (Cambridge University Press, Cambridge, 1995) at 101.

Historically models such as the Kingitanga, established as a response to land alienations and exclusion from Parliament, provide an example of internal self-determination. More recently the ‘tricameral model consisting of an Iwi/Hapū assembly (the rangatiratanga sphere), the Crown in Parliament (the kāwanatanga sphere) and a joint deliberative body (the relational sphere)’ proposed by the Independent Working Group on Constitutional Transformation also suggests such a governance structure.<sup>20</sup>

The thrust of self-determination is to enable Indigenous peoples to be in control of their destinies and to create their own political and legal organisations.<sup>21</sup> This does not necessarily amount to separate statehood, although that possibility remains.<sup>22</sup>

Erica Irene Daes argues that although article 3 provides grounds for an argument to achieve external self-determination, in some instances, Indigenous peoples have a mutual duty to share power with the existing state.<sup>23</sup> Further, Professor James Anaya argues, that although external self-determination often is not the objective of Indigenous peoples, it has, nevertheless, held a symbolic rhetoric as it embraces the ideology of Indigenous sovereignty.<sup>24</sup> It would thus appear that the Declaration provides for two types of self-determination.

## V. Aotearoa/New Zealand

Under New Zealand’s Constitution, it is assumed that Parliament is supreme and has full power to make law.<sup>25</sup> It is suggested that this assumption is subject to the effect of developing common law in New Zealand together with the recognition of custom law

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<sup>20</sup> *He Whakaaro Here Whakaumu Mo Aotearoa* - The Report of Matike Mai Aotearoa – the Independent Working Group on Constitutional Transformation (25 Jan 2016).

<sup>21</sup> See discussion by Iris Marion Young “Together in Difference: Transforming the Logic of Group Political Conflict” in Will Kymlicka *The Rights of Minority Cultures* (OUP, New York, 1995) at 155 – 175 where she notes that “what a bicultural society means... for Māori ... has not ended” highlighting the importance for Indigenous peoples to be in control of their destinies.

<sup>22</sup> See also discussion by James Tully “Indigenous Peoples and Freedom” in James Tully (ed) *Public Philosophy in a New Key* (Cambridge University Press, New York, 2008) at 285 – 287.

<sup>23</sup> Malgosia Fitzmaurice “The Question of Indigenous Peoples Rights: A Time for Reappraisal?” in Duncan French (ed) *Statehood and Self-Determination* (Cambridge University Press, Cambridge, 2013) at 350. See also Claire Charters and Rodolfo Stavenhagen (eds) *Making the Declaration Work The United Nations Declaration on the Right of Indigenous Peoples* (IWGIA, Copenhagen, 2009).

<sup>24</sup> Anaya, above n 7.

<sup>25</sup> Constitution Act 1986, s 15(1).

by the Courts,<sup>26</sup> potential equitable remedies for Māori and Treaty jurisprudence.<sup>27</sup>

The New Zealand government maintains the orthodox view that the Declaration is morally aspirational with no binding force but is affirmed so far as it was consistent with New Zealand's domestic law.<sup>28</sup> As an expression of aspiration, the New Zealand Government espoused that "it will have no impact on New Zealand law and no impact on the constitutional framework".<sup>29</sup>

The duties and obligations contained in the Treaty of Waitangi reflect the Crown's human rights responsibilities, such as recognition of "the unfettered chiefly powers [tino rangatiratanga] of the rangatira, the tribes and all the people of New Zealand over their lands, their dwelling-places and all of their valuables [taonga]".<sup>30</sup> It is suggested that in light of the continuing Treaty breaches by the Crown, the entrenchment of fundamental Indigenous rights, including that of self-determination, is required to step towards a form of equality for Māori. In the absence of entrenchment, it is foreseeable that applying the text of the Treaty consistently with the Declaration could provide an avenue for Māori to attain self-determination.<sup>31</sup>

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<sup>26</sup> See *Takamore v Clarke* [2012] NZSC 116 [2013] 2 NZLR 733 for a discussion and approach of the New Zealand Supreme Court on tikanga Māori.

<sup>27</sup> For example see *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 67 where the Court noted that the unique nature of the relationship between the Crown and Māori under the Treaty could result in the recognition of a *sui generis* fiduciary duty as appropriate. However, the court also noted that, given their recognition of parliamentary sovereignty, the courts should not develop the law in this area in a manner inconsistent with legislation, and should leave such development to Parliament. However, the outcome of the decision in the appeal of *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 is likely to clarify the uncertainty of whether or not the Crown owes fiduciary duties to Māori.

<sup>28</sup> Laura MacKay "The United Nations Declaration on the Rights of Indigenous Peoples; A Step Forward or Two Back?" [2013] (1) NZ Pub Int Law J at 177.

<sup>29</sup> McKay, above n 28.

<sup>30</sup> See Distinguished Professor Dame Anne Salmond's Brief of Evidence for the Waitangi Tribunal (Wai 1040, 17 April 2010) at 11 where she provides a translation of Article 2 of the Treaty.

<sup>31</sup> It is envisaged that this application would be initially confined to legal submissions asserting the right of Māori to self-determination. However, with the additional support of international instruments, such as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, which contain general human rights and considered in light of favourable general comments and creative legal interpretations of treaty monitoring-body decisions it is suggested that this application can advance indirectly Indigenous rights at the UN level and perhaps be persuasive for recognition of the right of self-determination for Māori. See also Waitangi Tribunal *Whaia te Mana Motuhake / In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) where the Tribunal provided an opinion on how the Declaration can inform Treaty principles such as Māori retaining their 'rangātiratanga' over their resources and taonga.

The internationally recognised right to self-determination is fundamental to recognising and realising the rights of Indigenous peoples including to culture and tikanga Māori. Achieving self-determination might allow Māori to freely choose and determine their own political and legal systems. The synergy with tino rangatiratanga provided for in the Treaty further supports this dialogue.

Professor James Anaya stated:<sup>32</sup>

I have observed several positive aspects of New Zealand's legal and policy landscape, as well as ongoing challenges, in relation to Māori issues. A unique feature of New Zealand is the Treaty of Waitangi of 1840, which is understood to be one of the country's founding instruments. The principles of the Treaty provide a foundation for Māori self-determination based on a real partnership between Māori and the New Zealand State, within a framework of respect for cross cultural understanding and the human rights of all citizens. I have learned of steps being taken within this framework, which can be described as constituting a good practice in the making, and I hope that concerted efforts will continue to be made in this regard.

If the right, for Māori, to self-determination was realised through a Treaty partnership, this could result in a pluralistic society where Māori might, for example, exercise their right of self-determination over their resources such as freshwater. The Crown, in a true partnership, might respect that right and enter into an agreement should the Crown seek access to the resource of freshwater. On a constitutional level this arrangement would broadly align with the bicameral model proposed by Matike Mai.<sup>33</sup> This model comprises of an Iwi/Hapū assembly and the Crown in Parliament with distinct rangatiratanga and kāwanatanga spheres.<sup>34</sup>

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<sup>32</sup> Statement of the United Nations Special Rapporteur on the situation of the human rights and fundamental freedoms of Indigenous peoples, Professor James Anaya, upon conclusion of his visit to New Zealand, 22 July 2010.

<sup>33</sup> The Report of Matike Mai Aotearoa, above n 20.

<sup>34</sup> Above n 20.

## VI. Pluralism

Anne Griffiths notes that,<sup>35</sup>

... legal pluralism has been invoked to uphold notions of authority and legitimacy, to favour or promote one set of legal claims over another ... .

Underscoring this comment are issues of who has the power to make law and who is to benefit. However, Sally Engle Merry describes legal pluralism as “a situation in which two or more legal systems coexist in the same social field”.<sup>36</sup>

With the use of case studies from Australia and Canada, Kristen Anker provides convincing comments on ways to make space for Indigenous legal traditions within a sovereign nation.<sup>37</sup> Anker states:<sup>38</sup>

... that an approach to law known as ‘legal pluralism’ provides a more apt language for treating ‘the justice question’ of the place of Indigenous law than orthodox legal theory because, in the way I conceive it, a legal pluralist recognition is an engagement about the nature of law and not about a formal relationship between two fixed entities.

Whilst this may be logically sound, on a practical note, within a legal system that fiercely adheres to the principle of Parliamentary sovereignty underpinned by legal positivism, entertaining the notion of legal pluralism in New Zealand to accommodate tikanga Māori appears unworkable.<sup>39</sup>

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<sup>35</sup> Anne Griffiths presentation to *Human Rights and Legal Pluralism in Theory and Practice Conference 5<sup>th</sup> to 6<sup>th</sup> December 2014*, Norwegian Centre for Human Rights (NCHR) in co-operation with the Rights, Individuals, Culture and Society Research Centre (RICS) at the Faculty of Law, University of Oslo. See also Anne Griffiths ‘Pursuing legal pluralism: the power of paradigms in a global world’ (2011) nr 4 *Journal of Legal Pluralism* 174.

<sup>36</sup> Sally Engle Merry “Legal Pluralism” (1988) 22 *Law and Society Rev* 869 at 870. See also Nicole Roughan “Conceptions of Custom International Law” (August 2007) *Social Science Research Network* <[www.ssrn.com](http://www.ssrn.com)> at 84 – 88.

<sup>37</sup> Kirsten Anker *Declarations of Interdependence A Legal Pluralist Approach to Indigenous Rights* (Ashgate Publishing, UK, 2014).

<sup>38</sup> Anker, above n 37.

<sup>39</sup> Also Nicole Roughan “The Association of State and Indigenous Law: A Case Study in ‘Legal Association’” (2009) 59 *UTLJ* 135 at 143.

As legal pluralism can ‘favour one system over the other’, under a pluralist legal order Māori could be required to accept a legal system that was responsible for land alienation and displacement of their customs. Although Sir Edward Taihakurei Durie contends that “the Treaty of Waitangi is not just a Bill of Rights for Māori but also for Pākehā too”,<sup>40</sup> and to this end if the Treaty of Waitangi was entrenched constitutionally it could realise legal pluralism within New Zealand society,<sup>41</sup> Moana Jackson is skeptical of any benefits in legal pluralism for Māori and depicts such orders as “inherently assimilative and racist”.<sup>42</sup> Moana Jackson further contends that under “a guise of sensitivity and good faith the colonial certainty of overt dismissal of [tikanga Māori] has been replaced by a new-age legalism”.<sup>43</sup> Further Jackson has stated that:<sup>44</sup>

The redefinition and incorporation of basic Māori legal and philosophical concepts into the law is part of the continuing story of colonization. Its implementation by government, its acceptance by judicial institutions, and its presentation as an enlightened recognition of Māori rights are merely further blows in that dreadful attack to which colonization subjects the Indigenous soul.

## VII. Tino Rangatiratanga and Self-Determination

According to Article 2 of the Treaty (Māori text), Māori retain their “tino rangatiratanga” (chieftainship). In contrast, the English version only guarantees to Māori possession over their lands and estates.

Tino rangatiratanga and self-determination are both rights that have not yet been incorporated by the state into domestic legislation. To this end, both are aspirational rights representing ideals as opposed to codified national standards. Both “advocate

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<sup>40</sup> New Zealand 1990 Commission The Treaty of Waitangi: The Symbol of our life together as a Nation, Wellington: NZ 1990 Commission, 1989 14. See also Turia: Immigration Bill – First Reading Friday, 17 August 2007, 11:08 am Speech: The Māori Party <scoop.co.nz>.

<sup>41</sup> Rodolfo Stavenhagen “Mission to New Zealand” E/CN.4/2006/78/Add.3 (13 March 2006) para 85.

<sup>42</sup> Moana Jackson “Changing Realities: Unchanging Truths” (1994) 10 Aust J of L and Soc 115 at 116.

<sup>43</sup> Jackson “Changing Realities: Unchanging Truths”, above n 42.

<sup>44</sup> Moana Jackson “Justice and Political Power: Reasserting Māori Legal Processes” in Kayleen M. Hazlehurst (ed) *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand* (Avebury, Aldershot, 1995) at 254.

for legal pluralism, thereby enabling iwi to practice internal self-government and manage their own affairs”.<sup>45</sup> However, they also differ.

Whilst there is much written on the right of self-determination and application to both Indigenous and non-Indigenous peoples, the application of tino rangatiratanga is limited to Māori with comparatively less written. As a Māori term, it is suggested that tino rangatiratanga provides a stronger claim for Māori.

Previously, the Waitangi Tribunal acknowledged that sovereignty was acquired subject to tino rangatiratanga.<sup>46</sup> However, more recently the Tribunal found that Māori who signed the Treaty did not in fact cede sovereignty to the Crown.<sup>47</sup> This implies that tino rangatiratanga exists independently of state sovereignty. In contrast, the right of self-determination derives from, and exists under, sovereignty as an international law norm.<sup>48</sup> Furthermore, self-determination has clear boundaries; it can either prevail or fall when in conflict with other human rights, for example if the right to religion conflicts with a right of self-determination then the right of self-determination may fail. Tino rangatiratanga is not subject to these restrictions and exists independently to international law norms as such it is uncertain whether such boundaries exist.<sup>49</sup>

Finally, tino rangatiratanga expresses the unique Māori concept of rangatiratanga that relates to concepts such as leadership and governance. Self-determination, however, is a creation of a Western paradigm.<sup>50</sup>

While self-determination seeks to realize similar goals, it is philosophically distinct from tino rangatiratanga primarily because tino rangatiratanga is a right that is viewed in context or part of the Māori world whereas the right of self-determination is a right on its own.

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<sup>45</sup> Toki “What a Difference a DRIP Makes” above n 6 at 256. See also the Waitangi Tribunal that has defined tino rangatiratanga as “self-determination”. See Waitangi Tribunal *Taranaki Kaupapa Tuatahi Report* (Wai 143, 1996) at 307.

<sup>46</sup> See the Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1987).

<sup>47</sup> See also Waitangi Tribunal *Te Paparahi o te Raki* (Wai 1040, November 2014).

<sup>48</sup> Toki “What a Difference a DRIP Makes” above n 6.

<sup>49</sup> The Waitangi Tribunal sees the Crown’s right to govern may only override tino rangatiratanga as a last resort. Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999) 330. The Tribunal saw the “national interest in conservation [was] not a reason for negating Māori rights of property”.

<sup>50</sup> Toki, “What a Difference a DRIP Makes”, above n 6.

Nonetheless, the right of self-determination will support and complement Māori claims to tino rangatiratanga.<sup>51</sup> Mason Durie regards Treaty settlements as the perfect union between tino rangatiratanga and self-determination.<sup>52</sup> Although often criticized by Māori as not providing a satisfactory form of tino rangatiratanga they provide for tino rangatiratanga in the sense that they recognise the mana of the Māori people and often provide an economic basis for development.

This analysis indicates that tino rangatiratanga is the stronger right for Māori when compared to self-determination. An internal form of self-determination does not encourage radical change to the nature of existing Indigenous Māori rights. Rather, it supports and complements tino rangatiratanga.

### **VIII. Conclusion**

Despite the international jurisprudence and constitutional examples articulating the recognition of Indigenous rights, including that of self-determination, how this right can be manifested, for Māori, is still unclear.

What is clear, however, is Māori seek a form a self-determination that affords them respect as Treaty partner and an ability to realize their social, cultural and political systems; the exercise of tino rangatiratanga. If this is not achieved, and Māori seek recognition through force, then by referring to “the idealism that gave birth to self-determination as a means to prevent war”<sup>53</sup> Dr Tomas noted:<sup>54</sup>

the ultimate irony from which unity of thought can be achieved is, therefore, that the peoples of Aotearoa New Zealand and the state must work diligently together to avoid this ever happening.

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<sup>51</sup> See Wai 2417, above n 30, at 70 where the claimants noted that “the Declaration complements and reinforces the principles of the Treaty” Note also the finding that the Māori Community Development Act 1962 provides self-government for Māori and reflects the Crown’s recognition that Māori raNgātiratanga must be protected.

<sup>52</sup> Mason Durie *Te Mana Te Kawanatanga* (Oxford University Press, Auckland, 1998). See also Wai 2417, above n 30.

<sup>53</sup> Tomas, above n 2, at 683.

<sup>54</sup> Tomas, above n 2, at 683.