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# The Problems and Promise of International Rights in the Challenge to Māori Imprisonment

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### Abstract

This article draws upon extensive primary research involving substantive documentary analysis of United Nations (UN) reports and New Zealand (NZ) debates over the last 20 years, and interviews with senior Māori professionals, to consider the role of international human rights standards and processes in the challenge to Māori imprisonment. It shows that over-representation is carefully managed by the NZ state in four ways: (i) a perpetual representation of Māori as *the* offenders; (ii) the selective endorsement of rights, such that discriminatory criminal justice operations are normalised; (iii) a pervasive human rights ritualism within UN reporting processes; and (iv) the legitimisation of imprisonment and inequalities through the international rights system. Notwithstanding these problems, Māori remain alive to the potential of challenging imprisonment through engagement with international rights frameworks. They indicate the need for a tripartite approach of reforms, decolonising acts and abolitionist strategies in doing so.

### Keywords

Māori imprisonment; rights; United Nations; state management; ritualism.

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## Introduction

The disproportionate punishment and imprisonment of Māori, the indigenous people of New Zealand (NZ), is a longstanding feature of the NZ criminal justice system. Over-representation has remained in place over the last four decades and is chronic at every stage. It has entrenched numerous personal, societal and intergenerational problems. Despite these realities, NZ authorities have managed concerns of over-representation in ways that sustain Māori imprisonment. This is most apparent in the way the NZ state engages with United Nations (UN) human rights bodies in relation to indigenous rights, discrimination and incarceration.

This article shows that the state management of Māori over-representation is carefully undertaken. It identifies four key problems. First, Māori are perpetually identified as *the* offenders and prisoners in official discourse, and neo-colonial state institutions are reticent to pursue alternative conversations or research. Second, the selective endorsement of rights means that there is no political commitment to give life to rights standards that might shift discriminatory criminal justice operations. Third is how a pervasive human rights ritualism is operationalised within UN reporting processes, with the state relying on bureaucratic scripts to advance government priorities, avoid sanction and minimise UN concerns at home. And, fourth, the dominance of a UN framework that affirms state authority and does little to unsettle the tenets of incarceration or structural inequalities. Taken together, international human rights processes are managed in ways that reassert state legitimacy and ‘the prison’. This performative environment is one in which Māori imprisonment is normalised, even with years of international and national criticism. Despite these fundamental problems, rights thinking and practice remain a significant means to reassert Māori power and destabilise over-representation. However, multiple approaches—of ongoing reforms, decolonising transformations and abolitionist strategies—are required. These actions demand considerable energy, creativity and solidarity, but they also need Māori and others to flexibly work above, with, alongside and beyond the state.

## Some context of Māori imprisonment

The contemporary policing and punishment of Māori reflects entrenched colonial practices that have perpetuated exclusion and disadvantage. Following the signing of the Treaty of Waitangi (the Treaty),<sup>1</sup> Māori quickly became a minority in their own land.<sup>2</sup> In securing the settler state, the Crown transferred the majority of Māori land into *Pākehā* (non-Māori) hands and established a government where voting rights were solely afforded to adult male landowners. This resulted in major conflicts. Increasing numbers of British forces used direct violence and incarceration to contain indigenous resistance. Māori who fought settlers were captured and held, often indefinitely and without trial (Belich 1986; Binney 1995). In 1863, the colonial government established the *Suppression of Rebellion Act*, a law that criminalised revolts and suspended rights to a fair trial before prison. From the 1870s to the 1900s, this and related laws were applied to Māori resisters who challenged land confiscations, but also to those who contested other oppressive new laws that contributed to Māori dispossession in material, economic, political, social and cultural terms (Bull 2004; Webb 2017). Within this context, prisons operated to quell resistance among Māori, but also to affirm state control.

Under these conditions, *Pākehā* defined Māori as ‘Other’, an uncivilized, ‘warrior race’ who required deepening state punishments and discipline (Jackson 2017). These colonising representations gained long-term traction. When Māori began to move to urban areas for work, particularly during the 1950s and 1960s, they encountered widespread racist practices within social, educational, welfare, health, policing and justice institutions. For example, denigrating ideologies about appropriate, ‘civilised’ life facilitated the mass removal of Māori children from their *whānau* (family, including wider family) into state care. The subsequent systemic criminalisation and extensive state abuse has deeply harmed generations of Māori and embedded the practice of continually targeting and processing of Māori through the welfare and criminal justice systems (Stanley 2016).

Today, young and adult Māori are more likely than all other NZ populations to be apprehended by police, committed to remand, held in youth justice residences, imprisoned and re-imprisoned. NZ's prison population recently reached its highest recorded level, surpassing 10,800 people (from a general NZ population of around 4.8 million in 2018). While accounting for just over 15 per cent of the total population, Māori represent over half of prisoners generally, and more than 60 per cent of those in female prisons (Department of Corrections 2017). The Māori imprisonment rate stands at 655 prisoners per 100,000 population compared with an overall NZ rate of around 220 per 100,000 population (Salvation Army 2017),<sup>3</sup> and almost three-quarters of those admitted to youth justice residences are Māori (Ministry of Social Development 2017).

Given the reliance on imprisonment, Māori are also more likely to experience the full range of prison conditions and treatments that violate human rights. National monitoring bodies have recorded significant dangers in NZ prisons, including assaults, deaths in custody, the inhuman and degrading use of restraints, systemic long lock downs and solitary confinement (NZ Ombudsman 2017; Office of the Inspectorate 2018; Shalev 2017). In turn, UN human rights workers have sought to question and destabilise Māori over-representation in prisons. In 2006, UN Special Rapporteur Rodolfo Stavenhagen (2006: [57]) noted that this disproportionate imprisonment 'arguably represents the underlying institutional and structural discrimination that Māori have long suffered'. Five years later, another Special Rapporteur, James Anaya (2011: [62]), lamented that there had been 'little change' in these prison rates. A further five years on, the UN Human Rights Committee (UNHRC) reconfirmed 'the disproportionately high rates of incarceration and overrepresentation of Māori and Pasifika, particularly women and young people, at all levels of the criminal justice process' (2016: [25]). UN agencies have regularly recommended that NZ 'enhance its efforts to address this problem ... as a matter of high priority' (UNCERD 2007: [454]).

## Method

United Nations' instruments, committees and reporting processes provide significant data for criminologists (see Barbaret 2014; Weber et al. 2014). This system of international human rights offers a distinct opportunity to understand punishment practices, and subsequently act on diminished rights standards within criminal justice systems. State reports to the UN illustrate how official agencies view particular social and carceral problems, while engagements with UN bodies can advance human rights-conscious shifts within criminal justice practices. International rights standards also affirm the rights of indigenous participation, autonomy and self-determination. If developed and implemented, they would produce profound changes in imprisonment use, conditions and treatments, especially for indigenous peoples.

With these factors in mind, the authors pursued a research project to consider the ways the NZ state has engaged with UN bodies in relation to the specific issue of Māori imprisonment. We have been led by questions such as: how, if at all, is this mass incarceration represented in human rights terms; how do UN bodies and the NZ state act upon this knowledge of imprisonment; and what might be the possibilities of using the UN human rights system to propel Māori decarceration? To this end, we engaged in primary and secondary research. First, we conducted a documentary analysis of reports, submissions and other process papers written by UN committees, and related documentation from the NZ Government and civil society organisations. This analysis covers 211 reports, written between 2000 and 2015. Second, an analysis of political commentary from Hansard and media reports relating to UN human rights activity between 1997 and 2017 was undertaken.<sup>4</sup> Third, interviews were conducted between February and April 2017 with 12 senior Māori professionals (lawyers, academics, researchers and civil servants) who have engaged with the UN over many years and/or have deep knowledge of Māori imprisonment. To ensure confidentiality, interviewees are solely identified by the *te reo Māori* (Māori language) term *Kaikōrero*, or 'speaker'.

### **The state management of Māori imprisonment**

The seemingly intractable social problem of Māori mass incarceration is well-established within human rights circles, but it is carefully state-managed. Any opportunities to reduce Māori incarceration have been diminished within national and international circles by: (i) official discourses that represent Māori as *the* criminals; (ii) state discourses that selectively endorse human rights; (iii) state ritualism towards UN reporting processes; and (iv) the legitimisation of incarceration through the UN rights system. Together, these discursive and administrative approaches work to normalise Māori disadvantage, marginalisation and imprisonment, while reaffirming state power.

### *The discursive management of Māori crime and incarceration*

Colonisation has always depended on a construction of ignorance about the cultures, languages, beliefs or beings of the Other, and the situation in NZ is no different. The impact of a colonial history involving violence, suppression and incarceration of Māori by Pākehā remains largely ignored within social and political realms. The ‘success’ of colonial power is that the over-representation of Māori as prisoners is now normalised.

It is tempting to think that this situation has evolved naturally; however, as inferred above, it has developed through silencing and distortions that reiterate colonial imperatives. As discussed elsewhere (Stanley and Mihaere 2018), penal capture is underpinned by systemic ignorance-making at a national level. For example, political commentators have continually constructed Māori offending as the result of Māori pathology or deficit. Over many years, government agencies have actively ignored multiple issues—of colonisation, institutional discrimination, bias, land dispossession, state violence or abuse, and structural disadvantages, as well as the assertion of Western law over *tikanga* (ethical behaviour)—when considering who is propelled into NZ prisons and why (McIntosh and Workman 2017). Instead, the emphasis has been on Māori as ‘urban misfit[s] ... cultural maladept[s] ... educational retard[s]’ (Jackson 1988: 26). In parliament, senior politicians have recently asserted that crime has become ‘a way of life’ for Māori, something developed ‘from the time that an offender is born or probably even before the offender is born’ (Collins 2010: 12731). Political rhetoric is replayed across media, with Māori commonly depicted as ‘gang members’, ‘child abusers’ or ‘warriors’, and as having ‘violent cultures’, ‘cultures of dependency’, or ‘risk factors’ for crime as a result (Leaman 2013; Marks 2011; Newman 2004; Newstalk ZB 2016; Sachdeva and Kerr 2016).

The disproportionate use of imprisonment is, therefore, discursively led by notions that any crimes or subsequent punishments are the inevitable result of pathological or socio-cultural deficits among Māori. There is limited examination of the systemic human rights violations inflicted against Māori over multiple generations, the discriminatory attitudes of criminal justice officers, or other structural and institutional concerns. Kaikōrero continually identified the reluctance of Pākehā to acknowledge NZ’s colonial history or its legacies as a significant barrier to changing imprisonment practices. They see most Pākehā as ‘shackled to their ignorance of the past’ (Kaikōrero 8), and actively avoiding examination of previous state violence and discrimination, and its impact on ‘the collective and intergenerational transfer’ of Māori into prisons (Kaikōrero 4). Individualising blame-led narratives have, instead, produced Māori as Others less deserving of rights and more deserving of punishment. In terms of imprisonment, Kaikōrero reflected upon the correctional reticence to engage with human rights obligations in departmental reports or policy documents. They determined that this reflected a refusal to engage with the humanity of those they manage and punish:

If Corrections was serious ... they would acknowledge the human rights conventions in all their policies. And they don’t because that would be an institutional acknowledgement that although these people have done wrong ...

that does not remove their humanity and therefore does not remove their human rights. (Kaikōrero 3)

Such official disregard for rights or for Māori was identified within multiple practices. Kaikōrero noted it was 'impossible now' to do any independent research in prisons,<sup>5</sup> a situation that has stymied critical examination of Māori imprisonment (Kaikōrero 2). They discussed how the Department of Corrections controlled research projects and blocked requests for information in ways that were 'hardly conducive to human rights' (Kaikōrero 6). At the same time, the state has regularly ignored the issue of Māori incarceration. For example, from 2008 to early 2017, no Department of Corrections briefings 'made any mention of Māori or the need to reduce overrepresentation in prison' (Workman, cited in McLachlan 2017). Similarly, our search of Hansard transcripts for this study demonstrated that there was not one substantive parliamentary debate on over-representation between 1997 and 2017. Māori incarceration, and the treatment of Māori in prisons (including their significant violation), has often been silenced and normalised at national levels.

### *The selective endorsement of rights*

This silencing and control of knowledge is carefully managed. Liberal democratic states do not readily engage in the widespread literal denial of rights; rather, as Cohen (2001) made clear, they prefer to neutralise or reconfigure rights discourses through other means. Having some engagement with human rights is useful for state legitimacy, and many states subsequently grapple with a 'selective endorsement' of rights (Lightfoot 2012).

The management of rights is exemplified in NZ's initial refusal to sign the UN Declaration on the Rights of Indigenous Peoples (UN Declaration) in 2007. This Declaration offers opportunities to advance rights, but also states indigenous peoples' entitlements to 'their inherent sovereign status' (Eruei 2017: 25; UN General Assembly 2007). With principles of self-determination and decolonisation, the UN Declaration has significant potential to challenge the structural, institutional and socio-cultural conditions that lead to incarceration. Following an international campaign of criticism and shaming, the NZ Government agreed to sign, yet official commitments were deeply limited. The signing of the UN Declaration was barely reported:

It was really under wraps. Like, this is an incredibly significant event for Māori and for indigenous people ... But ... there was very little media coverage and very little promotion from our government ... [it's] a kind of symbolic indication of ... our challenges. (Kaikōrero 10)

In political debates, the government focused on the 'aspirational' nature of the UN Declaration, noting that it required no change to existing domestic laws or treaty provisions (Lightfoot 2012; Toki 2011). Kaikōrero were attuned to this disregard:

[We] are witnessing this tick-boxing formulaic commitment to ideas and norms but with the kind of complete lack of true commitment to the substance of those norms. So ... [our] state might ... make this grand public statement, you know that 'We've signed up to this ... these are the standards la la la', but it would make no commitment to actually give life to the standards that are in that instrument. (Kaikōrero 5)

Such responses allow NZ to internationally market a commitment to indigenous rights while taking no substantive actions to change realities for Māori (Lightfoot 2012; Toki 2011). In turn, UN Declaration rights have not yet impacted on criminal justice operations (Cunneen and Tauri 2016).

State agencies also engaged activities that consolidated Pākehā state power under the guise of Māori engagement. For example, most Kaikōrero reflected on how Māori had been incorporated into the correctional workforce yet remained ‘invisible in terms of senior management’, and had little input ‘into policy or strategy at the managerial level’ (Kaikōrero 12). They also bemoaned the ‘misuse’ of Māori cultural identity in correctional programmes, determining that it provided a cover for the Department of Corrections to engage Māori prisoners into psychotherapeutic programs built on Western norms:

The Māori focus units<sup>6</sup> ... are white Eurocentric ... [They involve] taking the core psycho criminogenic concepts ... and Māori-fying them ... I mean that is an attempt at window dressing, adding a bit of Māori on ... That’s not respectful of the Māori voice or experience or anything like that. (Kaikōrero 2)

The units brought some positives for prisoners—such as allowing engagement with te reo and learning more about tikanga—but these individualised responses, decontextualised from the impacts and legacies of colonisation, failed to prioritise the basic principles of Māori culture (for further discussion, see McIntosh and Workman 2017; Mihaere 2015). Yet, as Kaikōrero also identified, the NZ Government represents these initiatives as promoting indigenous rights.

### *Human rights ritualism within UN reporting*

There are also significant limitations with attempts to secure rights for Māori through UN reporting processes, especially as the state uses international human rights engagements as an opportunity to promote NZ as a rights-conscious country. Officials paint ‘a picture of wonderfulness and great human rights with Māori’ (Kaikōrero 9) that is at distinct odds with the realities on the ground:

Very rarely will you see New Zealand actually front up and admit that it has done this or that to indigenous peoples, in the international sphere. It’s all peas and gravy and unicorns and rainbows, like ‘Come, smiley people, they let us speak our language!’ They roll that out but then ... they tend to ... fudge actually what’s happening ... to indigenous peoples’ rights. (Kaikōrero 8)

This approach reflects a pervasive human rights ritualism (Adcock 2012; Charlesworth and Larking 2015: 10). While NZ goes through the motions of reporting to the UN and receiving reports, it also goes to some lengths to ‘deflect real human rights scrutiny and to avoid accountability’ for the lack of human rights protections towards Māori (Charlesworth 2010: 11). Three official practices reflected ritualism in this area.

First, ritualism is apparent in how the NZ state removes Māori from UN processes. Under the UN Declaration, Māori have the right to self-determination, which includes the ‘right to autonomy or self-government’ and to ‘freely pursue their economic, social and cultural development’ (UN General Assembly 2007: [4, 3]). Further, as Treaty partners, Māori should occupy a partnership role, alongside the state, within international human rights reporting processes. In practice, however, Māori tend to be either sidelined completely or strategically chosen for ‘consultation’ purposes.

For example, Kaikōrero discussed how, in relation to treaty body reporting, government ministries frequently focused consultation towards Māori who either directly worked for them or were funded by them to provide services. This is deeply problematic on ethical terms, but also with regards to the state’s obligations. As Kaikōrero 2 reflected on NZ’s approach to reporting to one UN treaty body:

It was clear that ... they had ... engaged with their own Māori ... the Police had a Māori Advisory Committee ... Corrections similarly had a sort of in-house Māori Advisory Committee ... And we pointed out, you're only talking to those Māori that you pay, who work for you ... it is unethical for you to narrow the voice down and the experience down to those who work for you or are reliant on state money. That was the first problem. The second problem ... [is] it's a violation of the Treaty relationship between the state and Māori, that they have an obligation to actually engage widely with Māori on issues that pertain to them directly and to consult as widely as possible.

Given that civil society groups receive limited financial assistance or support to participate in UN activities, there is an inevitable dominance of the state's perspective in human rights reporting. In short, NZ ensured ritualism over Māori imprisonment concerns by removing the ability of Māori to 'have a say' about human rights protections.

Second, ritualism is invoked through a UN reporting system that relies on 'highly orchestrated' processes that follow repetitive scripts from one year or treaty body to the next (Cowan 2015: 51-52). States can hide behind mechanical reports and, while they may 'agree to the language and techniques of regulation', they also rely on the inability of regulators to monitor or follow up plans and policies (Charlesworth and Larking 2015: 11). Examining NZ Government interactions with the UN demonstrates a symbiotic performance operating over multiple reporting cycles. In the first stage, the UN records concerns. In the second, the state acknowledges that Māori over-representation in prisons is 'a significant challenge' (United Nations Committee on the Elimination of Racial Discrimination (UNCERD) 2012: [98]). Third, the state promises to act: it has 'set ambitious targets' and is 'committed to addressing disparities' (UNCERD 2013: [9]).<sup>7</sup> Fourth, it heralds progress: the government is proud that 'Significant progress has been made to improve the responsiveness of the criminal justice system to Māori and Pacific peoples' (UNCERD 2016: [145]). Finally, the UN committees take an encouraging tone, noting the 'commendable efforts' being made, but also return to being 'concerned at the ... information that Maori remain overrepresented as offenders ... and as victims' (UNCERD 2017: [24]). Despite some effort by UN committees to query over-representation, racial discrimination or bias within the NZ criminal justice system, bureaucratised monitoring offers limitless scope for states to focus on policies and strategies rather than outcomes. As one Kaikōrero concluded:

It's a way of managing human rights without actually advancing them, the reports bring small changes over time but we don't push forward on the big issues ... our rights are ... constantly contested. (Kaikōrero 6)

Thus, NZ's engagement with human rights language and processes brings reputational benefits and sustains state legitimacy (Charlesworth and Larking 2015) while deflecting concerns about Māori incarceration.

The third ritualism of UN reporting is also evident in how officials minimise UN concerns. NZ politicians rarely allow UN activities to gain traction within public debates. The NZ Parliament has no duty to discuss UN reports, and any mention of international concerns (like Māori over-representation) tends to emerge within other political debates. Further, when this commentary does occur, it often demonstrates a deep political antipathy to the UN system. A common refrain from NZ politicians is that the UN should just leave NZ alone. For example, in a reading for the legislation that allowed NZ to implement the Optional Protocol to the Torture Convention, one politician argued: 'We do not need to hold ourselves ultimately accountable to some little tinpot committee inside the United Nations ... The point is that we are not the problem' (Mark 2006: 2177). Similarly, in a discussion to implement the UN Declaration on the Rights of Indigenous People, another asserted: 'We need no lessons whatever' on 'how to treat indigenous peoples' (Anderson 2010: 10277). A further approach from NZ politicians is to diminish the UN's

capabilities, condemning critical reports as 'unbalanced' (Cullen, cited by Sharples 2006: 2495) or 'meddlesome' (Peters cited by Flavell 2007: 11357). In short, NZ politicians regularly undermine international human rights engagements and obligations.

### *Affirming state power through the UN rights system*

The state management of rights has done little to destabilise the long-term over-representation of Māori within NZ prisons. Most responsibility for this must be directed towards the NZ Government; however, a crucial limitation also rests with the international rights system. As noted above, UN reporting mechanisms are deeply technocratic, so much so that violating states can effectively market themselves as being progressive. However, even when UN bodies establish significant concerns, there is relatively little they can do to compel change, as they have 'no teeth':

It's the follow-up that's lacking, and the accountability that's lacking ... I think the reporting process is really good but it's the impact of the reporting, and the recommendations and the actions that happen afterwards. (Kaikōrero 11)

States like NZ have 'a tendency to ignore the recommendations ... ignore the reports' and they rarely operationalise change 'in a meaningful way' (Kaikōrero 6). They are also 'hard to embarrass' (Kaikōrero 2) and are able to withstand significant levels of shame.

Yet, beyond these concerns, international human rights processes also re-legitimised the state authority to consolidate incarceration. Part of the problem here is that the UN human rights framework largely accepts the use of incarceration:

I think some of the human rights stuff, particularly as it pertains to incarceration, never questions the right to incarcerate, it might talk about criteria that you would need to incarcerate but largely takes incarceration as a given ... they take incarceration as a norm. (Kaikōrero 4)

While some UN instruments indicate clear support for the reduced use of imprisonment,<sup>8</sup> the UN does not systematically advance decarceration practices or contest the state's power to punish. Further, the UN system does not 'offer a vehicle to critique the particular structures' (Kaikōrero 4) through which Māori are disadvantaged. Historically, international human rights frameworks have marginalised indigenous populations and their values (Mikaere 2007). Western values are 'the norm', with allowances being made for indigenous cultures; therefore, promoted human rights tend to reflect neoliberal values, including individualism. These forms do not work for indigenous peoples and they do not 'provide Māori with the protection and the support and advocacy that they should be getting' (Kaikōrero 11). Kaikōrero continually reflected these issues:

[Young people in prisons] come from communities that are burdened by very significant constraints around a whole lot of different freedoms ... when they were in the outside world they were hardly in freedom. (Kaikōrero 4)

[We are] pouring an extra billion dollars into prisons, and you and I know that the communities that are going to get targeted and imprisoned are ... communities like yours and mine which are sometimes trapped in the cycle of poverty ... Prisons, they're chucking us in there. (Kaikōrero 8)

UN bodies have certainly questioned over-representation over the last two decades, but ever increasing numbers of Māori have endured imprisonment. In this respect, the UN has had little impact in shifting the neo-colonial and neoliberal systems that pervade criminal justice practices.

Ultimately, the UN rights system has contributed to a deepening legitimisation of Māori incarceration.

### **Resisting Māori imprisonment**

The above discussions illustrate real doubts about the ability of international human rights instruments or bodies to challenge significant criminal justice problems. Māori imprisonment is normalised and re-performed through state–UN engagements. The ritualism of reporting processes operates to reassert state legitimacy, such that NZ continues to hold a strong human rights reputation despite the systemic inequalities, discrimination and incarceration experienced by Māori.

In the face of such knowledge, it is tempting to dismiss UN engagements as having limited value in progressing decarceration. However, Kaikōrero outlined three rights-based strategies to diminish incarceration: first, increased targeting of the UN to advance pragmatic legal and policy reforms ‘from above’; second, engagements with state agencies in ways that assert decolonisation through the use of international rights and the Treaty; and, third, the prioritisation of indigenous actions beyond the state to advance prison abolition. Taken together, these interlinked actions demonstrate an opportunity to move beyond rights ritualism.

### *Using the international human rights system to advance pragmatic reforms*

All Kaikōrero saw value in using the ‘powerful tools’ (Kaikōrero 7) of international human rights laws, norms, bodies and advocacy to secure progressive outcomes for Māori. They recognised the importance of placing violations against Māori on international record:

I was there [at the UN] ... one of the UN panel members asked the question: ‘How is it that New Zealand has this wonderful human rights record yet your country has one of the highest statistics for youth suicide?’ ... So, my response was pretty much that ... it speaks to the truth of what’s happening here. Our children aren’t properly cared for, our health system is a mess, our education system is a mess, our social barometer is really speaking to the injustices here which have come from ... the time of colonisation. And it’s not an exaggeration, it’s a fact. (Kaikōrero 9)

[I]t started to dawn on members of other states that actually things were not quite as rosy ... and that perception issue is something that [senior civil servants] do take very seriously. Any kind of potential damage to the image of New Zealand Incorporated! (Kaikōrero 1)

The involvement of Māori in UN processes is crucial to contest the myths of state achievements. While Māori understand that this might not instantly ‘change the government’s mind’, building an international record ‘will at some stage come back to bite them’ (Kaikōrero 3). These pronouncements create opportunities for continued domestic pressures too:

It also provides the moral leverage to be able to say ‘Here’s all these stacks of reports that have come back from the UN to you, New Zealand government, and you haven’t done anything, that’s appalling’ ...it is another avenue to try and change things. (Kaikōrero 1)

Further, UN engagements allow campaigners the opportunity to ‘hear positive stories of change’ and have conversations with other indigenous activists from around the world (Kaikōrero 5). These collaborations can diminish the sense of isolation, providing emotional and political nourishment for those who are often ‘working in hard spaces’ (Kaikōrero 5).

Given these opportunities, it makes sense for Māori to increasingly participate with the UN human rights system (that is, to work above the state) to challenge and reform imprisonment.<sup>9</sup> In doing so, Kaikōrero noted that Māori must build sustainable networks that enable the sharing of knowledge about UN norms and processes, while continuing to ‘demand proper policy ... and work ... and funding ... around’ all human rights instruments (Kaikōrero 9). Some identified that Māori had to engage more fully in reporting how the state fails in its obligations to protect Māori from violations, especially within the criminal justice sector:

We should kind of do our own report, you know, every five or ten years, on the state of Māori–government relations, in relation to the social and criminal justice setting ... to me, that’s pretty much the only way that we’re going to ensure that the range of Māori perspectives and experiences are recorded. (Kaikōrero 2)

Such increased engagement may offer a clear route to demand and achieve reforms around the policing, sentencing and incarceration of indigenous people. However, these initiatives require careful strategy, especially to ensure Māori are not incorporated into state-focused agendas. These efforts also require sustainable resources, from national and international bodies, so Māori can operate as peers within UN processes (Fraser 2005).

### *Engaging the Treaty and indigenous rights as decolonising tools*

Kaikōrero are well aware that any useful rights change would sustain decolonisation at structural, institutional and socio-cultural levels. Foremost among these is the knowledge that rights cannot be attained for Māori without full partnership with the Crown, as established under the Treaty of Waitangi. Kaikōrero 10 remarked:

I think it’s about looking at this word partnership and actually interrogating what that means. And, it not being just Māori can provide advice or we will consult with Māori, but actually who’s making the decisions at the end of the day. And, are Māori just writing a paper and Pākehā having a look at it and making the decision, or is that decision being made by Māori and Pākehā?

Several interviewees imagined that criminal justice responses would irrevocably change if the Crown pursued full partnership with Māori:

Imagine bringing the mātauranga Māori [Māori knowledge] perspective to policy, embedding that across government. You know there’s too many examples of policy being developed from the outsider perspective ... If we had the Treaty at the centre of it, and it was enacted the way it should be enacted in terms of true partnership ... then you will start to see real change. (Kaikōrero 11)

Such actions would challenge the very basis of working with or alongside the state. One advance would be the development of kaupapa Māori principles—thinking, acting or making decisions from a Māori worldview— to create different approaches to resolving the conflicts that make up the ‘crime’ problem:

Under our tikanga model, there would be different ways to resolve any imbalance created [from harms] ... that are different from how a state based system would address it. Under a tikanga system, your whānau or hapū [sub-tribe] or iwi [tribe] would rectify the balance. (Kaikōrero 1)

Kaikōrero envisaged increased possibilities to invoke Māori tikanga alongside Crown law and international law, so they ‘effectively function alongside each other’ (Kaikōrero 1).<sup>10</sup> The further development of tikanga would enable those making decisions about ‘crime’ to engage

*whanaungatanga* (relationship, kinship) so they remain attentive to community but also to ‘the land and sea and mountains and all those things’ (Kaikōrero 8).

Finally, Kaikōrero emphasise the self-determination principles built into the indigenous rights framework:

Whatever it may be, any aspect of criminal justice, then it starts with that idea of self-determination in the [UN] Declaration for me. And it’s been hard fought and ... it’s there enshrined in an international human rights instrument. That’s as good as it gets ... If you’re looking at fundamental reform (and that’s ... always been missing in Aotearoa [traditional Māori term for what is now named New Zealand]), we have ... political authority and autonomy over ... issues like criminal justice. (Kaikōrero 7)

Under the UN Declaration, Māori have the right to self-determination. Applied to concerns of mass imprisonment, *iwi* should have *tinu rangitiratanga* (Māori sovereignty) and ‘autonomy to address child welfare, adoption, incarceration, reoffending’, or other issues (Kaikōrero 7). To put it plainly, if Corrections (or any other justice agency) is truly interested in transformational change for Māori, they must give up power and enable decolonising rights to flourish.

### ***Building different worlds to advance abolitionism***

Debates on sovereignty inevitably concern the role of human rights in reinforcing the power of, and creating dependency on, the state. In contrast, indigenous rights are more useful in challenging violations that are structurally, institutionally and socio-culturally embedded:

One of the concerns of human rights is that it is a language that creates a kind of dependency on states ... [but] the Declaration on the Rights of Indigenous Peoples gives voice to collective understandings for rights. (Kaikōrero 5)

Kaikōrero note that Māori have to be attentive to *mahi* (work), which does not mimic the state and does not give further legitimacy to state violations. To that end, they regularly outlined the requirement to challenge the fundamental standing of the prison in NZ society.<sup>11</sup> This would take significant legal, policy and socio-cultural change:

Decarceration is really a complete cultural shift. Such is our reliance on [the prison], conceptually and actually ... that we can’t imagine a world without prison ... What would you need to have to not imagine a prison as a central institutional society? What would it mean at the education level? What would it mean in terms of the stories we tell our children? (Kaikōrero 4)

In turn, community action should be controlled by Māori and be totally independent from state actions. This necessitates ‘mobilising the people on the ground’ (Kaikōrero 11) but also requires a reconfiguration for Māori to operate beyond or outside the state:

The activities and the initiatives I see that make me most excited are the ones where Māori and communities are instituting things without expending all of that energy from knocking on the Crown’s door, where they just get up and do stuff. (Kaikōrero 5)

Where the real change and where the real hope is fostered is actually at the very local level. And without trying to take away from the importance of the [UN] Declaration, I actually think that Māori rights and indigenous rights ... don’t need the Crown to say ‘here you go, we’ll give you these rights’ ... I think we have far

more agency than that ... the best place then to get them is from ourselves in what we're doing. (Kaikōrero 10)

All of this reflects a strong impetus for Māori to advance abolitionist thinking and establish autonomous practices that give life to decarceration. At the same time, Kaikōrero are attentive to the long-term difficulties in breaking rights ritualism. Māori have, as detailed above, endured long-term intergenerational trauma and violations that affect every whānau, hapū and iwi. Māori imprisonment is stratified through society and some Māori are propelled into prisons as a result of their involvement with the state, such as through the state care system (Stanley 2016). For many, 'survival is pretty much a daily activity' (Kaikōrero 4). Under these conditions, putting the onus onto Māori communities to have the energies, ideas and resources to derail carceral disproportionality is unfair. Māori require allies within and beyond NZ.

## Conclusion

The disproportionate imprisonment of Māori is maintained through state management at national and international levels. Incarceration has been normalised within political, media and institutional discourse as part of colonial and neo-colonial processes. This has been bolstered through long-held ideological constructions that Māori are deficient or pathologically prone to crime. Such colonising discourses are maintained through institutional structures that shut down opportunities for independent critical work, and are upheld through political systems in which Māori imprisonment has been frequently silenced as a problem. These practices have ensured the position of Māori as *the* prisoners has frequently gone unchallenged.

In the human rights-conscious setting of NZ, it might be expected that rights instruments, frameworks and reporting processes offer an opportunity to challenge the over-representation of Māori in prisons. However, in practice, the NZ state has selectively endorsed rights in ways that neutralise indigenous rights and assert Pākehā norms and values across criminal justice settings. Further, the government has engaged in pervasive human rights ritualism within UN reporting mechanisms—prioritising state views, relying on orchestrated bureaucratic scripts, and diminishing UN bodies and UN criticisms—in ways that shut down opportunities to think through or act upon the high levels of Māori incarceration. These rights-degrading responses have been undertaken in an international rights environment that intrinsically reaffirms state authority and the use of imprisonment, and provides limited critique of the structures or conditions that facilitate mass imprisonment in the first place. In short, the human rights framework—while ostensibly about providing protections from state-led violations—reiterates state legitimacy and normalises inequalities within a neo-colonial setting.

Notwithstanding these structural and bureaucratic problems, Māori remain alive to the potential of challenging Māori imprisonment with a deepening, critical engagement above the state, through UN rights processes. International actions still offer multiple reformist benefits, by widely recording violations, shaming states, facilitating networks between indigenous activists and propelling domestic activism. Continuing to assert indigenous rights standards alongside national Treaty obligations could further create spaces in which practices of participation and self-determination are demanded. Rights instruments can be used by New Zealanders to insist that the state fulfils their decolonising obligations; they can open up progressive space to work with or alongside official agencies. Yet, as this research makes clear, a reliance on the institutional framework of rights can only go so far in working towards decarceral or abolitionist ends. Ultimately, this requires strategies to deal with crimes and harms in ways that work beyond the state, and move beyond the prison.

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- <sup>1</sup> From 6 February 1840, following the arrival of Captain William Hobson (a representative of the British monarch Queen Victoria), Māori signed a document known as the Treaty of Waitangi ('the Treaty'). With differing versions between English and *te reo Māori* documents, the Treaty was and remains contentious. In the English version, Māori cede sovereignty and were guaranteed the full exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties. In the Māori version, Māori cede *Kawanatanga* (governance) and were guaranteed *Tino Rangatiratanga* (sovereignty) *o ratou wenua o ratou kaima me o ratou taonga katoa* (over lands, settlements, and all other treasures).
  - <sup>2</sup> The 1840 population of 100,000 Māori and 2,000 (largely British) *Pākehā* settlers quickly changed, with Māori becoming a 16 to one minority by 1900 (Belich 1986; Poole 1991). The combination of war and death from disease saw Māori numbers drop from an estimated 100,000-200,000 at Cook's arrival in 1769, to about 40,000 at the start of the twentieth century (Walker 1990).
  - <sup>3</sup> The general NZ rate is around 220 per 100,000 population. This, in itself, is high compared to other liberal democracies, such as Australia (162), England and Wales (145), Scotland (138), or Canada (114) (International Centre for Prison Studies 2017).
  - <sup>4</sup> We thank Sally Day for her research assistance.
  - <sup>5</sup> While it is possible to undertake research in prisons, fully independent research is impossible. To gain access, external researchers need to gain consent from the Department of Corrections. Researchers are more likely to gain access if their project fits with the Department's own research priorities. The Department will often seek modifications to projects that are accepted. Further, as part of the research contract, the Department may request changes to, or even veto aspects of, research findings before publication. The Department has ultimate control over what research is undertaken, and how it is reported.
  - <sup>6</sup> Māori Focus Units are 60 bed prison units designed on Māori principles.
  - <sup>7</sup> Further positive initiatives will often be claimed by the government as their own, in a way that overlooked Māori activism and their actions. As Kaikōrero 5 noted, the government 'will point to things ... that people have fought tooth and nail for, to get up for a start. And then the Crown will claim them as something that they have been nurturing ... or give the impression that it's been something that's come from them'. These activities diminished trust between Māori and government.
  - <sup>8</sup> For example, the 1990 UN Standard Minimum Rules for Non-custodial Measures (Tokyo Rules) established that states should develop measures to reduce imprisonment in ways that move 'towards depenalization and decriminalization' (UN General Assembly, 1990a: [2.7]). Further, in the 1990 UN Rules for the Protection of Juveniles Deprived of the Liberty (Havana Rules), it is identified that incarceration should be 'limited to exceptional cases' (UN General Assembly 1990b: Rule 2).
  - <sup>9</sup> In April 2018, 10 Māori members of the Aotearoa Youth Leadership Institute presented to the UN Permanent Forum on Indigenous Issues in New York. They focused on a government proposal to build a 'mega prison' on confiscated Māori land in Waikato. Illustrating the lack of access to the UN, the group had to raise over \$60,000 to fund their travel to the UN in New York. See <https://www.maoritelevision.com/news/national/waikato-mega-prison-proposal-face-united-nations-indigenous-forum>. Their interventions were widely reported in NZ. In June 2018, the government abandoned the 'mega prison', but confirmed the build of a smaller prison.
  - <sup>10</sup> In recent years, there has been a step to develop culturally appropriate responses to young Māori offenders through Rangatahi Courts. While not separate from the mainstream youth justice system, these marae-based courts (that is, courts based in Māori meeting houses) do include a focus on broader community responsibilities of care (see Quince 2017 for discussion on their success and critiques).
  - <sup>11</sup> Māori thinkers have been at the forefront of arguments on decarceration and on building different responses to 'crime'. For example, see McIntosh (2017) and Jackson (2017).

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