

Indigenous Peoples: Issues in International and Australian Law

International Law Association
(Australian Branch)

Martin Place Papers No. 6

*Papers presented at a series of three seminars held between
2002 and 2004 in association with the
Human Rights and Equal Opportunity Commission*



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Human Rights and Equal
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The International Law Association (ILA) was founded in Brussels in 1873. Its objectives include the study, elucidation and advancement of international law, public and private, the study of comparative law, the making of proposals for the solution of conflicts of law and for the unification of law, and the furthering of international understanding and goodwill. The ILA has consultative status, as an international non-governmental organisation, with a number of the United Nations specialised agencies. An Australian Branch of the ILA was formed in 1959. The Branch is active in organising conferences, seminars and workshops on a wide range of international law topics.

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Foreword

I am pleased to be able to introduce these papers on an enduringly important topic for all Australians.

It is also pleasing that this publication marks the continuation of the Martin Place Papers series after a pause of several years. The series was the brainchild of the late Professor David Johnson, then Challis Professor of International Law, University of Sydney. It serves to preserve occasional papers on a variety of topics, presented at meetings sponsored by the Australian Branch of the International Law Association, which might otherwise not be published, at least not in the form in which they were presented.

Mr Greg Marks is to be congratulated on collecting and editing the papers that follow. He was also responsible for instigating the seminars at which they were presented. His leadership in matters concerning indigenous rights in national and international law has been appropriately recognised in his election, at the Biennial Conference of the International Law Association, held in Toronto, Canada, in June 2006 to the position of Rapporteur of the Committee on the Rights of Indigenous Peoples.

Ivan Shearer

President, Australian Branch,
International Law Association

14 August 2006

Preface

The accommodation of rights and interests between the Indigenous inhabitants of Australia, the Aboriginal and Torres Strait Islander peoples, and the descendants of the European and other settlers, remains a priority concern for the Australian legal and political system.

The rights of Indigenous peoples have been recognised in international law and practice. Since international law has significant force in the Australian legal framework, it is clear that international norms, particularly those concerning human rights, are highly relevant to the legal and political situation of Australia's Indigenous peoples. Since World War II Indigenous peoples around the world have increasingly turned to international forums for clarification, confirmation and development of their rights. This reflects in part the long standing refusal of Indigenous peoples to completely surrender their autonomy to the nation states in which they find themselves. It also reflects frustration on the part of Indigenous peoples at the intransigence of nation states in recognising on-going Indigenous autonomy in respect their lands and territories, resources, and law and custom.

Given the interrelation of domestic and international considerations in respect of Indigenous peoples, the Australian Branch of the International Law Association (ILA) has established an Indigenous Rights Committee. This Committee collaborated with the Human Rights and Equal Opportunity Commission (HREOC) to convene a series of three seminars on topics concerning the international law implications of Indigenous issues. The seminars covered the proposal for a treaty with Indigenous Australians, the role and recognition of customary Indigenous law, and the question of sovereignty. The support of the Human Rights and Equal Opportunity Commission in co-sponsoring the seminars is greatly appreciated

The papers presented at these seminars are brought together in this edition of the Martin Place Papers, an occasional series published by the ILA (Australian Branch). The papers are presented largely as delivered, rather than as formal academic articles. It is hoped that this approach will retain the directness and vitality of the presentations. It does mean, however, that the articles are not necessarily fully referenced nor consistent in citation systems.

The seminars, and the production of this Martin Place Paper, would not have been possible without the initiative and support of Margaret Brewster, President Emeritus of the Australian Branch of the ILA. Margaret saw the importance of bringing Indigenous rights within the focus of the ILA and has worked hard to achieve this. The current President, Professor Ivan Shearer, has fully supported this development, as well as presenting a paper at the first of the seminars.

Greg Marks

Convenor
Indigenous Rights Committee

A National Treaty with Indigenous Australians – the International Law Perspective

The first seminar was held on 10 September 2002. It was chaired by Professor Larissa Berehdnt. Papers were presented by the then Aboriginal and Torres Strait Islander Social Justice Commissioner of the Human Rights and Equal Opportunity Commission (HREOC), Dr William Jonas AM, and Professor Ivan Shearer, AM, RFD, then Challis Professor of International Law, University of Sydney.

Papers presented at the seminar:

Native Title and the Treaty Dialogue

Dr William Jonas

I would like to acknowledge the Eora people: the traditional owners and custodians of the land where we meet today.¹

It is very fitting that we discuss native title in the context of a treaty just one month after a very significant native title decision, the *Miriuwung Gajerrong* decision², has been handed down by the High Court. 406 pages of honed legal reasoning cut through almost the entire history of non-Indigenous land law in Western Australia to decide the final shape that native title would take for the *Miriuwung Gajerrong* people.

It took about a week for people interested in this decision to properly formulate their views on its significance and for comments and opinions to filter through the media. One view that intrigued me came, not so much from the inner circle of people working in the area, but rather from the letters of ordinary but concerned citizens. Many simply asked ‘What happened to Mabo?’

People weren’t asking this question from a legal perspective. They weren’t asking; ‘How and to what effect did the native title legislation prevail

over the common law principles established in the Mabo decision?’ What they were asking was ‘What happened to the spirit of Mabo? What happened to the promise that Mabo held out for a new relationship between Indigenous and non-Indigenous people.’ And even though these people did not necessarily understand the legal reasoning of the *Miriuwung Gajerrong* decision, they understood, perhaps intuitively, that Mabo’s promise had been broken, and that native title had not delivered a new relationship. It is perhaps fitting then that we recall, in the context of a treaty dialogue, why the *Mabo* decision³ came to represent the promise of a new relationship between Indigenous and non-Indigenous people in much the same way that a treaty does.

Firstly, Mabo overturned *terra nullius*. It branded it a fiction and a racially discriminatory one at that. This then created space within the common law for the recognition of native title. But it created this space in a particular place; a place also significant to treaty-making. It created it at the foundation of our nation and the political relationship that this foundation was based on; that between Indigenous and non-Indigenous people.

In *Mabo* the High Court rejected *terra nullius* as a basis for the foundation of this nation on three grounds;

¹ Editors note: the terms ‘Eora’ and ‘Gadigal’ are both used in these papers to refer to the Aboriginal people of Sydney. Eora refers to the people of the wider Sydney area. Of those people, the Gadigal inhabited the area from South Head through the present Eastern suburbs to Sydney Cove and ending at Darling Harbour (see State Library of New South Wales, *Eora – Mapping Aboriginal Sydney 1770 – 1850*, 2006 pp 1-5).

² *The State of Western Australia v Ben Ward and Ors*; [2002] HCA 28, 8 August 2002.

³ *Mabo v Queensland, (No 2)* (1992) 175 CLR 1.

- ♦ *Terra nullius* no longer accorded with 'present knowledge and appreciation of the facts'⁴ with regard to Aboriginal society. The proposition that Aboriginal people were 'without laws, without sovereign and primitive in their social organisation'⁵ could not be sustained in the light of present knowledge about the complex and elaborate system by which Indigenous society was governed at the time of colonisation.
- ♦ *Terra nullius* no longer accorded with the values of contemporary society. In particular *terra nullius* is a discriminatory denigration of Indigenous society which was considered 'so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society.'⁶ The notion of equality relied on by the Court to reject *terra nullius* was one that recognised and gave equal respect to the distinctive characteristics of Indigenous society.
- ♦ *Terra nullius* is out of step with modern international law, particularly in relation to the human rights of equality and self-determination. In this regard the Court was influenced by the decision of the International Court of Justice in its *Advisory Opinion of Western Sahara* (1975) ICJR that rejected *terra nullius* as the basis for Spanish sovereignty in Western Sahara.

The rejection of *terra nullius* was a rejection of the assertion that Indigenous people were not socially or politically constituted. The promise of native title was that *terra nullius* would be replaced, not by another value judgment by non-Indigenous society about Indigenous society, but rather by a recognition of and protection for the system of laws and customs that give Indigenous people their status as a sovereign people. Justice Brennan's judgment suggests as much:

Native title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be

ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty...It is a problem that did not arise in the case of a settled colony so long as the fictions were maintained that customary rights could not be reconciled 'with the institutions or the legal ideas of civilized society' that there was no law before the arrival of the British colonists in a settled colony and that there was no sovereign law-maker in the territory of a settled colony before sovereignty was acquired by the Crown.⁷

Mabo also recognised that this distinct identity, and the system of laws on which it was based, was not frozen in time but could evolve, changing in response to circumstances yet nevertheless retaining its characteristic as a distinct social and political system.

When people today ask 'What happened to Mabo?' they are asking what happened to these monumental shifts in thinking that sought, in much the same way a treaty seeks, a new foundation for this nation in an equitable relationship between Indigenous and non-Indigenous people. What most people don't realise is that the failure of the law of native title to achieve this transformation originates in the Mabo decision itself and the concept of sovereignty constructed by it. The *Miriwung Gajerrong* decision is but a logical consequence of these beginnings. It is also a response to the *Native Title Act 1993 (Cth)* (NTA) which reinforces the common law position.

There is a troubling disjuncture in the reasoning of the High Court in the Mabo decision. On the one hand *terra nullius* was overturned because it failed to recognise the social and political constitution of Indigenous people. Yet the recognition of native title was premised on the supreme power of the state to the exclusion of any other sovereign people. Confirming the principle in the *Seas and Submerged Land Case* that the 'acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the Courts of that state'⁸ Justice Brennan in Mabo identified the extent of the court's power as merely 'determining the consequences of an acquisition [of sovereignty] under municipal law'.

⁴ *Ibid* p38.

⁵ *ibid*, p36.

⁶ *In re Southern Rhodesia* (60) (1919) AC 211, pp233-234, per Lord Sumner, quoted in *Mabo decision*, p39.

⁷ *Mabo decision*, op cit, p58

⁸ *New South Wales v Commonwealth* (Seas and Submerged Lands Case) (1975) 135 CLR p338

The assertion in *Mabo* of supreme and exclusive sovereign power residing in the State has determined the development of native title in two significant ways. First, the characteristics of Indigenous **sovereignty**, the political, social and economic systems that unite and distinguish Indigenous people as a people, have been erased from native title. Second, and as a consequence, the state's power to extinguish native title is supreme.

First, the failure of the common law to recognise Indigenous people as a people, with sovereign rights:

The failure to conceive of native title in terms of sovereign rights recognised at international law was postulated in *Mabo* as a result of an inherent limitation of the common law itself. As Brennan said:

There is a distinction between the Crown's title to a colony and the Crown's ownership of land in the colony...The acquisition of territory is chiefly the province of international law; the acquisition of property is chiefly the province of the common law.⁹

By being consigned to the common law, Indigenous people's relationship with the land is constructed as a domestic property right, rather than as political, cultural or sovereign rights. Special Rapporteur and now chair of the United Nations Working Group on Indigenous Populations, Miguel Alfonso Martinez, in his *Study on treaties, agreements and other constructive arrangements between States and Indigenous populations*,¹⁰ June 1999, refers to this phenomena as 'the domestication of the indigenous question':

..that is to say, the process by which the entire problematique was removed from the sphere of international law and placed squarely under the exclusive competence of the internal jurisdiction of the non-indigenous states. In particular, although not exclusively, this applied to everything related to juridical documents already agreed to (or negotiated later) by the original colonizer States and/or their successors and indigenous peoples.

Terra nullius was a particularly brutal method of achieving this end of relegating the rights of Indigenous people to the internal laws of the

coloniser. The common law of native title while giving some recognition to Indigenous traditions and customs nevertheless continues this process of domestication.

A construction of native title as a bundle of rights, confirmed in the *Miriuwung Gajerrong* decision, also reflects the failure of the common law to recognise Indigenous people as a people with a system of laws on which a relationship to land is founded. Native title as a bundle of separate and unrelated rights with no uniting foundation, is a construction which epitomises the disintegration of a culture when its governing essence is neatly extracted from it.

In the *Miriuwung Gajerrong* decision, the High Court preferred the 'bundle of rights analogy' which, the majority argue, at least provides for the recognition of residual rights once the 'core concept of a right to be asked permission for access and to speak for country' are extinguished. In view of their finding that this 'core concept', something I suggest akin to a sovereign right, is inherently fragile against 'the imposition of a new authority over the land', the recognition of residual rights probably does take on increased importance. The majority put it as follows:

An important reason to conclude that, before the NTA, native title was inherently fragile is to be found in this core concept of a right to be asked permission and to speak for country. The assertion of sovereignty marked the imposition of a new source of authority over the land. Upon that authority being exercised, by the creation or assertion of rights to control access to land, the right to be asked for permission to use or have access to the land was inevitably confined, if not excluded. But because native title is more than the right to be asked for permission to use or have access (important though that right undoubtedly is) there are other rights and interests which must be considered, including rights and interests in the use of the land.¹¹

It can be seen in the *Miriuwung Gajerrong* decision, as in the *Mabo* decision, that the construction of native title at common law as an inherently fragile and inferior interest in land, originates from the supreme power of the sovereign state to relegate it to this position. Native title is premised on this relationship of inequity, it does not transcend it. The practical effect of a construction of native

⁹ *Mabo decision*, op cit, pp44 - 45

¹⁰ Martinez, M., 22 June 1999, UN Doc E/CN.4/sub.2/1999/20

¹¹ *Miriuwung Gajerrong decision*, op cit, p43.

title as a fragile and dispersed bundle of rights is to facilitate its destruction through extinguishment. This then brings me to the **second** characteristic of supreme sovereign state power, underlying the Mabo decision and the development of native title law.

The power to extinguish native title:

The power of the state to extinguish native title and the continuing exercise of this sovereign power underlies the development of native title at common law. As Brennan stated in Mabo:

Sovereignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory. It follows that, on a change of sovereignty, rights and interests in land that may have been indefeasible under the old regime become liable to extinction by exercise of the new sovereign power.¹²

Broadly speaking, extinguishment takes place in two stages of the native title process. First, in the recognition stage, the court will only recognise claims where there has been an ongoing connection between the claimants and the land. Thus, historical dispossession through legislative or executive acts, or any other unauthorised (including illegal) acts will be confirmed in the native title process. The pending decision of the High Court in the *Yorta Yorta* case will decide the extent of 'extinguishment' in this stage of the native title process.

Second, even if the claimants' relationship to their land withstands this historical dispossession and their connection remains strong, the court will, as a matter of law, determine whether the title has in any case been extinguished by the creation of non-Indigenous interests (whether current or expired) over the same land.

The court's approach to the extinguishment of native title has been made clear in the *Miriuwung Gajerrong* decision and the decision in *Wilson and Anderson*.¹³ The first requirement is to determine whether the NTA prescribes extinguishment, either through the 'past act' regime or the confirmation provisions. Where the NTA is silent on extinguishment the common law will operate and extinguish native title either completely, where the subsequent interest amounts to exclusive possession, or partially, to the extent of any inconsistency with the subsequent,

non-Indigenous interest. The High Court also decided the question, left open in the *Wik* case, of whether, in the event of inconsistency native title is suspended for the duration of the inconsistency or whether it is permanently extinguished to that extent. Permanent extinguishment was preferred.

This preference confirms the underlying premise on which native title is constructed through the common law and the legislation; that the acquisition of sovereignty by the British was to the exclusion of any other sovereign power, including Indigenous people, and that the state is the sole repository of this power. As I said previously, the *Miriuwung Gajerrong* decision and the extensive extinguishment it contains, naturally follows from the assumptions about sovereign power contained in the common law and the native title legislation.

I want now to posit a different set of assumptions about sovereignty and power in order to break through the impasse which native title has reached to allow a real dialogue about a treaty to take place. But rather than approach these issues by seeking to re-define state sovereignty I want to approach it from the perspective of Aboriginal sovereignty.

To date, Aboriginal sovereignty has tended to be defined as something analogous to the sovereignty of the State or government in international law. It has, in my opinion, been wrongly conflated with the concept of 'State sovereignty'. The effect of this is to establish a framework in which Aboriginal sovereignty is pitted against the existing system. Aboriginal sovereignty immediately becomes an oppositional force; a threat to territorial integrity; to our system of government; to our way of life. And as a consequence, it irresistibly leads the broader community to the conclusion that Aboriginal sovereignty *cannot* be recognised and must be resisted.

This issue of definition of Aboriginal sovereignty is one of the main concerns that I have at this early stage of debate about a treaty. There has been an illegitimate and quite wrongful assumption made by Government that it has the prime role in defining what Aboriginal sovereignty is. This is the wrong starting point for the treaty debate. It gives pre-eminence to non-Indigenous understandings even before the process has gotten underway.

¹² *Mabo decision*, op cit, p63.

¹³ *Wilson v Anderson*, [2002]HCA29, 8 August 2002, S101/2000

Defining Aboriginal sovereignty in these terms, in non-Indigenous ways, is a way of guaranteeing its fragility and ultimate demise.

There is a second set of concerns that I have about the defining of Aboriginal sovereignty as the same as, and thus a competitor of, State sovereignty. This is that it also promotes a concept of power in Australian society as static and monolithic; only able to reside in the State – the government – and unable to be changed or challenged. There are a number of problems with this construction of power, not least of which is its lack of reality. The nature of Australian sovereignty continually changes and is constantly being re-aligned and redistributed among a myriad of levels and players. The distribution of sovereign power is not fixed and unable to be challenged.

Historically, this evolving nature can be demonstrated by looking at the movement from the process of colonisation in the eighteenth and nineteenth centuries; to the federation of these colonies in 1900; to the continual re-alignments of power between the states, territories and federal governments under the Constitution; to the creation of new territories – such as the Northern Territory and A.C.T in the past forty years; to the passage of the *Australia Act* in 1986 – just 16 years ago – when for the first time Australia became autonomous from the British legal system. It continues with ongoing debates about statehood for the Northern Territory; the possibility of becoming a republic; Australia's participation in the ANZUS alliance; and so on.

Clearly, distribution of power within society, between governments, is not static or monolithic.

But it is not just inter-governmental relations which change the nature of power distribution in Australian society. An equally important international force at play is developments in international law. Broadly speaking, in the nineteenth and early twentieth century, international law had shifted to a **positivist** construction. This was based on the premise that 'international law upholds the exclusive sovereignty of states and guards the exercise of that sovereignty from outside interference'.¹⁴ This approach has increasingly been under challenge since 1945, particularly due to the process of decolonisation and the recognition of human rights. A key feature of this change has been the recognition of the rights of non-government

actors in the international system. Indigenous peoples are now, for example, legitimately subjects and actors in the international legal system.

Ultimately, what this means is that we see an international legal system that is moving away from concepts of rights as being **given** by states or which only exist thanks to the acquiescence or agreement of governments. The move is towards a more naturalist, and truly universal, approach. Rights are not within the discretion of governments to give or withhold but are **inherent**. For Indigenous people, the international system has begun to acknowledge their **collective** rights to self-determination and to protection of culture – that is, that rights reside in a peoples' systems of organisation, governance and ultimately, sovereignty.

International law remains an imperfect system and this is certainly highlighted by the disjunction between the recognition of Indigenous people's rights by numerous expert bodies and independent authorities within the United Nations, as against the continued reluctance of government-run structures within the United Nations to provide similar recognition. In the negotiations on the draft Declaration on the Rights of Indigenous People States still resist including any recognition of a collective dimension to Indigenous people's livelihoods and the full application of the principle of self-determination to Indigenous peoples.

Why do they resist? The reason usually given is to guarantee their territorial integrity and sovereignty. As Indigenous representatives point out, the underlying assumption here is that State sovereignty and territorial integrity are privileged over the rights of Indigenous peoples to be self-determining. That they have a higher claim to protection. In fact just the opposite is true. International law simply does not prioritise a State's organisational form over the rights of its constituent members. The sanctity of the State's integrity is dependent on it remaining representative and being truly of the people. As the former chair of the Working Group on Indigenous Populations, Erica-Irene Daes has stated:

The concept of "self-determination" has... taken on a new meaning in the independent State to share power democratically. However, a State may sometimes abuse this right of its citizens so grievously and irreparably that the situation is tantamount to classic colonialism,

¹⁴ Marks, G, 'Sovereign states vs peoples: Indigenous rights and the origins of international law' (2000) 5(2) AILR 1, 3.

and may have the same legal consequences. The international community... discourage(s) secession as a remedy for the abuse of fundamental rights, but, as recent events around the world demonstrate, secession cannot be ruled out completely in all cases. The preferred course of action, in every case except the most extreme ones, is to encourage the State in question to share power democratically with all groups, under a constitutional formula that guarantees that the Government is “effectively representative”...

Continued government representivity and accountability is therefore a condition for enduring enjoyment of the right of self-determination, and for continued application of the territorial integrity and national unity principles.¹⁵ International law will generally support the claim of States to territorial integrity, but this comes with responsibilities and the obligation to be representative and inclusive of all its citizens, including Indigenous peoples. Martinez makes the point:

The more effective and developed the national mechanisms for conflict resolution on indigenous issues are, the less need there will be for establishing an international body for that purpose.¹⁶

Ultimately, what this brief discussion of the international debate on self-determination hints at is that increasingly the credibility and legitimacy of a State's foundations, its sovereignty, depends on its inclusivity and the way it treats Indigenous peoples.

The recognition of native title came from an acknowledgement of important truths about our past and the need to reconcile these truths with contemporary notions of justice. But it also brought to the fore a fundamental conflict arising at the time of the establishment of Australia as a colony; that is the conflict between the assertion on the one hand that the settlement of Australia gave rise to exclusive territorial jurisdiction by the colonial power and, on the other hand, the illegality and immorality of asserting this right without an agreement from those who previously occupied that land and who continue to maintain their deep spiritual economic and social connection to the land. The *Miriuwung Gajerrong* decision confirms that the native title

process, while valuable in giving recognition to inherent rights, is not able to resolve this conflict.

Rather it must be resolved through a treaty process which emphasises co-existence and mutual benefit. Negotiation based on consent and equality can transform what was a contradiction at the foundation of our nation between the conflicting claims of Indigenous and non-Indigenous people to the jurisdiction of traditional lands, into an agreement as to the basis of our coexisting sovereignty over that same land.

A Treaty between the Aboriginal Peoples of Australia and the Government of Australia from an International Law Perspective

Professor Ivan Shearer

In what follows I have not ventured into the history of proposals for a treaty between the Aboriginal peoples of Australia and the Government of Australia. Others here will know this much better than I. Nor do I wish to suggest in detail what such a treaty might contain, if it were possible to bring it about. My purpose is to address the nature of treaties in international law, the possibility of treaties between state and non-state parties, and some contemporary forms of treaty-making in the international arena that might offer some helpful models or analogies.

In international law a treaty is normally understood to be “an international agreement concluded between States in written form and governed by international law”. The Vienna Convention on the Law of Treaties, concluded in 1969, and to which Australia and most other states are parties, so defines the term in article 2 (1) (a). The Vienna Convention is also regarded as an authoritative statement of customary international law. That Convention, however, expressly recognises that there can be other forms of agreement, such as between states and “other subjects of international law”, the legal force of which is to be determined by applicable rules of international law independent of the Convention.

¹⁵ Daes, E, *Explanatory note concerning the Draft Declaration on the Rights of Indigenous Peoples*, 19 July 1993, UN Doc: E/CN.4/Sub.2/1993/26/Add.1, paras 22,23.

¹⁶ Martinez, M., *op cit*, para 317.

There can also be forms of agreement that are not governed by international law. “Intention to create legal relations” is as much a formal yardstick of characterisation in international law as in domestic law. There can be agreements that are binding at the political level but not at the legal level. In the practice of Australia and other countries increasing use is made, in contemporary international relations, of the “Memorandum of Understanding” as a mode of agreement. This mode produces an agreement of less than treaty status. It is often used in the conclusion of development assistance agreements or of transitory agreements relating to the disposition of armed forces. In these cases it offers a more flexible form of agreement, allowing for easier change in accordance with circumstances. Australia regularly uses this form of agreement also in its relations with Taiwan, but in this case by reason of the fact that it does not recognise Taiwan as a State having a separate international personality from China. Memoranda of Understanding are treated as binding at the political level but not enforceable in international law.

What are examples of “other subjects of international law” which are recognised as having the capacity to enter into international agreements? The prime example is that of the United Nations, which was recognised as having the capacity to enter into treaty relations with states in an advisory opinion of the International Court of Justice in 1949. This capacity is also possessed by certain international organisations, especially the Specialised Agencies of the United Nations. Beyond these examples it cannot be stated that there is a generally recognised capacity of non-state entities to enter into treaty relations. It is a question of recognising international personality as the basis of the power to enter into treaty relations. States in the post-Westphalian order have been extremely reluctant to concede such personality to entities other than states. A small, particular exception is the recognition of the right of an authority representing a people engaged in an armed struggle against a State Party in exercise of its right of self-determination to make a declaration that it will apply the Geneva Conventions and Additional Protocol I in relation to the conflict.¹⁷ That would have to be regarded as a special case, dictated by humanitarian concerns.

Another important facet of the post-Westphalian order also comes into play in assessing claims to international personality. There is a profound reluctance, indeed aversion, of states to concede any measure of international personality to the various peoples constituting their own populations. The so-called “treaties” concluded in the past between the colonial powers and indigenous peoples in order to obtain cessions of territory were generally held to be valid acts of the ceding indigenous sovereign in international law but, once title to the territory had thus passed to the acquiring state, continuing relations between the conqueror and the subject peoples came to be regarded as subject only to domestic law.¹⁸ This is true even in New Zealand, where the Treaty of Waitangi is regarded as having status under national law only. There is no current willingness among states to endorse the notion of separate international personality among their peoples, since that could lead to the endangering of territorial integrity and to ultimate dismemberment. The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, adopted by consensus by the General Assembly of the United Nations on 24 October 1970, included an interpretative paragraph on the right of self-determination of peoples. It stated that:

Nothing in the foregoing paragraphs shall be 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 conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”

So what of a “treaty” between the Aboriginal and non-Aboriginal peoples of Australia? It is clear that the word “treaty” carries with it the implications of (a) an intention to create legal relations between the parties governed by international law; and (b) that the parties each possess a separate international personality. I frankly cannot see any government of Australia

¹⁷ Additional Protocol I (1977) to the Geneva Conventions of 1949, article 96(3).

¹⁸ See e.g. the decisions of the Privy Council in *In re Southern Rhodesia* [1919] AC 211, and in *Hoani Te Heu Heu Tukino v. Aotea District Maori Land Board* [1941] AC 308, and the arbitral award in the *Delagoa Bay case* (1875), Moore, J.B., *International Arbitrations*, 4984. See generally G. Alfredsson, “Treaties with Indigenous Populations” in *Encyclopedia of International Law* Vol.2, 951-953.

willing to negotiate any form of agreement carrying these implications.

What I can foresee is a form of agreement between the Aboriginal and non-Aboriginal peoples of Australia that has political, preferably constitutional, status in the Australian legal order. A word should be chosen for such an instrument free from associations that give rise to the twin bogeys of sovereignty and international law. Ideally it should be a unique word, not associated with any other situation. I have yet to hear a better term than Makaratta, which was proposed more than 20 years ago. But perhaps a more acceptable term will emerge. It is not the name that matters, but what it conveys as a truthful and potent vehicle for setting black-white relations on a positive course. International law is not entirely irrelevant, however. It can provide useful analogies and precedents for such an instrument.

If I can be allowed a comment as a distant observer of, but not as a participant in, the debate of the past 20 years, I have the impression that too much has been proposed for inclusion in what I shall continue to call “the treaty”. It seems as though the participants from all sides have envisaged a lengthy and comprehensive text that would settle all questions. In my opinion that road will lead to inevitable frustration. Moreover, can or should all such questions be settled at one particular point of history? What I would suggest is a short and simple instrument that creates a framework¹⁹ for the future course of black-white relations in Australia and for work on an ongoing basis on particular questions. Such a treaty would contain:

- (a) a statement of reconciliation and of the desire to make a new start in black-white relations;
- (b) a statement of agreed general principles;
- (c) an identification of the areas in which future negotiations will take place with a view to the conclusion, from time to time, of particular subsidiary instruments or mechanisms; and
- (d) provision for the creation of a body to implement the treaty.

I would hope also that the treaty, at least in its initial parts, would contain “constitutional poetry” of an inspirational kind.

A number of examples of the kind of treaty I have in mind exist in the international sphere. They are often called “framework conventions”. They typically begin with preambular paragraphs that identify the problems and objectives and assert a common resolve to work towards their resolution and attainment. They then proceed to commit the parties to co-operation in a concerted effort to achieve the objectives of the Convention. The approach is programmatic rather than definitive. No party commits itself to precise and binding obligations. What is established by the convention is an ongoing process, not a final settlement. The legal obligation arising from such conventions may consist, in the final analysis, only of the obligation to demonstrate good faith in engaging in the forms of co-operation set out in the convention.²⁰ But good faith should not be seen as an obligation devoid of content; it is an important principle of both international law and national law in its own right.

There are a number of examples. I shall mention two of them.

(a) The Helsinki Final Act on Security and Co-operation in Europe, 1975.

All the states of Europe, including the Soviet Union, and the United States and Canada, signed this instrument. The name itself throws doubt on its status as a legal binding agreement, since that term has traditionally been used for a statement of the outcome of a conference rather than a treaty text. Indeed the Helsinki Final Act itself explicitly states that it does not qualify as a treaty or convention required to be registered under article 102 of the Charter of the United Nations. However, the commitment of the parties to act in good faith is emphasised in the last paragraph of the document, where the signatories state that they are “mindful of the high political significance which they attach to the results of the Conference” and where they declare “their determination to act in accordance with the provisions contained in the above texts.”

¹⁹ This notion has been suggested previously also by the Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament, 7 December 2000.

²⁰ The duty to co-operate in good faith under the World Heritage Convention was regarded by the High Court in the *Tasmanian Dam* case to be a sufficient obligation – if obligation were needed – to enliven the external affairs power of the Constitution: *Commonwealth v. Tasmania* (1983) 46 ALR 625, per Mason J. at 697-700, Brennan J. at 771-779, and Deane J. at 805.

The Final Act then proceeds to identify the areas in which the parties will co-operate with a view to achieving desired outcomes. These areas are termed “baskets”. Basket I confirms ten general principles of relations between the parties based on their obligations under the UN Charter. It then sets out guidelines for the establishment of confidence-building measures in the field of security, including the giving of advance warning of military exercises and the exchange of observers. Basket II relates to co-operation in the field of economics, science, technology, and of the environment. Basket III relates to co-operation in the humanitarian and other fields. These other fields are identified as human contacts, information, culture, and education. The Fourth, and final, Basket establishes a continuing process of the Conference on Security and Co-operation in Europe (CSCE) to verify compliance with the commitments of the participating states. This has now flowered into an organisation, called the OSCE, which has played a significant part in recent European events, such as the break-up of the former Yugoslavia.

In this brief paper I have stressed ideas from the international sphere that I think could be fruitfully employed in the search for a model treaty between Aboriginal and non-Aboriginal Australian citizens. They include the model of a framework agreement, the achievement of reconciliation through an ongoing process, gradual and measured progress in particular fields, confidence building, and good faith.

(b) The second example has been much in the news of late. It is the United Nations Framework Convention on Climate Change, 1992.

The Convention states an agreed objective in article 2 and a set of principles in article 3. Article 4 on “commitments” is in the form of pledges of co-operation and statements of aspiration to be followed within the framework. The actual setting of specific targets is left to subsequent protocols, especially the Kyoto Protocol of 1998. Even that Protocol contains elements of flexibility, including recognition of the different capacities of developed and developing economies.

Some commentators decry such instruments as “soft law”. They cannot conceive of law as anything other than “hard” and enforceable by inflexible legal processes backed up by sanctions. Such an attitude ignores the realities of international relations and – by extension – the realities of sensitive national political issues, such as the situation of Aboriginal Australians. In fact, so-called soft law has produced outstandingly successful results in the first example, and moderately successful results in the second. Even in the second example, the great force of the dynamics of the process set in train is evident in the defensive postures of those states that are reluctant to commit themselves to specific emission targets. They may shy away from specific targets but they dare not disengage themselves from the process. In the end an accommodation will be reached.

Recognising Aboriginal and Torres Strait Islander customary law – international and domestic law implications

The second seminar in the series was held on Thursday 20th November 2003 on the topic of *Recognising Aboriginal and Torres Strait Islander customary law: international and domestic implications*. The seminar was chaired by Margaret Brewster, then President of the ILA (Australian Branch). The President of the Human Rights and Equal Opportunity Commission, the Hon John von Doussa, provided introductory remarks. Papers were presented by the then Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Dr William Jonas AM, and Ms Megan Davis, Faculty of Law, the University of New South Wales.

Papers presented at the seminar:

Introductory remarks

The Hon John von Doussa

I'd like to begin by acknowledging the Gadigal People, the traditional owners of the land where we are meeting today. On behalf of the Human Rights and Equal Opportunity Commission, I would like to welcome you to this workshop on the recognition of Aboriginal Customary Law.

This is the second workshop that HREOC has co-hosted with the Australian Division of the International Law Association. It follows a workshop on the international and domestic implications of a treaty in Australia with Indigenous peoples that was held in September 2002. On behalf of HREOC I'd also like to begin by thanking Margaret Brewster, the President of the International Law Association, and Greg Marks of the ILA for making the arrangements and agreeing to co-host this workshop with HREOC. I think that we are developing a fruitful and interesting collaboration through these occasional seminars and I look forward to our future collaborations.

The issue of Aboriginal Customary Law is one of the most difficult that we face in reconciling Indigenous and non-Indigenous legal traditions in this country. Aboriginal Customary Law as a shorthand term refers to Indigenous traditions and systems of law and governance across all

areas of cultural life. This includes what we would classify in the non-Indigenous legal system as family law, intellectual property, marriage, criminal law, succession, and systems of dispute resolution. Like the recognition of native title and the debate about a treaty, it poses a challenge to the existing relationship of Indigenous peoples with the State.

Decisions of the High Court, such as *Mabo v Queensland (No.2)*, *Coe v Cth* and *Walker v NSW*, make clear that there is no room to challenge the assertion of sovereignty by the Crown or for an alternative body of law to operate independently alongside the Australian legal system. But this does not exclude the possibility of more limited recognition, which the Australian Law Reform Commission termed 'functional recognition', or for alternative forms of incorporation of Aboriginal Customary Law within the mainstream Australian legal system.

Such recognition could take many forms – from formal legislative recognition and incorporation, or attempts to codify or regulate the interaction of customary law with non-Indigenous systems; to less formal recognition such as one-off consideration of customary law issues as a mitigating factor in sentencing matters for criminal cases; to the even less formal approach of influencing how officials, such as child welfare workers or police, might exercise their discretion in situations where customary law might be perceived to be a contributing factor.

How Aboriginal Customary Law can be recognised within our mainstream legal system poses many challenges. The challenges arise at two levels. The first is at a theoretical or academic level, for example:

- ♦ how do we ensure consistency in the circumstances in which Courts accept that Aboriginal Customary Law is a relevant factor to be considered in a case?
- ♦ how, or indeed can, Aboriginal Customary Law be incorporated into the legal system in a way that does not breach the principles of non-discrimination and equality before the law?
- ♦ are there justifications for legal pluralism by recognising a source of law making that does not fit within the three arms of government – the Judiciary, the Executive and the Parliament – that are the usual sources of law within our legal system? and
- ♦ in recognising Aboriginal Customary Law, what are the limitations on recognition that should legitimately be imposed – compliance with criminal codes and consistency with universally recognized human rights are two limitations that are widely agreed, but are there others?

At the second level, considerations of a practical kind arise. Customary Aboriginal Law is not a static body of rules that apply equally throughout the country. They have evolved in local areas having regard to all prevailing circumstances, and for this reason differ in content from area to area and from time to time and the customary laws continue to evolve and, at times, are even revived in a way that fits the present circumstances of the community. If all of the theoretical problems at the first level can be overcome, then I think there will be real questions about how to determine what the relevant customary law is which should be applied in a particular case.

The existence of relevant customary law, and its contents, are likely to be treated as questions of fact which will have to be proved by calling witnesses to give evidence about those matters. This process is likely to add new complexities to the trial process.

I have had some experience sitting as a Supreme Court Judge in Vanuatu where customary law is very much a part of the legal system. I have experienced the practical difficulties in a criminal trial where the defendant sought to rely on customary law and custom medicine

as a defence to a sexual charge involving a stepdaughter. Evidence had to be led on these questions. Human nature being what it is, the prosecution and the defence advanced different interpretations of the relevant customs, and it was left to the Court to decide the true content of the custom, and whether it could apply at all in the circumstances.

There is another significant issue which may have to be addressed if Aboriginal Customary Law is to be applied. It may become necessary to determine whether the customary law is consistent with international human rights as established by international conventions and customary international law. It is generally recognised under international law, and by most advocates for the recognition of Aboriginal Customary Law in Australia, that the customary law must, to the extent of any inconsistency, give way to internationally recognised human rights. For example, international human rights law requires that women not be subjected to violence, and that cruel or inhumane punishments or death not be inflicted. The obligation to take measures to ensure recognition of human rights under international law rests on the State. This means that the State would have to remain involved, through a recognised court system, and the courts would have to be the final arbiters of whether the operation of relevant Aboriginal Customary Law in a particular case was consistent with human rights recognised by international law.

I mention the practical difficulties of establishing the content of customary law, and the need for the State to continue to be involved to ensure the application of international human rights law, to illustrate the difficulties of separating the rules and procedures of the present Australian legal system from an Aboriginal Customary Law system.

All these issues look mainly to the limits of recognising Aboriginal Customary Law. But from the perspective of reconciliation and the coming together of two cultures, there is also the question of how can the non-Indigenous legal system itself change and adapt to recognise Aboriginal Customary Law. These are some of the issues that our speakers will grapple with this afternoon.

At the risk of exceeding my role in welcoming you, can I just mention a case which the Vanuatu Court of Appeal decided two weeks ago, [*Joli v Joli*, Court of Appeal decision 7 November 2003] which concerned whether the Matrimonial Causes Act, 1973, of the United Kingdom applied

in Vanuatu in so far as it made provision for a property settlement after a divorce. In Vanuatu under a clause in the Constitution, laws which applied at the day of Independence continue to apply unless the Parliament of Vanuatu has passed legislation on the subject matter. Those pre-independence laws include the laws of general application of England and France provided, however, that the foreign laws pay sufficient regard to Vanuatu custom. An argument was raised that the English notions of dividing property and adjusting proprietary interests was inconsistent with the custom requirements for succession to land. The importance of land and its succession is essential to Customary Law in Vanuatu.

The Court of Appeal found there was no inconsistency between the English legislation and custom because the English legislation, in directing that the Court should take into account numerous considerations, included a direction to the Court to take into account any other relevant circumstances. The Court of Appeal held that the custom laws about succession to land and inheritance were relevant circumstances, and the English legislation allowed them to be taken into account and reflected in any order made by the Court. That case shows that through a common statutory provision allowing the Court to have regard to any other relevant matter, custom law could be recognised and taken into account.

First, we will hear from the Aboriginal and Torres Strait Islander Social Justice Commissioner at HREOC, Dr Bill Jonas who will provide a domestic perspective. Commissioner Jonas will address issues of human rights compliance as well as providing some comments on recent developments in Indigenous community justice mechanisms and the report of the Northern Territory Law Reform Committee, released a fortnight ago. Our second speaker will then be Ms Megan Davis of the Gilbert and Tobin Public Law Centre at the University of New South Wales. Ms Davis has served an internship in the Office of the United Nations High Commissioner for Human Rights and has participated as an advisor to ATSIC and others in negotiations on Indigenous rights in international forums, including the United Nations process on the Draft Declaration on the Rights of Indigenous Peoples and the World Intellectual Property Organisation. Ms Davis will talk about the international implications of recognition of Aboriginal Customary Law, including on issues relating to intellectual property regimes.

The Recognition of Aboriginal Customary Law

Dr William Jonas AM

I'd like to begin by acknowledging the Gadigal People, the traditional owners of the land where we are meeting today.

I'd like to begin by acknowledging that this is the first public event that I have hosted since the appointment of Justice John von Doussa as President of the Human Rights and Equal Opportunity Commission. My fellow commissioners and staff have been delighted by his appointment and I am very pleased that he is able to join us here today.

Now I have to admit – we have been totally overwhelmed by the response to this workshop. We didn't ask people to RSVP, although many of you did – so many in fact that we started to get very worried about how many people were actually going to turn up and so decided to change the venue so you could all fit in the room. I have been wondering why exactly there is so much interest. I thought that I would start by posing a question to you, which is why is the issue of Aboriginal Customary Law of such interest to such a wide range of people? Hopefully we can reflect on this in discussion after the presentations.

I wanted to begin by reflecting on a workshop that I attended in Madrid last week. The workshop was organised by the Office of the United Nations High Commissioner for Human Rights to support the work of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Professor Rodolfo Stavenhagen. It was on the theme of Indigenous peoples and the administration of justice. Approximately 25 experts from across the world were convened to discuss the key issues facing Indigenous peoples in criminal justice related areas, to identify best practice and solutions to this situation, and to make recommendations to relevant actors within the United Nations system.

Even though I have now participated in many UN forums, I remain quite surprised by the similarities in the situation of Indigenous peoples in differing regions of the world. Not only are there similar problems identified as existing for Indigenous peoples no matter where they live; but there are also similar approaches being adopted to address this situation and a commonality of the underlying principles and assumptions that

need to be recognised if progress is to be made or extended.

Throughout the workshop we heard examples of the importance of recognising Indigenous customary law systems and developing and strengthening Indigenous community justice mechanisms in order to break the cycle of offending by Indigenous peoples, deal with the underlying causes which lead to disproportionate rates of contact at all stages of the administration of justice and strengthen Aboriginal communal structures. During the workshop the Special Rapporteur, Professor Stavenhagen, asked two sets of questions to the experts which he saw as crucial in addressing how Aboriginal customary law systems could be recognised. He was, he confessed, playing devil's advocate, but his two questions will be familiar ones to you. He asked:

First, how do you make the legal system work better for Indigenous peoples and how do you incorporate Indigenous legal systems into the mainstream legal process without violating the universality of human rights? In other words, how do we recognise Aboriginal customary law in a manner that is non-discriminatory?

And **second**, providing that you can recognise Indigenous legal systems in a manner that is non-discriminatory, how do you guarantee individual human rights within Indigenous communities, particularly for women and children?

These questions really are the key issues that have to be addressed for there to be much progress in recognising Aboriginal customary law systems. They are also the issues around which the international and domestic implications of recognising Aboriginal customary law converge. In relation to the first set of questions, for example, the position of our federal government is clear. In its response to the Council for Aboriginal Reconciliation's documents, the government states that it:

is unable to endorse the approach to customary law in the Council's Declaration as the Government believes all Australians are equally subject to a common set of laws... Neither the government nor the general community... is prepared to support any action which would entrench additional, special or different rights for one part of the community.

In similar debates in recent years I have noted that this type of concern is misplaced for practical reasons. In the *Social Justice Report*

2000, I stated that the view of equality that this reflects 'however popular, does not reflect reality. The view that everyone should be treated the same overlooks the simple fact that throughout Australian history Indigenous peoples never have been... The failure to provide us with the same opportunities as the rest of society in the past means that to now insist on identical treatment will simply confirm the position of Indigenous people at the lowest rungs of Australian society' (*Social Justice Report 2000*, p19).

These types of comments also reflect what I consider to be a common misunderstanding of the principles of non-discrimination and equality before the law. In international law, the promotion of equality does not necessitate the rejection of difference. It accepts that there are circumstances in which differential treatment is warranted and thereby permitted.

In the decision of the International Court of Justice in the South West Africa Case, Judge Tanaka explains this principle:

The principle of equality before the law does not mean the absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal... To treat unequal matters differently according to their inequality is not only permitted but required.

Such an understanding of equality, often referred to as 'substantive equality', takes into account 'individual, concrete circumstances'. It acknowledges that racially specific aspects of discrimination such as socio-economic disadvantage, historical subordination and the failure to recognise cultural distinctiveness must be taken into account in order to redress inequality in fact. The alternative approach, often referred to as 'formal equality', relies on the notion that all people should be treated identically regardless of their differing circumstances. Such an approach 'denies the differences which exist between individuals and promotes the idea that the state is a neutral entity free from systemic discrimination.'

The Human Rights Committee, which oversees implementation of the ICCPR, and the Committee on the Elimination of Racial Discrimination, have adopted a substantive equality approach to the meaning of non-discrimination. In accordance with this, there are basically two types of differential treatment that are permissible in order

to achieve equality, and which are considered to be non-discriminatory. These are special measures (or affirmative action) and actions that legitimately recognise cultural difference. Special measures are remedial provisions aimed at raising segments of the community who are not equal to a position of equality within society. They are defined in Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination.

In addition, there are also certain circumstances where it is appropriate to recognise the distinct cultural characteristics of particular groups, especially minorities. The critical issue is to identify those differences that justify a differentiation in treatment. Judge Tanaka in the South West Africa Case stated that differences which minority groups may choose to protect are the relevant differences, rather than oppressive distinctions ascribed in order to justify the reduction of rights. The purpose of the intended measure must be protective and not motivated by discrimination itself; and for this reason it cannot be imposed. In other words, there must always be the choice for, in this case Indigenous peoples as the intended beneficiaries, to accept or reject the proposed form of recognition.

In Australian law, section 8(1) of the *Racial Discrimination Act 1975* (Cth) exempts special measures from the prohibition of racial discrimination in section 9 of the Act. In explaining the requirements for a special measure under the Racial Discrimination Act, Justice Brennan has stated that:

- ♦ The wishes of the members of the class are relevant – a special measure will not bring about advancement if it is conferred against their will, and similarly, an advancement cannot confer benefits which convert members of the class from a disadvantaged class into a privileged class;
- ♦ The special measure must not maintain separate rights; and
- ♦ The special measure must not be continued after the objectives for which they were taken have been achieved – although this does not mean that it is necessary that the special measure be created with a finite time for its existence.

Justice Brennan made these comments in *Gerhardy v Brown*, which remains the lead case on the meaning of special measures in Australian law. The High Court has been extensively, and in

my view rightly, criticised for its decision in this case. In *Gerhardy*, the High Court found that land rights legislation constituted a special measure and was not racial discriminatory. The criticism of this comes from the application by the Court of a formal equality approach to interpret the *Racial Discrimination Act 1975* (Cth). This has been largely due to the Court's reliance on justifying Aboriginal land rights as a special measure, rather than embracing a more expansive understanding of equality as provided in international law. Such an understanding could have allowed recognition of land rights as a legitimate differentiation of treatment.

The difficulty of the High Court's approach in *Gerhardy v Brown* has been highlighted by the recognition of native title in *Mabo*. The source of recognition of native title is the traditions and customs of Aboriginal and Torres Strait Islander peoples rather than an act of recognition by the Parliament. Native title continues to be recognised until such time as it is extinguished by the Crown or until the traditional laws and customs on which it is based are no longer observed. There are also a number of relevant differences between native title and ordinary forms of title that my office has previously argued meet the test of being 'reasonable, objective and proportionate' and accordingly mandate appropriately different treatment to achieve substantive equality.

It is therefore not possible to characterise the basis of recognition of native title as temporary in scope or as having a finite period for recognition as would be required to qualify as a special measure. The High Court has, albeit briefly and without reconsidering its *ratio* in *Gerhardy*, recognised this in its subsequent decision on native title in *Western Australia v Commonwealth* (1995). There the Court characterised the original *Native Title Act 1993* (Cth) as 'either a special measure... or as a law which, though it makes racial distinctions, is not racially discriminatory'.

In my view, based on these principles and the interpretation of them in Australian courts, Aboriginal Customary Law could be recognised as a legitimate differentiation of treatment that does not offend the prohibition of racial discrimination in sections 9 or 10 of the *Racial Discrimination Act 1975* (Cth). It is, however, uncertain whether the High Court will follow through the consequences of its characterisation of the Native Title Act in *Western Australia v Commonwealth* by recognising this. There can be no doubt, however, that should they take a more limited approach, in accordance with the Court's reasoning in *Gerhardy v Brown*, they would find that Aboriginal Customary Law

falls within the exception to the prohibition of racial discrimination in the Racial Discrimination Act by being accepted as a special measure.

On either basis, the concerns expressed earlier that recognition of Aboriginal Customary Law creates a situation of favourable treatment for Indigenous peoples that results in unequal treatment or discrimination against non-Indigenous people can therefore be rejected.

We can then move on to the Special Rapporteur's second question – namely, guaranteeing individual rights. I consider this issue in depth in my submission to the Northern Territory Law Reform Committee's inquiry into customary law from earlier this year. That submission, and one focused on the gender dimensions of recognising customary law by the Sex Discrimination Commissioner, is available on the internet from HREOC's website.

I will only highlight a few key points about this issue here due to time. First, it needs to be recognised that all human rights are indivisible, with no hierarchy of recognition of these rights or special status given to one over the other, including group versus individual rights. In many instances there will be no conflict between individual and group rights and they will be able to operate in an interdependent manner. As my predecessor as Race Discrimination Commissioner noted in 1995:

The claim that collective rights jeopardise traditional individual rights misunderstands the interdependent relationship between group and individual rights. The apparent tension between individual and collective rights is partially resolved once it is recognised that certain individual rights cannot be exercised in isolation from the community. This is particularly the case in indigenous communities... It is often the case that the protection and promotion of collective rights is a pre-requisite for the exercise and enjoyment of individual rights. The right of an Aboriginal or Torres Strait Islander person to protect and enjoy his or her culture, for example, cannot be exercised if an indigenous culture is struggling to survive within the majority culture and the indigenous community has no right to protect and develop its culture. If rights are not granted collectively to indigenous peoples which enable them to defend their culture, the practice of their religion and the use of their languages, the result is unequal and unjust treatment.

This reflects a vital point about the recognition of Aboriginal Customary Law – namely, the

recognition of Aboriginal peoples' minority group rights and collective rights have the capacity to strengthen social structures within Aboriginal communities as well as the observance of law and order.

Second, as discussed above, there is a crucial issue of consent that is relevant to an activity or form of recognition being accepted as non-discriminatory or a special measure. As the Sex Discrimination Commissioner noted in her submission to the NT customary law inquiry, too often women's voices are excluded from consultation and negotiation processes. It is quite critical that such voices are not ignored, particularly in determining the consent or willingness of a community for customary law processes to be recognised or to create some impositions on that community.

Third, however, there will be other circumstances where individual and collective rights are in opposition and a balance must be struck. This does not mean that collective and individual rights are irreconcilable. Decisions made under the Optional Protocol to the ICCPR and General Comments interpreting the scope of the ICCPR by the United Nations Human Rights Committee in relation to Article 27 of the Covenant, for example, provide guidance on how this contest between collective and individual rights should be resolved.

In relation to Article 27 of the ICCPR, the Human Rights Committee has noted that there is positive obligation on States to protect minority group rights and cultures. The Committee has also placed limits on those measures that can be recognised. So while it acknowledges that positive measures by States may 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 practise their religion, it also notes that 'such positive measures must respect the (non-discrimination provisions of) the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population'.

Similarly, the Committee notes that 'none of the rights protected under Article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with other provisions of the Covenant'. This includes, for example, Article 6 (the inherent right to life); Article 7 (torture or cruel, inhuman or degrading treatment); and Article 23 (requirement of free and informed consent for marriage). And in relation to Article

3 of the Covenant (equality between men and women), the Committee has observed that:

Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes... States should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights... The rights which persons belonging to minorities enjoy under Article 27 of the Covenant in respect of their language, culture and religion do not authorise any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.

The Committee has also expressed concern about domestic violence, including forced sexual intercourse, within the context of marriage.

The provisions of the ICCPR are also to be read consistently with the interpretation of similar relevant rights under other conventions. So, for example, Article 27 alongside the guarantees of non-discrimination, equality of men and women, and equality before the law should be read consistently with related provisions of the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The Committee on the Elimination of Discrimination Against Women has noted that gender-based violence is a form of discrimination within the meaning of CEDAW and that States are required to act to protect women against violence of any kind occurring within the family, workplace or any other area of social life and that traditional attitudes which subordinate women, including forced marriages, will breach that Convention. There are further examples that could be used in relation to the Convention on the Rights of the Child and other international treaties.

The specific rights of minorities and indigenous peoples that have been recognised under Article 27 of the ICCPR are therefore qualified by the requirement that their enjoyment shall not prejudice the enjoyment by all persons, including individuals from within the group, of all universally recognised human rights and fundamental freedoms. The commentaries of the international treaty committees, particularly the Human Rights Committee, demonstrate that human rights standards are capable of being applied in a manner that appropriately balances the rights of individuals within Aboriginal

communities – such as women and children – with those of the community as a whole.

So the issue is not whether Aboriginal customary law can be recognised in accordance with human rights standards but how to guarantee this. And this issue of how is in my view a very difficult one. This is where we need further debate and research – not on the issue of whether we should provide recognition but on how we can provide appropriate recognition. Again, I think that the submissions that HREOC made to the NT inquiry provide extensive guidance for how to go about this process and the underlying principles that ought to be observed by governments.

I will give you one example. We recommended to the NT inquiry that a provision be inserted into the Sentencing Act that states that the judiciary must determine in all matters whether customary law is a relevant consideration, and if so, to provide appropriate weight to customary law and to apply it consistently with human rights. We proposed this as an alternative to a provision that states that customary law does not apply in specifically elaborated circumstances as generally it will be difficult to elaborate what those circumstances are with sufficient clarity and without limiting judicial discretion. The benefit of framing the provision in terms of positive recognition of customary law should be clear, as should the benefits of having the judiciary consider such recognition in all cases in order to provide greater consistency of application of customary law. It would certainly be unfortunate if the only references to Aboriginal customary law that emerged were excisions of where such law could not be recognised, or forms of non-recognition.

I want to now make some practical comments about customary law processes and then to briefly refer to the report of the Northern Territory Law Reform Committee, which came out two weeks ago.

At a practical level, it is important to note that there are a range of formal processes recognising customary law currently in place across Australia, as well as informal recognition by the judiciary in some circumstances. Formal processes include community justice groups in Queensland, as trialled in Hopevale, Kowanyama and Palm Island from 1993; the law and justice committee process trialled in Lajamanu, Ali-Curung and Yuendumu in the Northern Territory; the Ngunga Court and most recently the Ngunga Youth Court in South Australia; Circle Sentencing in NSW;

the Koori Court in Victoria and Murri Court in Queensland.

Many of these processes have emerged out of negotiations between Indigenous communities and government and out of a partnership approach. Many are small trials which have been expanded when the initial trials have proven successful. This has been an important factor, as these trials are often more resource intensive than usual processes due to the need for extensive consultation, education and training in the community, customisation of programmes to the individual community needs and the consequent higher cost. Formal schemes that are not resourced or developed properly will be counter-productive and will potentially undermine important considerations such as the provision of adequate human rights protection.

It is also important to note that many of these schemes take an expansive view of what customary law is. Customary law evolves. It changes to the circumstances of the community exercising it, and in some cases it can be revived (if only partially). It is a reflection of living, breathing and changing Aboriginal cultures. Attempts to consign customary law to an earlier time will result in the strengths of many Aboriginal communities being excluded from devising solutions to difficult, intransigent problems. It will only lead to a continuation of what can only be described as the utterly hopeless and ineffective approaches that exist today.

The fact that Indigenous involvement in sentencing processes is taking place in urban areas in the most settled eastern sea-board states, such as through the Koori, Ngunga and Murri Courts and circle sentencing, demonstrates the vitality and evolving nature of customary law. The first year review of circle sentencing in NSW acknowledges that the concept emerged from the desire of the community in Nowra to strengthen its system of customary law. It is fundamentally a customary law response, though classically it might not be described as such by some people.

Fundamentally, what these processes do is recognise the role of the Indigenous community in devising solutions to issues being faced by the community. For too long there has been insufficient attention to high rates of Indigenous victims of crime. The reality that the only solution to such victimisation that is recognised and implemented through the legal system is to lock up the offenders has split Aboriginal communities, and often led to under-reporting of crime, or tolerance of crimes that are in

fact intolerable, such as family violence. That is why my first recommendation to the NT inquiry was that the government acknowledge the importance of recognising customary law in order to develop and maintain functional, self-determining Aboriginal communities and that such recognition would benefit all members of the community by creating safer communities.

Despite these initiatives that I have mentioned, however, it is clear that there is still only limited recognition of customary law, that it is generally limited to the sentencing stage of the process rather being recognised as playing a role through a more holistic approach to community justice, community safety, crime prevention and healing and restorative justice; and that it is uneven in its application across the country. This last point is largely inevitable in a federation where criminal law is by and large a state and territory responsibility. But it demonstrates that we still have a long way to go.

Let me now conclude with some brief comments on the NT Law Reform Committee's recent report on customary law in the Territory. The report came out two weeks ago. The Committee has described its report as 'confined to practical steps which can be taken immediately'. The report correctly predicts criticism of the Committee's confined and limited approach as 'unwelcome gradualism'.

The report contains a number of important findings. It finds that customary law is being widely practised across the Northern Territory. It recognises the ability of customary law to assist with law and justice issues in communities and to assist positive outcomes with respect to social well-being. It finds against codification of customary law, preferring to leave interpretation and evidence of what is customary law to Indigenous communities. It therefore seeks to focus on how to empower Indigenous communities to implement customary law. This is within limitations of respect for human rights and compliance with the criminal code, but with full acknowledgement that Aboriginal communities are best placed to define their own problems and solutions.

The Committee's approach is general in scope and based on incremental change which seeks to create small scale success by building on existing Indigenous community efforts and then multiply it. These are important findings and practical realities. Ultimately, they are let down by the report being far too general in some parts and with some of its recommendations being quite underwhelming. There is also disappointingly very

little reference in the report to any submissions to or consultations undertaken by the Committee during the course of their inquiry. This would have provided some more detailed options for consideration by the NT government.

As a result it is no wonder that there have been some calls from within the Territory for a national inquiry into customary law. I personally, however, do not favour such an inquiry. We are not looking for justifications as to whether customary law should be recognised and we are not looking for nationally applicable approaches. It is time to provide greater support at the ground level in communities to articulate what communities want and where they want to go, and to then assist them to develop the skills and capacity to get there. The NT inquiry, though extremely limited in scope, provides the tools to do this. The efforts of the Northern Territory government, as demonstrated by the Indigenous economic forum that it held last year and its indigenous governance conference of last month, demonstrates that the type of change envisaged by the Law Reform Committee is consistent with its current approach and is feasible. It is up to communities in the Territory, to ATSIC and ATSI, to AJAC and to the Northern Territory government to simply get on with the job.

As I stated in my submission to the Northern Territory inquiry:

there is currently a crisis in Indigenous communities. It is reflected in all too familiar statistics about the over-representation of Indigenous men, women and children in criminal justice processes and the care and protection system; as well as in health statistics and rates of violence. Ultimately, one thing that these statistics reflect is the breakdown of Indigenous community and family structures. They indicate the deterioration of traditional, customary law processes for regulating the behaviour in communities. This is due in part to the intervention of the formal legal system through removal from country, historical lack of recognition of traditional rights to country and non-recognition of customary law processes as an integral component of the operation of Aboriginal families and societies in the Northern Territory...

Customary law should be treated by the Government as integral to attempts to develop and maintain functional, self-determining Aboriginal

communities. Customary Law is therefore more than a mitigating factor in sentencing processes before the courts. It is about providing recognition to Aboriginal customary processes for healing communities, resolving disputes and restoring law and order.

Thank you.

The Recognition of Aboriginal Customary Law and International Law developments

Megan Davis

I'd like to begin by acknowledging the Gadigal People, the traditional owners of this land.

I would like to thank the ILA, in particular Greg Marks, for inviting me here to speak. I am honoured to deliver this paper alongside Bill Jonas. I, like many indigenous people, admire Bill, who has worked tirelessly for my people as the Aboriginal and Torres Strait Islander Commissioner and the Social Justice Commissioner.

I too was surprised by the interest in the seminar and indeed the number of calls I had received from anthropologists and academics who had been working in the field for decades, inquiring as to what new and innovative thinking or strategy Bill Jonas and I were unveiling here today.

Well, it was a bit embarrassing to keep saying we aren't really unveiling anything, but this seminar is an excellent opportunity to provoke some comment and exchange ideas and opinions on this complex issue.

Perhaps the renewed interest has come on the back of the Northern Territory and Western Australian inquiries into customary law²¹ and the media publicity of the Jackie Pascoe controversy last year where customary Aboriginal law and human rights were big news items. Perhaps it is not renewed interest at all but an issue where many in the community would like to see some concrete developments. It will be interesting to later on hear people's reasons for being here.

Just briefly, my own interest in the recognition of customary Aboriginal law or Aboriginal law

²¹ See Law Reform Commission of Western Australia, *Aboriginal Customary Laws – Discussion Paper*, 2005; Northern Territory Law Reform Commission, *Towards Mutual Benefit*, Report on Inquiry into Aboriginal Customary Law 2003.

is, apart from being Aboriginal (Wakka Wakka), related to my work in international human rights law. For about six years I have been working in the area of international human rights and indigenous people, as a law student with the Foundation of Aboriginal Islander Research Action in Brisbane, as a UN Fellow in Geneva, and now as an academic. This is a perennial issue for Aboriginal people and an unresolved one.

In terms of substantive work, this year has seen a lot of interest in the intersection of Aboriginal customary law and international human rights law. Like Bill, I have been recently overseas (about a month and a half) and both times I was presenting papers on how Aboriginal customary law intersects with the Australian legal system. The first workshop in Ottawa, with the World Intellectual Property Organisation (WIPO), looked at ways to recognise indigenous traditional knowledge including potential *sui generis* models. Interestingly, my brief from WIPO was to survey Australian case studies that WIPO provides as examples of the way in which Aboriginal customary law can be recognised or accommodated within a common law system without the creation of a *sui generis* model. The second workshop was in Spain, at the Onati Institute of the Sociology of Law, looking at feminist or women's perspectives of international law and globalisation in the new millennium. Here, I delivered a paper on the 'Globalisation of International human rights law and its impact upon Aboriginal women'.

From intellectual property rights to the rights of women, the potential scope of recognition of Aboriginal law is wide. It moves beyond the popular image of customary law as it relates to criminal law and criminal justice. (Indeed I remember at the University of Queensland Law School typically Queensland discussions of Aboriginal customary law rarely moved beyond 'spearing' and 'payback').

What is Aboriginal custom?

The right to manifest, practise, develop and teach custom (as provided in the UN Draft Declaration

on Indigenous Peoples Rights, for example) is an important right. The protection of customs, traditions, language and ceremonies is vital for all Aboriginal people in Australia. It is key to the survival of indigenous cultures globally.

In Australia, it is as relevant for those Aboriginal people who continue to practise Aboriginal law in rural and remote areas as it is for those Aboriginal people whose custom and tradition is essentially a modern evolving construct, a hybrid of experience, of culture and of mythology that is the inevitable result of displacement, of systemic dispossession policies of successive state and federal Australian governments.²²

The content of Aboriginal law is as diverse as Australia's many Indigenous cultures are diverse and vibrant expressions of Aboriginality (I acknowledge too that this term is controversial for many Aboriginal people).

Human rights and Aboriginal customary law

As I alluded to before, the most vivid and most recent example of the public debate on the intersection of Aboriginal customary law and the legal system came with the decision in *Jackie Pascoe v Peter William Hales*,²³ particularly the comments made by Justice Gallop. Equally engaging were the comments of Justice Riley in *Hales v Jamilmira*.²⁴

The debate was quite polarised, with some human rights lawyers arguing that Aboriginal customary law must be 100 per cent consistent with international human rights norms and that it must evolve to reflect those norms. There were other arguments that human rights are only a relatively recent concept when compared to Aboriginal culture and that:

on such issues Australia's legal system may simply have to bite the bullet and go against the norms of international human rights. Human rights are essentially a creation of the last hundred years. These people have been carrying out their law for thousands of years.²⁵

²² For example the impact of extensive control policies: *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qd); *Aboriginal Protections Act 1909* (NSW); the *Northern Territory Aboriginals Act 1910* (SA); the *Aboriginals Ordinance 1911* (NT); the *Aboriginals Ordinance 1918* (NT); the *Welfare Ordinance 1953* (NT); the *Aboriginal and Torres Strait Islanders Affairs Act 1965* (Qd); the *Aborigines Act 1911* (SA); the *Aborigines Act 1934* (SA); the *Aboriginal Affairs Act 1962* (SA); the *Aborigines Protection Act 1886* (WA); the *Aborigines Act 1905* (WA); the *Native Welfare Act 1963* (WA).

²³ Northern Territory Supreme Court 8 October 2002, http://www.nt.gov.au/ntsc/doc/sentencing_remarks/archives/Pascoe_08102002.html.

²⁴ [2003] NTCA 9.

²⁵ Quoted in David Fickling, 'Bridging whitefella law and Aboriginal clan justice', at <http://www.eniar.org/news/fickling3.html>.

At the time, some aspects of the media also investigated the notion of distorted customary law or *bullshit law* that is sometimes used in mitigation of sentencing for criminal offences of violence and sexual abuse against women. On Radio National's, the Law Report, for example, one commentator argued that the Australian legal system was an adversarial system and therefore lawyers are entitled to use any arguments at their disposal to get the client off.²⁶

So, the common question that is asked by international lawyers is: how can aspects of Aboriginal law be reconciled with human rights norms, and, more commonly, how do you protect the rights of women and children or reconcile group rights with the rights of the individual?

Well, the international jurisprudence already shows that this can be done without derogating from human rights norms and must be done with appropriate safeguards. Indeed, it is surprising to see that when controversies do occur like the Jackie Pascoe controversy, the public discussion goes back to 'Step One': can Aboriginal law be recognised consistently with human rights?

Yes it can.

'Step Two', the stage at which Australia, as a nation that has lived with Aboriginal people for over 214 years, should be, is the debate on how you do it. And that's where the recommendations and submissions to the Northern Territory inquiry, including the excellent submissions of both the HREOC Aboriginal and Torres Strait Islander Social Justice Commissioner and the HREOC Sex Discrimination Commissioner provide important strategies for this to be done.

My brief today was to look at the international human rights law framework relating to the practice of Aboriginal customary law within States. I think Bill has successfully addressed the reconciliation of individual and group rights and the notion of special measures. I also agree with him that the time for 'Step 1', in terms of still asking 'can Aboriginal customary law be recognised in accordance with human rights

standards?', has really passed. We are now at step 2, how can we provide that recognition, how do you guarantee that it is consistent?

Indigenous people at the United Nations

By way of general background, the past three decades have seen indigenous peoples make enormous inroads into the consciousness and processes of the United Nations and indeed international law.

Through access to the UN, and with the assistance of the UN, indigenous peoples have been able to highlight the injustices that have been suffered and the inequity that has been entrenched as a result of successive waves of imperialism, colonisation and now trade liberalisation. (Indeed my current research project gauges the positive and negative impact of trade liberalisation upon indigenous peoples.)

The principal body of human rights treaties contain important principles relating to the treatment and rights of indigenous peoples within states. There is a distinct and growing body of jurisprudence in international human rights law that specifically engages with indigenous peoples. The employment of human rights discourse in the relationship with the State has been a powerful and effective tool.

The institutional framework of United Nations mechanisms specifically dealing with indigenous issues includes:

- ♦ The United Nations Working Group on Indigenous Populations²⁷
- ♦ Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people²⁸
- ♦ Permanent Forum on Indigenous Issues²⁹
- ♦ The Human Rights Commission Working Group on elaborating a draft Declaration on the Rights of Indigenous Peoples.

As I have stated all of the principal human rights treaties elaborate standards that are relevant to indigenous peoples.³⁰

²⁶ The Law Report – see <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s706299.htm>.

²⁷ ECOSOC resolution 1982/34.

²⁸ Commission on Human Rights resolution 2001/57.

²⁹ ECOSOC resolution 2000/22.

³⁰ Including the Universal Declaration on Human Rights; International Covenant on Civil and Political Rights; International Covenant on Economic Social and Cultural Rights; International Convention on the Rights of the Child; International Convention on the Elimination of All Forms of Discrimination against Women; International Convention on the Elimination of All Forms of Racial Discrimination; International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; UN Draft Declaration on the Rights Indigenous Peoples; and ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No.169).

International Covenant on Civil and Political Rights (ICCPR)

Article 27³¹ is the oft-quoted ICCPR provision that protects the right of indigenous peoples to maintain culture and language and religion where it differs from the majority group (so it's a protection and different to a right to be free from discrimination on the grounds of language etc). The Human Rights Committee jurisprudence on Article 27 has frequently dealt with indigenous issues.³²

It emphasises positive measures. Such protection must be justifiable as being 'directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned'.³³ They are rights that cannot be practised inconsistent with other ICCPR rights.

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

The Committee on the Elimination of Racial Discrimination has called on parties to:

*Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.*³⁴

The Convention on the Elimination of Discrimination against Women (CEDAW) – customary law and women's rights

The *Convention on the Elimination of Discrimination against Women* (CEDAW) requires States Parties to take measures to facilitate the modification of traditional cultural practices in the realisation of women's human rights:

States Parties shall take all appropriate measures ... to modify the social and cultural patterns of conduct of men and women, with a view to achieving the

*elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.*³⁵

The United Nations Development Fund for Women (UNIFEM) has emphasised the need to '...replace harmful customs with new practices that respond to current needs'.

Advocates of gender equity must recognize and challenge the social acceptance and perpetuation of harmful traditional practices in all cultures. Historically, religion and culture have proven extraordinarily adaptive; most belief systems have been revised over time to accommodate new understandings and new values that emerge in human society. Numerous cultures offer examples of traditions, including customs harmful to women, that have changed or died out. For generations, women (and some men) in Sudan endured mutilation to acquire face marks, a traditional sign of beauty as well as an indicator of tribal affiliation. In recent years, this tradition has rapidly disappeared. The binding of women's feet in China is another example of a nearly universal custom that is no longer practised.³⁶

In considering the relationship between protecting minority rights and the rights of women to equality, the Human Rights Committee has confirmed the importance of upholding women's rights. The Human Rights Committee has also noted that:

*Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes... States should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights...*³⁷

³¹ ICCPR, Article 27: *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

³² Human Rights Committee General Comment 23 para 7 in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies UN Doc HRI/GEN/1/Rev5 2001:

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. ... The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

³³ Human Rights Committee, General Comment 23 – Article 27, para 9.

³⁴ General Recommendation XXIII on the Rights of Indigenous Peoples para 4(e), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies UN Doc HRI/GEN/1/Rev5 2001.

³⁵ Convention on the Elimination of All Forms of Discrimination Against Women Article 5(a).

³⁶ United National Development Fund for Women (UNIFEM) "Women, Culture and Traditional Practices" CEDAW Advocacy Kit [gopher://gopher.undp.org:70/00/unifem/poli-eco/poli/whr/cedaw/cedawkit/wctp](http://gopher.undp.org:70/00/unifem/poli-eco/poli/whr/cedaw/cedawkit/wctp).

³⁷ Human Rights Committee General Comment 28 para 5 in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies UN Doc HRI/GEN/1/Rev5 2001.

Thus:

The rights which persons belonging to minorities enjoy under Article 27 of the Covenant in respect of their language, culture and religion do not authorise any State, group or person to violate the right to the equal enjoyment by women of any Covenant rights, including the right to equal protection of the law.³⁸

According to the HREOC Sex Discrimination Commissioner, international law hasn't adequately addressed customary law and international human rights:

While it is clear that there are cases internationally where women's individual human rights and minority rights are in conflict, international human rights law has yet to consider this issue in relation to Aboriginal Customary Law. Aboriginal Customary Law may be as diverse as Aboriginal communities and there can be disagreement as to what constitutes Aboriginal Customary Law. In these circumstances, a contextual approach to resolving apparent conflict that acknowledges the individual circumstances involved is more likely to resolve potential conflicts.³⁹

Convention on the Rights of the Child (CROC)

Article 30 of this widely ratified convention provides 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.

International Labour Organisation 169

This convention provides in respect of indigenous peoples and customary law as follows:

Article 8:

[Indigenous peoples] shall have the right to retain their own customs and institutions, where

these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights.

Article 9(1) provides that, subject to the same limitations:

the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.

UN Draft Declaration on the Rights of Indigenous Peoples

An open-ended inter-sessional Working Group on the Draft Declaration was established in 1996. For nine sessions this Working Group of the Commission on Human Rights struggled to establish consensus on the text of an international declaration elaborating the rights of Indigenous Peoples.⁴⁰ The text of the Draft Declaration originated from within the standard setting mandate of the United Nations Working Group on Indigenous Peoples (UNWGIP).⁴¹

It is an innovative text enumerating controversial rights such as the right to self-determination, right to land and resources (including restitution and compensation) and collective rights. The text was drafted in consultation with indigenous peoples who had participated in its development through the Working Group on Indigenous Populations since 1985.⁴²

Australian law and practice

There have been examples of the Australian common law accommodating aspects of customary law particularly in the field of intellectual property. While the situation regarding indigenous intellectual property and protection of traditional knowledge is far from resolved, there are examples of the courts finding traditional custodians as having an equitable interest in artwork where there had been a copyright infringement which entitled the traditional custodians to equitable relief.

In the *Bulun Bulun* case⁴³ the Federal Court found that traditional custodians in certain

³⁸ Human Rights Committee General Comment 28 para 32 in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies UN Doc HRI/GEN/1/Rev5 2001.

³⁹ http://www.humanrights.gov.au/sex_discrimination/customary_law/submission.html#14.

⁴⁰ S C Res 1994/45 Draft United Nations Declaration on the Rights of Indigenous Peoples.

⁴¹ ECOSOC Res 1995/32.

⁴² For survey of its developments see: Sarah Pritchard, 'Working Group on Indigenous Populations: mandate, standard-setting activities and future perspectives' in Sarah Pritchard (ed) *Indigenous Peoples, the United Nations and Human Rights* (1998) 40.

⁴³ *John Bulun Bulun v R & T Textiles Pty Ltd* (1998) 41 IPR 513.

circumstances have a fiduciary obligation to protect ritual knowledge in artistic work from being exploited. The court found that:

the Aboriginal peoples did not cease to observe their *sui generis* system of rights and obligations upon the acquisition of sovereignty of Australia by the crown...[T]he question for the court is whether those Aboriginal laws can create binding obligations on persons outside the relevant Aboriginal community.⁴⁴

In determining how customary law intersects with the common law of Australia the court went onto say that:

The conclusion that in all the circumstances Mr Bulun Bulun owes fiduciary obligations to the Ganalbingu people does not treat the law and custom of the Ganalbingu people as part of the Australian legal system. Rather it treats the law and custom of the Ganalbingu people as part of the factual matrix which characterise the relationship as one of mutual trust and confidence.⁴⁵

It is interesting to note that the Australian government has used these cases and many others to demonstrate to the TRIPS (Trade-related Aspects of Intellectual Property Rights) Council how the existing intellectual property systems can provide protection for traditional knowledge. In 2000–2001 WIPO undertook a major investigation of Australian intellectual property laws and how existing systems can be used. According to the Australian government, in its submission to the TRIPS Council, before there can be a discussion on a *sui generis* system, full account must be made of the progress of the existing legal framework and its evolution toward the protection of traditional knowledge. It is the author's contention that those cases are simply examples of when matters have reached the court and are an exception to the rule. While examples of *obiter dicta* have assisted indigenous people in advocacy for reform, the scope for judicial creativity is very limited and it is the role of government to legislate to protect these unique rights. It is the nature of Australia's representative government and separation of powers that the evolution of such reform won't come from the courts. The 'judicial creativity' Australia refers to in the report must become legislative creativity.

Conclusion

The Australian legal system has recognised the existence of Aboriginal customary law in respect to our property rights, or native title. This was made clear by Australian High Court in *Mabo (No 2)* which held that the nature and content of native title will be shaped by 'the laws and customs' of the traditional landholders. This fundamental recognition of customary law was directly influenced by the developments of international human rights law, in particular the international prohibition of racial discrimination as exemplified by the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) which Australia signed in 1966. The High Court's rejection of Australia as *terra nullius*, empty of or without peoples governed by a system of set of laws, was consistent also with the decision of the International Court of Justice in the *Western Sahara* case of 1975.⁴⁶

The acquisition of Australia by way of 'peaceful settlement' as opposed to cession (by way of treaty agreement) or conquest, resulted in the domestic law completely denying Aboriginal customary law and jurisdiction. Although there was some early attempt by the New South Wales judiciary to draw upon United States case law to recognise that Aboriginal people were a sovereign people 'entitled to govern themselves according to their own laws and customs', this jurisprudence was not accepted by the domestic legal system.⁴⁷ In the United States, the limited recognition of Indigenous sovereignty has meant also recognition of customary law, as illustrated by the Navajo Tribal Court system, which incorporates a 'Peacemaker' system drawing on customary law.

The growing body of law relating to Indigenous peoples' international human rights can provide the necessary legal foundation in Australia for the recognition of customary law.⁴⁸ In addition to the ICERD, as discussed above Australia is also a binding signatory to the ICCPR, where Article 27, as noted above, requires States to respect the culture of Indigenous peoples. Indigenous peoples rights to self determination, at least of an 'internal' nature, has also been recognised by the Human Rights Committee. The manner in which these rights can be domestically implemented can clearly include the recognition of customary law.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ [1975] ICJR, at 39.

⁴⁷ See also *Coe v Commonwealth (No 2)* (1993) 118 ALR 193; *Walker v New South Wales* (1994) 182 CLR 45

⁴⁸ For example Articles 8 and 9(1) of ILO Convention 169, as above.

Indigenous Peoples and Sovereignty

The third seminar in the series was held on Wednesday 10 November 2004 on the topic of *Indigenous peoples and sovereignty – does sovereignty mean secession?* The seminar was chaired by Greg Marks, Convenor of the Indigenous Rights Committee of the ILA (Australian Branch), who also provided introductory comments. Papers were presented by the Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Mr Tom Calma, and Mr David Ritter, then Principal Legal Officer, Yamatji Marlpa Land and Sea Council and Visiting Fellow, Law School, University of Western Australia.

Papers presented at the seminar:

Introductory remarks

Greg Marks

It is customary now to acknowledge, in a forum such as this, that the land on which we stand, or on which this building stands, is Aboriginal land. This is an entirely appropriate acknowledgement.

But such a simple formulation does not take us very far and indeed its potential for glibness or for providing an element of parading one's enlightened consciousness can cover over the real issues – who owned the land when Europeans arrived? Who now owns the land? What are the implications of such ownership? And this, of course, is a question wider than property or real estate law – it is not just who owns parcels of land in terms of proprietorship, although this a central consideration. Rather, it is who owns the total extent of the land, that is the territory in question, in terms of control and decision-making. It is ownership as the constituent of sovereignty.

If we look at what happened to the Aboriginal people of this area we see a disaster that unfolded quickly despite the apparent good intentions of Governor Phillip. It was a disaster not just of misunderstandings and cross cultural confusion. It was a disaster inherent in the decision to occupy the land of another people. The contradiction between the humane intentions of the British and the expropriation of the land belonging to another society was not recognised. As Ian Jacobs in his *History of the Aboriginal Clans of Sydney's Northern Beaches* observes:

In hindsight it seems quite bizarre that the well meaning and well intentioned Phillip was deliberate in his attempts to establish friendly relations when his purpose was to secure land from its traditional owners.⁴⁹

Here, I think, we see the working of the concept of *terra nullius* in practical terms. The British did not see the legal rights of the inhabitants, rights which it can be argued are not merely moral rights but rights which have been recognised in the law of nations going back over many centuries.

The frontier in Australia is very recent. This is easily forgotten living in the midst of a complex, modern and largely urban society. In a world of rapid technological progress, intense engagement at the global level, and the increasing sophistication and cosmopolitanism of Australia, we can readily lose sight of the fact that the frontier is only a couple or a few generations ago. Take, for example, the life of Olive Pink, an eccentric Daisy Bates type character who lived and worked with Aboriginal people for a long period in Central Australia. When she camped to the north west of Alice Springs with the Walpiri in the 1930s to undertake ethnographic studies it was for many of these Warlpiri either a first or a very early contact situation, and traditional life had scarcely been touched by the European intrusion into their lands then getting underway.⁵⁰

My own grandmother was born on a station in northern NSW and was cared for and looked after by traditional Aboriginal people – one couple in particular. She was an eyewitness to many of the events later re-told by Thomas Keneally in his

⁴⁹ Jacobs, Ian, *A History of the Aboriginal Clans of Sydney's Northern Beaches*, Northside Printing 2003, p 27.

⁵⁰ Markus, Julie, *The Indomitable Miss Pink – A Life in Anthropology*, UNSW Press, 2001.

book *The Chant of Jimmy Blacksmith*. At home we often heard about those tragic events from our grandmother, long before Thomas Keneally heard and retold the story.

So, the frontier is close to us in Australia, almost within living memory. Thus questions of sovereignty – whose land it was, how it came to be taken over and on what terms, and whether there are continuing claims to some sort of sovereignty that can stand up in law, domestic or international, these are questions that arise out of our immediate past. The legacy of the frontier remains highly contested, and the resolution of these issues remains central to Australia's legitimacy and the justice of our legal and constitutional arrangements.

However, the issue of sovereignty of Indigenous peoples has been contested for a long time, since the original European expansion into the New World in the sixteenth century. By what right did Europeans acquire the territories of others, the Indigenous peoples, without their agreement? The question was studied, debated and contested at the very beginnings of international law, especially by Spanish jurists and theologians such as Francisco de Vitoria and Bartolome de Las Casas.⁵¹

The complex issues raised then always centred around the concept of sovereignty. They still do. If we ignore them, they will continue to haunt us. Issues of sovereignty and jurisdiction, both in terms of historical grievances on the part of Indigenous peoples, and their continuing claims for autonomy, will not go away from the discussion of indigenous rights. This is despite the efforts of many states and their domestic courts to refuse to acknowledge the continuing claims of indigenous people to international status.⁵²

The Australian courts continue to deny outright that there is any continuing Aboriginal sovereignty or law-making capability past the date of acquisition of sovereignty by the Crown.⁵³ Similarly, the courts refuse to recognise that

there is any ongoing responsibility, or fiduciary obligation, in respect of indigenous peoples, arising from the usurping of their ownership and control of their lands. In fact, the Australian High Court characterises the complete destruction of Indigenous sovereignty, and hence of any law-making or self-governance capacity, as a “cardinal fact”.⁵⁴ As per Chief Justice Gleeson and Justices Gummow and Hayne in the *Yorta Yorta* decision, the Court asserts that “there could be no parallel law-making after the assertion of sovereignty”.⁵⁵ Thus, the Indigenous peoples of Australia who suddenly appeared on the legal landscape with *Mabo*, did so on a pretty limited basis. They now had some, vulnerable, property rights. But the door has stayed firmly shut on sovereignty.

Apart from native title, Indigenous Australians have no distinct and inherent rights. They are entirely subject to the vagaries of Australian law – even the international protection that should have been provided by Australia voluntarily ratifying human rights treaties can, it seems, be ignored with relative ease by the Australian Government.

However, others have found a different path. In particular the US Courts and Governments have been able to recognise a form of Indian sovereignty, albeit constrained and limited. The doctrine of Indian tribes as separate nations, domestic and dependent, but nations nevertheless was set out in a trilogy of cases by US Chief Justice Marshall in the early 1830s.⁵⁶ This doctrine remains the basis of relations between Indian tribes and the federal government of the United States of America to this day, and provides Indian tribes with a level of legal rights and self-government unimaginable in Australia. And yet the US shows no signs of falling apart as a result of this recognition of ongoing sovereign rights.

It has been persuasively argued that US law in respect of Indian tribes reflects the doctrines of Indigenous rights argued by Francisco de Vitoria and others in the sixteenth century.⁵⁷ Perhaps de Vitoria provides a conceptual framework for

⁵¹ Marks, G C, “Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de Las Casas” (1992) AYIL 13, pp1-51.

⁵² See Anaya, James, *Indigenous Peoples in International Law*, Oxford University Press, 2nd ed, pp26 -31.

⁵³ For example, *Coe v Commonwealth* (1979) 53 ALJR 403 and *Walker v New South Wales* (1994) 185 CLR 45.

⁵⁴ *Western Australia & o’rs v Ward & o’rs* [2002] HCA 28 (8 August 2002) (“*Miriuwung Gajerrong*”)

⁵⁵ *Members of the Yorta Yorta Aboriginal Community v Victoria & o’rs* [2002] HCA 58 (12 December 2002) per Gleeson CJ, Gaudron, Gummow & Hayne JJ at [44].

⁵⁶ *Johnson v McIntosh*, 21 US (8 Wheat) 543 (1823); *Cherokee Nation v Georgia* 30 US 1 (1831); *Worcester v Georgia* 6 Pet 515 (1832).

⁵⁷ Cohen, F, “The Spanish Origins of Indian Rights in the Law of the United States” (1942) 31 Geo LJ1

dealing with the fact of two peoples sharing the one land. Denying the application of *terra nullius* to the Americas, de Vitoria, in a famous passage, concluded that:

The aborigines in question were true owners, before the Spaniards came among them, both from the public and private point of view.⁵⁸

However, he also allowed for very wide rights for the Spaniards in terms of sociability and trade, going as far as rights of residence and of exploitation of resources. In a way, this was a formulation of a co-existence regime, and although it was at root unjust to the Indians, it nevertheless provided for an on-going Indigenous sovereignty and for sets of legal rights existing side by side with those of the colonists.

Such an attempt to live with and provide a legal framework for the necessary ambiguity of settler societies has barely surfaced in the legal and constitutional framework of Australia. However, Indigenous Australians have discerned the need. Responding to the 10 Point Plan by which the Government of the day proposed to amend the Native Title Act in response to the Wik decision,⁵⁹ Indigenous negotiators advanced an argument for co-existence,⁶⁰ that is for co-existence of legal rights of pastoralists and Aborigines – one land, two owners.

I want to conclude with some brief general observations about the way the concept of *terra nullius* has worked to be the essentially racist justification of colonisation. The Roman law concept, which was the international manifestation of *res nullius*, that is a thing not owned by anyone but available to ownership by the first person to seize it with the requisite intention to become its owner for as long as they controlled it, was shifted by degrees from applying to lands that were genuinely empty, to lands that were in fact occupied, but occupied by so-called “uncivilised races”. These were races allegedly not socially or politically organised. In the words of the American international lawyer Christopher Joyner, speaking in respect of the Americas:

Despite the manifest inhabitation of the land by Indian tribes, European jurists conveniently reasoned that all Indians were barbarians and

savages by instinct, and therefore incapable of self-government.⁶¹

Terra nullius, racism and destruction of a peoples’ sovereignty are intrinsically linked, in Australia as in other former colonies. David Ritter will explore the consequences of *terra nullius* in contemporary Australia in his paper entitled “The Return of the Zombie: *Terra Nullius* in 2004”.

Finally, no matter how these issues are dealt with by domestic courts and governments, sovereignty is, essentially, an international law concept. Since World War II, the rights of Indigenous peoples have re-emerged for consideration, affirmation and development at the international level. Sovereignty’s modern application to Indigenous peoples under international law has largely centred around the Indigenous demand that the international norm of self-determination should apply to them as to other peoples. However, at the international level opposition to Indigenous self-determination by some nations has been strong, apparently because of concerns about fostering secessionism or separatism. Tom Calma’s paper will bring us up to date with relevant developments in the UN system.

Thank you.

Indigenous peoples and the right to self-determination

Tom Calma

I would like to begin by acknowledging the Gadigal people of the Eora nation.

I pay my respects to the Gadigal as a Kungarakan man whose traditional country lies far north from here, up near Darwin. I recognise the relationship of the Gadigal to this land and their ongoing responsibilities to it, under the watch of their ancestors. In other words, I recognise the ongoing dimensions of the sovereignty of the Gadigal to this country.

On behalf of the Human Rights and Equal Opportunity Commission, thank you for joining

⁵⁸ Vitoria, F, *De Indis and De Jure Belli Relectiones*, (1st ed np 1557) reprinted in Scott JB (ed) *Classics of International Law Series*, 1964 (Bates J trans)

⁵⁹ *Wik Peoples v Queensland* (1996) 187 CLR 1.

⁶⁰ National Indigenous Working Group, *Coexistence – Negotiation and Certainty*, Canberra April 1997.

⁶¹ Joyner, C, “The Historical Status of American Indians Under International Law”, 11 *The Indian Historian* No 4, at 31.

us here today at this seminar which we are co-hosting with the International Law Association (ILA). This is the third seminar HREOC has co-hosted with the ILA on international law dimensions of issues facing Aboriginal and Torres Strait Islander peoples. These seminars have come about due to the efforts of Greg Marks of the ILA, with the eager support of the ILA's President, Margaret Brewster. So thank you to both Greg and Margaret for your efforts, and for your introductory comments this afternoon. I would also like to thank David Ritter who has flown over from Perth to join the discussion today.

This afternoon I am going to talk to you about the importance of the letter 'S' in international law. Indigenous peoples – or Indigenous people as governments prefer to refer to us – have been fighting for the letter 'S' in the United Nations for at least thirty years. We have been fighting for recognition in international law that we are a 'peoples'. As we know, one of the fundamental principles of international law is set out in Article 1 of the two international covenants (on civil and political, and economic, social and cultural rights). Article 1 states:

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

Throughout the history of the United Nations, governments have been very careful to ensure that they have not used the words 'Indigenous' and 'peoples' next to each other in a sentence. So for example, the three main Indigenous mechanisms in the UN are called:

- ♦ The Working Group on Indigenous *Populations*
- ♦ The Permanent Forum on Indigenous *Issues*; and
- ♦ The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous *people*.

We are also currently in the International Decade for the World's Indigenous *People*.

On the odd occasion where the term 'Indigenous peoples' has been used, it has been qualified on the basis that the status of Indigenous people remains subject to negotiation. As an example, Article 1(3) of the International Labour Organisation's *Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries* states that:

The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

Another such example is the Durban Declaration of the World Conference Against Racism from 2001. What governments are doing when they make such a qualification, or when they refuse to use the phrase 'Indigenous peoples' at all, is deferring to the ultimate settlement of this issue through another of the processes of the United Nations.

This is through the working group established by the Commission on Human Rights in 1995 and which is rather inelegantly known as the Ad-hoc open-ended inter-sessional working group on the Draft Declaration on the Rights of Indigenous Peoples. I will refer to it as the CHR Working Group for the remainder of this discussion. For ten years now, this working group has been negotiating a Declaration on the Rights of Indigenous Peoples.

There are two key dates relating to the Draft Declaration that will occur later this year. First, the CHR Working Group will meet for the third week of its tenth session from 29 November to 3 December. At the end of that week, the CHR Working Group will have deliberated for 10 years. Under Commission of Human Rights rules, there will be a review of the Working Group's operations, and a decision will need to be taken next March or April to decide whether to extend the working group any further.

The second key date is that the International Decade for the World's Indigenous *People* will end on Human Rights Day, December 10, this year. One of the key objectives of this decade is the adoption of the Draft Declaration on the Rights of Indigenous Peoples and the further elaboration of international standards on Indigenous rights. As you may know, to date through the CHR Working Group process a total of 2 out of 45 articles of the Draft Declaration have reached consensus and have been provisionally adopted. It is clear that when these two key dates come around there will not be a fully agreed and finalised Declaration.

What I want to talk about here is the nature of the debate in this working group on the application of self-determination to Indigenous peoples and some highly significant developments in the Working Group during its two most recent sessions in September 2003 and September 2004 on this issue.

I must confess that coming into the role of Social Justice Commissioner I had heard very negative opinions about the Working Group process. Of course, agreement on only 2 of 45 articles in 10 years with the most recent date of agreement on text being 1996 certainly doesn't leave a favourable impression. But I was quite surprised when I attended the latest session of the Working Group this September at the pace of the deliberations and the atmosphere of goodwill that exists in the negotiations. In light of the challenges that remain for this Declaration, I think it is worth me saying at this point that the negotiations are being conducted in good faith and there remains much hope that a Declaration will eventually come into existence.

So I am *not* describing to you a debate that has no chance of resolution. In fact, as you will see shortly, the debate is currently delicately poised and may even be heading towards consensus on the issue of recognition of a right to self-determination for Indigenous peoples. Before discussing why this is so, however, I will provide a brief overview of the history of the Draft Declaration. A full description of this history can be found in the *Social Justice Report 2002*.

Indigenous peoples' have sought the recognition of their rights in international forums going back to the League of Nations in the 1920s. There are two aspects to this struggle. First, recognition of the place of Indigenous peoples at the negotiating table as sovereign peoples, or the right to participate. And second, the elaboration of the distinct rights of Indigenous peoples, based on the recognition and protection of distinct Indigenous cultures and societies.

It was not until 1982, however, that Indigenous peoples have been able to access United Nations processes with any consistency or in numbers. This was made possible through the establishment of the Working Group on Indigenous Populations (or WGIP). For twenty plus years, the WGIP has fulfilled two functions. It has reviewed developments in the recognition of Indigenous human rights, something which it does on a thematic basis each year. And secondly, it gives attention to the evolution of standards concerning the rights of Indigenous peoples.

It is under this second function of the WGIP that the Draft Declaration on the Rights of Indigenous Peoples emerged between 1985 and 1993. The five independent experts who make up the Working Group engaged in debate with Indigenous organisations and governments in its annual sessions and progressively developed a

Declaration setting out specific issues that they felt required recognition in order to protect the distinct cultures of Indigenous peoples. The Declaration recognises the distinct cultural attributes of Indigenous peoples and the necessity for these to be protected in order for Indigenous peoples to be able to live freely and in equality with other segments of society. This involved recognition of:

- ♦ the spiritual connection of Indigenous peoples to their traditional lands and resources;
- ♦ the specific vulnerabilities of Indigenous peoples, including through economic marginalisation and in times of war and conflict;
- ♦ the particular vulnerabilities of Indigenous women and children; and
- ♦ the need for recognition of the continuing existence of distinct systems of law and governance.

In 1993, the WGIP concluded its work on the Declaration when it inserted into Article 3 recognition that Indigenous peoples have the right to self-determination. The WGIP's Declaration was then adopted by consensus by the Sub-Commission on the Protection and Promotion of Human Rights in 1994. Both the Working Group on Indigenous Populations and the Sub-Commission are, of course, independent expert bodies in the UN human rights system.

In 1995, the Commission on Human Rights established the CHR Working Group to elaborate a Declaration on the Rights of Indigenous Peoples. As a working group of the CHR, this process is a political one involving States or governments. Indigenous peoples can participate in the working group in informal session, but ultimately the process is controlled by the member states. At times there have been heated debates in the Working Group on the adequacy of the participation of Indigenous peoples. And this is an issue that has not been fully resolved.

The specific mandate of the CHR Working Group is to negotiate a Declaration based on the draft prepared by the WGIP and endorsed by the Sub-Commission. So the negotiations take as their basis text that was negotiated by States and Indigenous peoples under the guidance and ultimate decision of the independent experts of the WGIP

The issue of self-determination lies at the core of the Declaration. There are a number of provisions

in the Declaration which relate to this principle. The key ones for explaining the debates are as follows:

Preambular paragraph 14 affirms the fundamental importance of the right of self-determination of all peoples, and preambular paragraph 15 notes that this Declaration may not be used to deny any peoples their right of self-determination. Article 3 then outlines the right of self-determination in the language of the international covenants which I read earlier. Article 31 gives examples of what self-determination might entail and Article 45 ensures that the right of self-determination, and the other rights recognised in the Declaration, are to be applied consistently with the Charter of the United Nations. There are other articles of the Draft Declaration that relate to self-determination, but it is these ones that debates in the CHR Working Group have largely focused on.

It is fair to say that resolving the issue of Indigenous self-determination is the main challenge faced by the CHR Working Group. During the debates on self-determination in the working group to date, very few States have indicated that they can accept the current wording of the Draft Declaration. Most countries have sought to amend the text to safeguard their territorial integrity and political unity from separatist Indigenous movements. The Australian government position until this year was based in concern about separatism and secession, but went further as it opposed the use of the term 'self-determination' at all, and instead sought the Declaration to refer to a right to 'self-empowerment' or 'self-management'.

The United States of America has sought to further limit the application of self-determination to Indigenous peoples to what is termed 'internal' dimensions. And then a few countries, such as the United Kingdom and France, have expressed concern about ensuring that recognition of the rights of Indigenous peoples – including to self-determination – does not threaten the universality of human rights or provide special status to Indigenous peoples.

Indigenous peoples have responded to these concerns by stating that nothing less than the recognition of a full right of self-determination is acceptable. They have argued that the international covenants provide that 'all peoples' have the right of self-determination and that this applies without discrimination. Accordingly, the CHR Working Group needs to ensure that it does not restrict Indigenous peoples to enjoyment of a lesser, and discriminatory, standard of

international law. The USA's position of internal self-determination is rejected outright by Indigenous peoples. Indigenous people also note that there are a number of independent studies through the Sub-Commission, as well as findings and commentaries by the human rights treaty committees which state that Indigenous peoples do constitute 'a peoples' for the purposes of article 1 of the international covenants. Accordingly, they argue that the existence of the right of self-determination for Indigenous peoples does not depend on its recognition in the Draft Declaration. This is another reason why Indigenous peoples are concerned that any restrictions on the right would be discriminatory.

This is a shorthand description of an extremely complex debate but it is these issues that have dominated the debates on self-determination in the Draft Declaration process. These debates have been very extensive in the 2003 and 2004 sessions of the CHR Working Group, and we are starting to see a convergence of the views of States and Indigenous peoples on the principle. The central issue here is the territorial integrity and secession argument. So in order to comment on this, let me describe to you the very significant developments on this issue in the 2003 and 2004 sessions of the Working Group.

The 2003 session of the Working Group focused on a proposal by the Nordic countries – Norway, Denmark, Finland, Iceland and Sweden – relating to self-determination. Part of this proposal involved amending the text of the Draft Declaration to address the concerns of States as well as those of Indigenous peoples. That proposal involved maintaining Article 3 of the Declaration in its original form and amending preambular paragraph 15 of the Declaration to include language from the 1970 *Friendly Relations Declaration* which would protect against the dismemberment of the territorial integrity or political unity of a State.

The American Indian Law Alliance (or AILA) conducted a detailed analysis of this proposal in which they concluded that it may inadvertently create a discriminatory standard for Indigenous peoples by subjecting the entire draft Declaration to the principle of territorial integrity. As a consequence, they proposed an alternative amendment to preambular paragraph 15 as well as preambular paragraph 14. This alternative text would, in their words, 'ensure a coherent approach that is consistent with international law' and 'meet the basic objectives of the Nordic States' proposal'. They stated:

We are prepared to consider an amendment to the preamble to (the Declaration) so as to *acknowledge* that international law principles applicable to the right of self-determination may be freely invoked in the future. However, it would be misleading and unjust to highlight in (the Declaration) solely the principle of territorial integrity. This could erroneously imply that the principle of territorial integrity has some special status or significance above a host of other international law principles – such as democracy, rule of law, respect for human rights, non-discrimination and justice – which all apply in the context of self-determination.⁶²

Accordingly, AILA proposed the following amended text for pp14 and 15. The amendment to pp14 would ensure the equal application of the right of self-determination to Indigenous peoples, and pp15 would refocus the text from explicit guarantees of territorial integrity to a more general, and broader, application of international law standards. The AILA proposal is a critical intervention in the CHR Working Group. This is because it is the first time that an Indigenous organisation has proposed a substantive change to the text of the Draft Declaration. The importance of this was acknowledged by States and has been a catalyst for the debate in the 2003 and 2004 sessions.

Prior to the 2004 session of the Working Group, the Nordic States were joined by New Zealand and Switzerland in a new proposal for the Declaration. This built on the debates in the 2003 session and proposed new language for a number of articles, including those relating to self-determination. This new language on self-determination takes into account the AILA proposal from 2003 by building on their proposal for preambular paragraph 15.⁶³ It also takes up the concerns of States by explicitly incorporating into the body of the Declaration, in Article 3, language relating to territorial integrity.

This new language formed the starting point for discussion in the 2004 session of the Working Group. The new language in Article 3 reflects the Friendly Relations Declaration and is also drawn directly from the Vienna Declaration of the World Conference on Human Rights in 1993.

As noted, it introduces to the draft Declaration explicit language on territorial integrity. Prior to this language being considered in the most recent session of the Working Group, Indigenous peoples gave consideration to alternative language on self-determination. This resulted in a further new proposal, which was put forward on behalf of most Indigenous representatives attending the meeting.

This proposal sought to build on the AILA proposal from last year by proposing a slightly reworded version of preambular paragraph 15, retaining Article 3 in its original form (that is, without explicit language on territorial integrity) and by adding a new preambular paragraph which would provide positive recognition to other principles of international law that are relevant to self-determination and which had been referred to by AILA in their submissions in the 2003 meeting. In introducing this proposal, Indigenous people provided an explanatory note as to the intention of the amendments. It reads in part, that the purposes of the amendments, which are to be read together, includes:

- ♦ to achieve consensus among States and Indigenous peoples, by accommodating both State and Indigenous concerns in regard to the fundamental human right of self-determination;
- ♦ to retain the original language of article 3... consistent with principles of equality and non-discrimination;
- ♦ to affirm that, to the extent provided in international law, States will continue to have the freedom to invoke any principle of international law, including the principle of territorial integrity, in relation to the exercise of self-determination;
- ♦ to avoid any explicit reference to the principle of territorial integrity in the (Declaration), in view of the growing abuses of this principle in different regions of the world; and
- ♦ to encourage harmonious and cooperative relations between States and Indigenous peoples, based on universal and mutually reinforcing principles and values of international law.⁶⁴

⁶² American Indian Law Alliance, *Nordic States' proposal on self-determination: Indigenous concerns and a proposed alternative*, 15 September 2003.

⁶³ Note: The AILA proposal was added to by Guatemala and Mexico during the 2003 session and resulted in a revised version which has been referred to as the Guatemala / AILA proposal. For the purposes of time I have not described the content of this proposal, as it is incorporated into subsequent proposals by Indigenous Peoples and the Nordic countries in the 2004 session.

⁶⁴ Inuit Circumpolar Conference, *Indigenous peoples proposed amendments relating to the right of self-determination – explanatory note*, 20 September 2004.

Again, the introduction of such a proposal and an explanatory note that explicitly details the interpretation of international law as it applies to Indigenous peoples in relation to self-determination is highly significant. Now there were a few other proposals made in the September 2004 meeting about self-determination, but at the end of the day the debate has reached a point where we are moving between this proposal of the majority of Indigenous delegations and that of the Nordic countries. The only other substantive proposal which differs from these is a proposal by another Indigenous delegation to include the entirety of Article 1 of the international covenants in Article 3 of the Declaration.

I want to conclude by making some comments about where the debate is at, but before doing that I want to provide you with one more piece of detail about the debate. A very significant development from an Australian perspective was the change in our government's position during the debates at this session. In previous sessions, our government had argued against the principle of self-determination. This year they dropped their opposition to the use of this term, with the proviso that it was appropriately qualified with protections of territorial integrity. The Nordic, New Zealand and Swiss proposal in this year's meeting addresses that concern and so the government were prepared to accept this text or a slightly modified version of it.⁶⁵

So where does this leave us and more importantly what does it mean?

There has been a significant narrowing in the lines of dispute about the right of self-determination as it applies to Indigenous peoples. Most participants in the CHR Working Group, through the positions they have adopted, impliedly or explicitly acknowledge that Indigenous peoples are capable of being recognised as possessing a right of self-determination. These debates have, in my view, moved from being focused on whether Indigenous peoples have a right to self-determination to now focusing on the *nature* and *extent* of Indigenous peoples' right to self-determination.

This is not to say that it is not still contentious. Recognition of self-determination is a vital step in a legal process of decolonising the relationship of Indigenous peoples and States. Some Indigenous peoples see the attempts to impose qualifications of territorial integrity as leading instead to their

re-colonisation or as limiting recognition of their sovereign rights as Indigenous nations.

When the CHR Working Group resumes later this month it will focus on the issue of self-determination. It is likely that the debate will come down to how the principle of territorial integrity is 'captured' by the Declaration. The proposal of Indigenous peoples, with no explicit reference, comes with a clear understanding of how international law operates and how it includes territorial integrity considerations. Some States showed great interest in seeing the explanatory note jointly agreed by most of the Indigenous delegations incorporated into the record of the meeting, so that it may form part of the interpretative materials of the Declaration (or the *travaux préparatoires*) once it is concluded.

The Social Justice Commissioner's Office, along with Australian Indigenous organisations, has endorsed this proposal. It has clear logic and a guarantee of the application of the territorial integrity principle *alongside other principles of international law* through the provisions of preambular paragraph 15 as well as Article 45 (which I only briefly mentioned earlier). In other words, despite the absence of explicit language on territorial integrity, the draft Declaration has a double guarantee of the application of this principle already. But it is a guarantee that is appropriately weighted alongside other, equally important, principles of international law.

What remains to be seen is whether this logic is enough for those States who remain concerned to ensure that there is absolutely no misunderstanding about the effect on their political unity and territorial integrity of the recognition of the right of self-determination for Indigenous peoples. I would argue that more explicit text is unnecessary from an international law perspective. But as Indigenous peoples have known and stated for a long time, this process is one that is primarily about politics and not law. And I think it is a politics of decolonisation – a new version of a process that to date has not been applied to Indigenous peoples.

This is the context in which the upcoming negotiations on the Draft Declaration will take place.

Thank you.

⁶⁵ The government indicated in debates that it was prepared to move the second new proposed paragraph of Article 3, which relates to legitimate action to realise the right of self-determination, to the Preamble.

Postscript

The CHR Working Group met for its eleventh session in November–December 2005 and January–February 2006. By the end of this session consensus had been reached on approximately two thirds of the text of the Declaration. Negotiations continued on self-determination, land and resources, the general provisions and other issues.

The Chairperson of the Working Group submitted his report on the Declaration to the Commission on Human Rights in March 2006. In his report, the Chairperson annexed a revised Chairperson's text for the Declaration. This text includes all language agreed during the negotiation sessions, as well as the Chairperson's own proposals on those remaining articles that were still pending, based on the discussions held during the sessions.

In relation to self-determination, the Chairperson's text maintains Article 3 unamended; moves Article 31 so that it is placed immediately following Article 3 (this identifies self-government and autonomy as a special form of the exercise of self-determination); and preambular paragraphs 14, 15, 15bis and 16 continue to provide interpretative content on self-determination.

The Chairperson states in his report to the CHR that he hopes that his Chairperson's text 'would be considered as a final compromise text'.⁶⁶

The Chairperson's text was then considered at the inaugural session of the Human Rights Council. Indigenous organisations and numerous States pushed for the adoption of the Declaration. On 29 June 2006, this text was adopted by a vote of 30 for, 2 against, 12 abstentions, with 3 states absent.

The Human Rights Council's Declaration on the Rights of Indigenous Peoples will now be considered by the United Nations General Assembly in its 61st session in the latter part of 2006. With the likely passage of the Declaration through the General Assembly, the debate on the entitlement of Indigenous peoples to the letter 'S' will be confirmed once and for all.

The Return of the Zombie: *Terra Nullius* in 2004

David Ritter

Prologue

Thank you to the Human Rights and Equal Opportunity Commission for the support in travelling from Western Australia, to the International Law Association for the invitation to talk and to my employer, the Yamatji Barna Baba Maaja Aboriginal Corporation native title representative body for permitting me to accept.

Introduction

The doctrine of *terra nullius* is once again a matter of public intellectual debate, with recent contributions appearing in *The Financial Review*,⁶⁷ *The Bulletin*,⁶⁸ *The Australian*,⁶⁹ *Quadrant*, Michael Duffy's *Counterpoint*⁷⁰ and Geraldine Doogue's *Sunday Profile*⁷¹ on Radio National. In this paper I discuss this sudden proliferation of noise about *terra nullius* and what it might signify. In order to address the present though, I first want to return to very different days, specifically ten years back in time in November, 1994...

A decade ago I completed my first writing about native title, a critical analysis of the so-called 'rejection of *terra nullius*' in *Mabo*.⁷² I was motivated to write by what seemed to be an extraordinary

⁶⁶ UN Doc: E/CN.4/2006/79, 22 March 2006, para 30.

⁶⁷ B. Attwood, 'Myth, history and the law of the land', *The Australian Financial Review*, Friday 11 June 2004, 6-8, 6 (this article appears expanded and referenced as B. Attwood, 'The Law of the Land or the law of the land?: History, law and narrative in a settler society', *History Compass*, vol. 2, 2004).

⁶⁸ M. Connor, 'Error Nullius Revisited', *Upholding the Constitution*, 16, ch.4

⁶⁹ M. Connor, 'Dispel myth of terra nullius and historians are on shaky ground', *The Australian*, 9 July 2004

⁷⁰ 'Terra Nullius: Legal Update', *Counterpoint*, Monday 16 August 2004, presented by Michael Duffy, transcript available at <http://www.abc.net.au/rn/talks/counterpoint/stories/s1179206.htm>; and 'Wedge Watch - Terra Nullius Contested', *Counterpoint*, Monday 12 July 2004, presented by Michael Duffy; transcript available at <http://www.abc.net.au/rn/talks/counterpoint/stories/s1153484.htm>.

⁷¹ 'Bain Attwood and *Terra Nullius*', *Sunday Profile*, presented by Geraldine Doogue, Sunday, 25 July 2004, transcript available at <http://www.abc.net.au/sundayprofile/stories/s1160553.htm>.

⁷² Subsequently published as D. Ritter, 'The Rejection of Terra Nullius in *Mabo*: A Critical Analysis', *Sydney Law Review*, (1996) 18(1) 5.

disjunction: numerous commentators were saying that it was ‘the rejection of *terra nullius*’ by the High Court in *Mabo* that had permitted the recognition of native title in Australia: it was a description in the nature of an accepted shorthand.⁷³ Yet, prior to *Mabo*, there was no Australian court case at all which stood as authority for the proposition that the application of the ‘doctrine of *terra nullius*’ prevented native title in Australia from being recognised. In the only prior Australian case on point, *Milirrpum v Nabalco* which was decided in 1971, the single judge of the Supreme Court of the Northern Territory who heard the matter decided that native title had ‘never formed, part of the law of any part of Australia,’⁷⁴ but he did not rely on any so-called doctrine of *terra nullius*.⁷⁵

Legal historian Henry Reynolds was, even before *Mabo*, perhaps the most famous and forceful exponent of the idea that *terra nullius* stood as a barrier to the recognition of native title in Australia. According to Reynolds in the vastly influential 1987 work, *The Law of the Land*, Australia had been annexed by the Crown as apparently *terra nullius* (a land belonging to no-one) because the indigenous inhabitants seemed ‘without political organisation, recognisable systems of authority or legal codes.’⁷⁶ Reynolds concluded that, if the Courts would accept that Australia was not *terra nullius* at colonisation, then there would be no choice but to recognise the existence of native title under Australian common law. Reynolds felt that, with ‘*terra nullius* out of the way,’ prior Aboriginal occupancy could become ‘the starting point for legal argument.’⁷⁷ The subsequent apparent rejection of *terra nullius* and the recognition of native title in *Mabo* seemed to verify Reynolds’ ideas.

Ten years ago my conclusion was that the High Court’s repudiation of the doctrine of *terra*

nullius was doctrinally immaterial to the result in the *Mabo* decision. No obscure international law maxim had ever stood as a barrier to the recognition of native title in Australia. The more prosaic truth was that prior to *Mabo*, the High Court had simply never been asked to decide whether Australian law recognised Indigenous titles to land. In *Mabo*, in the absence of any binding Australian precedent, the Court simply considered the state of affairs in every other nation in the common law world, – including Canada, New Zealand and the United States – and in each case the authority was clear: there was a doctrine of native title. The *Mabo* case was no more than the cautious application of principle accepted throughout the rest of the common law world and, as such, was both proper and quite conservative.⁷⁸ I was emboldened because other rather more distinguished commentators had reached the same conclusions about the relevance of *terra nullius*, including the former High Court Chief Justice Sir Harry Gibbs and Professor Richard Bartlett, one of the leading academic authorities on native title in Australia, who had written that:

The *Mabo* decision has been hailed as the rejection of the concept of ‘*terra nullius*’...But the concept is essentially irrelevant to native title at common law.⁷⁹

In my view there was a particular ideological explanation for why the High Court had engaged in what appeared to be a purely rhetorical exercise. By 1992 it had become clear as a matter of acknowledged public fact that Aboriginal people did own land in a proprietary sense according to their own traditional system of law and custom and that, accordingly, the absence of legal recognition of native title created a rupture between truth and power. By purporting

⁷³ See for some examples of many B. Mellor, ‘Nullius annulled’, *Time Australia*, 1992 7, 52; M. Lavarch, *Native Title: Legislation with Commentary*, Commonwealth Government Printing Service, Canberra, 1994, pp.iii-iv; M. Mason, *The Mabo Case – Native Title Ousts Terra Nullius*, Commonwealth Parliamentary Library, Canberra, 1992.

⁷⁴ *Milirrpum v Nabalco Ltd and the Commonwealth* (1971) 17 FLR 141, p.245.

⁷⁵ The decision was also widely and correctly criticised as wrong at law. See J. Hookey, ‘The Gove Land Rights Case’, *Federal Law Review*, 1972 5; *passim*; *Calder v Attorney General for British Columbia* (1973) 34 DLR (3d) 145 (S.C.), pp 200 and 218; ‘Aboriginal Title to Lands’, *University of Western Australia Law Review*, 1974 6, 282, p.283; K. McNeil, ‘A Question of Title’, *Monash University Law Review*, 1990 16, 91, p.93; M.C. Blumm and J. Malbon, ‘Aboriginal Title, the Common Law and Federalism’ in M.P. Ellinghaus (ed), *The Emergence of Australian Law*, (Butterworths Sydney), 1989, p.141; R.H. Bartlett, ‘Aboriginal Land Claims at Common Law’, *University of Western Australia Law Review*, 1983 15, 293, p.293; K. McNeil, *Common Law Aboriginal Title*, (Oxford University Press Oxford), 1989.

⁷⁶ H. Reynolds, *The Law of the Land*, Penguin, Ringwood (Vic.), 1987, p.12.

⁷⁷ *Ibid*, p.174.

⁷⁸ For contemporary defences of the decision, see M. Kirby, ‘In Defence of Mabo’ in M. Goot and T. Rowse (eds), *Make a Better Offer: The Politics of Mabo*, Pluto Press, Leichardt (N.S.W.), 1994; G. Nettheim, ‘Judicial Revolution or Cautious Correction?’, *University of New South Wales Law Journal*, 1993 16, 1, S. Churches, ‘Mabo: A Flexible Sinew of the Common Law’, *Brief*, 1993 20, 8 and R.H. Bartlett, ‘Mabo: Another Triumph for the Common Law’, *Sydney Law Review*, 1993 15, 178.

⁷⁹ R.H. Bartlett, R.H., *The Mabo Decision*, Butterworths, Sydney, 1993, p.ix.

to reject '*terra nullius*' as the doctrine that had been responsible for Aboriginal dispossession, the High Court was able to solve the discursive crisis. While power in Australian society had shifted somewhat with the recognition of native title under the common law, the broader ideological consequence was the re-legitimation of the existing legal hierarchy. The *Mabo* decision said nothing about the legitimacy of British colonisation of the Australian continent. Quite the reverse: it confirmed that Commonwealth sovereignty was inviolate. In a simple legal-historical moral fable, once the wicked and unjust doctrine of '*terra nullius*' had been dispelled, the legal and administrative arrangements which were assembled after the fall could be defended as, by definition, fair and just.⁸⁰

The High Court's refutation of *terra nullius* was also seen as raising the curtain for the new native title era which began on 1 January 1994 with the commencement of operation of the (*Commonwealth*) *Native Title Act*. Upon the commencement of the actual operation of the relevant legislation it could be said that in practice there was '*terra nullius* no more.'⁸¹ The new debates were about the detail of native title: what it was, who held it, what destroyed it and the functioning of that labyrinth of process which the NTA ushered in to existence. Pre-eminent among the debates that followed *Mabo* and the enactment of the NTA, were the pastoral lease question (was native title extinguished by pastoral leases?) and the tradition question (how 'traditional' did an Aboriginal society have to be to continue to be acknowledged as native title holders?) Answers to these and other questions have now been provided by the Courts.⁸² It is now abundantly clear that the law of native title, though still an important process for the recognition of traditional ownership, is less than the great emancipatory revelation for all Indigenous people than some people once envisaged.

What role has '*terra nullius*' played in the post-*Mabo* environment? First, if one accepts for a moment the notion that a doctrine of *terra nullius* did have to be rejected in order for *Mabo* to be decided as it was, then one would expect it to be irrelevant to ongoing formal legal debates, perhaps

like obsolete causes of action forming no part in contemporary civil litigation. Similarly though, if one follows the thesis that *terra nullius* was not pertinent to the question of whether native title should be acknowledged under Australian law, then the expectation would also be that it would be absent from current question. So how do we account for the renewed interest in *terra nullius*?

The 'rejection of *terra nullius*' remains entrenched as a convenient summary of the popular or collective understanding of the *Mabo* decision: a slogan to be invoked in speeches, newspaper articles and textbooks. The familiar incantation is suggestive of course of far more than just the purported *ratio decidendi* of the *Mabo* case. While no doctrine of *terra nullius* needed to be rejected in *Mabo*, the phrase was never-the-less an evocative description of the discourses that operated to legitimate the dispossession of Aboriginal people and permitted both the exclusion of Aboriginal people from the rule of law, and, where Aboriginal people were formally included within the colonial system, the manner in which they were disadvantaged because of their non-conformity to the dominant culture. One sometimes also sees reference to the 'rejection of *terra nullius*' used as shorthand to connote both the apparent victory of the new Indigenous history over the silence of earlier historiography and the policy triumph of self-determination over assimilation. The phrase also echoed Prime Minister Paul Keating's broad political rejection of Australia's imperialist, anglospheric and monarchist past, in favour of a republican, multilateral and multicultural future. The 'rejection of *terra nullius*' was a phrase encapsulating the political and cultural zeitgeist.

Times, though, have changed and the political use of the metaphor of *terra nullius* has shifted with them. Where once Reynolds used the term to create what Bain Attwood has recently called a 'juridical history or myth' upon which the doctrine of native title could be founded;⁸³ now the spectre of *terra nullius* is summoned to renounce the atavistic. By way of example, in a contribution to Robert Manne's 2003 anthology *Whitewash*, a collection of essays on Windschuttle's book *The Fabrication of Aboriginal History*, entitled '*Terra nullius* Reborn', Reynolds argued that there:

⁸⁰ A conclusion supported by Bain Attwood. See B. Attwood, 'Myth, history and the law of the land', *The Australian Financial Review*, Friday 11 June 2004, 6-8, 6 (this article appears expanded and referenced as B. Attwood, 'The Law of the Land or the law of the land?: History, law and narrative in a settler society', *History Compass*, vol. 2, 2004).

⁸¹ To use the title of an article of the time. See F. Brennan, 'Terra Nullius no more', *Eureka Street*, 1992 2, 4.

⁸² This is not the place to cite the relevant authority. See generally R. Bartlett, *Native Title in Australia*, Butterworths, 2004 and M. Perry and S. Lloyd, *Australian Native Title Law*, Thompson, 2003.

⁸³ B. Attwood, 'Myth, history and the law of the land', *The Australian Financial Review*, Friday 11 June 2004, 6-8, p.8.

is no doubt about Keith Windschuttle's ambition. He seeks to bring the concept of terra nullius back to life... He tells us that the notions of the exclusive possession of territory and the defence of it either by law or force 'were not part of the Aborigines' mental universe.' In short the Tasmanians 'did not own the land.' The concept of property was 'not part of their culture.'⁸⁴

It is ambiguous that rather than dealing with Windschuttle on the many and varied methodological grounds that are available, Reynolds chooses to resort to the rhetorical authority of the law. However, as a matter of law and logic, Windschuttle cannot 'bring the concept of terra nullius back to life' as Reynolds alleges. An historian cannot retrospectively impose the operation of a legal position on people and events of two hundred years ago. John Dawson in a vitriolic attack in the July–August 2004 edition of *Quadrant*, suggested that, rather than argue in methodological terms, Reynolds:

plants his banner on the battlements of the High Court, and with a cry of 'Remember Mabo' he rallies the faithful to his side in its defence.⁸⁵

Reynolds is not the only eminent historian who has used the High Court as a redoubt in the midst of the so-called history wars. Patricia Grimshaw, for example, engaged in public debate with Keith Windschuttle, cited the 'rejection of terra nullius' in *Mabo* as one of the reasons why listeners should discount the latter's arguments.⁸⁶ There is a clear elision occurring between the doctrine and the discourse of terra nullius in these debates. Logically, it can only be the 'discourse of terra nullius' which Windschuttle is seeking to reinvigorate and which Reynolds, Grimshaw and others are seeking to condemn, but confusion arises because the phrase also purports to name a doctrine with legal affect. References to the *Mabo* decision to support the arguments of

historians are also ambiguous in another way. Since when did historians cede jurisdiction to the law courts? It is one of the enduring intellectual and cultural consequences of the *Mabo* decision and the High Court's doctrinally unnecessary forays into history, that an implicit expectation developed that the 'new Indigenous history' which has been elaborated in Australia in the last thirty years could be written up, accompanied by legal submissions and taken to the Courts in the expectation that 'justice' (in accordance with contemporary ideas of that expression) would be done.

The hearing of an application for a determination of native title before the Federal Court is no more than an adversarial proceeding concerning the existence of present rights. A native title 'claim' is not made for recompense for past loss, but for the recognition of current but inchoate rights. There is no 'defence' available to Aboriginal people that they would have been able to prove native title but for past injustices. The role of the courts is not to do 'historical justice' (whatever that means); the judicial function is to decide a dispute between the parties on the basis of the limited range of facts in evidence. Historians should not so willingly cede jurisdiction over humanistic thinking to judicial functionaries.⁸⁷

Late last year saw the publication of an expanded third edition of Reynolds' 1987 book, *The Law of the Land*. Strangely, the new version does not respond to any of the critics of the original work and the fresh writing is principally confined to the development of the law of native title since *Mabo*.⁸⁸ Unsurprisingly, Reynolds does not like what he has seen and reflecting bitterly on the way that the Courts have interpreted native title he concludes that if 'you can no longer sustain terra nullius in the face of world opinion, an 'inherently fragile' native title is the next best thing.'⁸⁹ A significant critique of Reynolds' new edition has come from fellow historian Bain Attwood who has also highlighted the legal irrelevance of terra nullius to

⁸⁴ H. Reynolds, 'Terra Nullius Reborn' in R. Manne (ed), *Whitewash: On Keith Windschuttle's Fabrication of Aboriginal History*, Black Inc, Melbourne, 2003, p. 109.

⁸⁵ J. Dawson, 'The Nullius Ideal: on "Terra Nullius Reborn" by Henry Reynolds', *Quadrant*, Vol XLVIII, No 7, July-August 2004: available online at: http://www.quadrant.org.au/php/archive_details_list.php?article_id=862.

⁸⁶ In the course of a debate with Windschuttle entitled 'White Settlement: Violent Conquest or Benign Colonisation?', aired on 20 April 2003 on ABC Radio National's *Hindsight* program.

⁸⁷ See generally H. Wootten, 'Conflicting Imperatives: Pursuing Truth in the Courts' in I. McCalman and A. McGrath, *Proof & Truth. The Humanist as Expert*, Australian Academy of the Humanities, Canberra, 2003.

⁸⁸ *The Law of the Land*, despite its influence, has always enjoyed a mixed reputation, even on what might be described as the academic left. See for example V.Gollan's contribution to R.Lilley et al, 'The Appropriation of Terra Nullius. A Review Symposium', *Oceania*, 1988-89, 59, 222-231, p 229; V. Kerruish, 'Reynolds, Thompson and the Rule of Law', *Law in Context*, 1989 7, 87 and A. Curthoys, 'Rewriting Australian History: Including Aboriginal History', *Arena*, 62, 1983, 96-110.

⁸⁹ H. Reynolds, *The Law of the Land*, Penguin Ringwood (Vic.), 3rd ed, 2003, p.235.

the *Mabo* decision in a sustained criticism of the Reynolds thesis in a lengthy article published in *The Financial Review*.⁹⁰

Curiously, Attwood's review found an almost immediate admirer in Christopher Pearson, who wrote a scathing attack on Reynolds for *The Weekend Australian*.⁹¹ It is implicit in Pearson's commentary that if Reynolds was wrong about *terra nullius*, then the High Court's decision in *Mabo* must also have been wrong and there should never have been any recognition of native title in Australia:

the discipline of economic history is so unfashionable that we are not likely any time soon to get a sober reckoning of what *Mabo*, *Wik* and the native title legislation all told cost the gross national product.⁹²

Ironically though, in assuming that the rejection of *terra nullius* played a decisive role in *Mabo*, Pearson is actually accepting Reynolds' analysis of the case. The problem for both Pearson and Reynolds is that, as I have argued, *Mabo* turned on the proper interpretation of the common law, not the applicability of the international law notion of *terra nullius*.

Another of Pearson's inspirations was Tasmanian historian, Michael Connor who has written a series of articles censuring Reynolds, and criticizing the numerous commentators who have adopted the shorthand 'rejection of *terra nullius*' meaning of *Mabo*.⁹³ Connor too seems to assume some determinative doctrinal significance

of *terra nullius* to the result in *Mabo*, though his principal concern is with what he perceives as 'the fawning stupidity, cupidity of a generation' of historians 'and their willingness to believe the unbelievable.'⁹⁴

History is being written with both eyes on the law courts, and sometimes in the pay of the parties arguing in the courts.⁹⁵

Connor is correct in noting that historians are being retained as expert witnesses in native title cases. However, historians like Reynolds whose legal-historical arguments may quite properly influence the court in certain circumstances under even the most conservative analysis of the extent to which judges may have regard to history,⁹⁶ are not in the nature of retained expert witnesses in native title proceedings, who are subject to appropriately rigid Federal Court practice directions.⁹⁷

It is evident that the recent legal-historical debates about the strength of Reynolds' scholarship evince ongoing dialogues over present controversies, fought on the terrain of the past. Pearson is using historical debate as an opportunity to try to reopen old political battles over native title, implying that if Reynolds was wrong, there should be no native title. Connor dismisses reliance on Reynolds' theories not only on the basis of their inaccuracy, but more broadly on ideological grounds as inapt for the present because '*terra nullius* serves a politics of confrontation.'⁹⁸ Reynolds himself continues to

⁹⁰ B. Attwood, 'Myth, history and the law of the land', *The Australian Financial Review*, Friday 11 June 2004, 6-8, 6 (this article appears expanded and referenced as B. Attwood, 'The Law of the Land or the law of the land?: History, law and narrative in a settler society', *History Compass*, vol. 2, 2004).

⁹¹ C. Pearson, 'Shifting War on Terra Nullius', *Weekend Australian*, June 26-27, 2004, p.18.

⁹² C. Pearson, 'Shifting War on Terra Nullius', *Weekend Australian*, June 26-27, 2004, p.18.

⁹³ M. Connor, 'Dispel myth of Terra Nullius and Historians are on Shaky Ground', *The Australian*, 9 July 2004; M. Connor, 'Error Nullius', *Bulletin*, 28 August, 2003 and M. Connor, 'Error Nullius Revisited', *Upholding the Constitution: Papers of the Samuel Griffith Society*, 16(4).

⁹⁴ M. Connor, 'Error Nullius Revisited', *Upholding the Constitution: Papers of the Samuel Griffith Society*, 16(4), p.9.

⁹⁵ M. Connor, 'Error Nullius Revisited', *Upholding the Constitution: Papers of the Samuel Griffith Society*, 16(4), p. 8.

⁹⁶ See for example *Communist Party Case (1950-51)* 83 CLR 1 and *Woods v Multisport Holdings Pty Ltd [2002] HCA (7 March 2002)*, per McHugh J and Callinan J.

⁹⁷ See Federal Court of Australia, 'Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia', issued by Black CJ on 19 March 2004. Reynolds was specifically retained in relation to the *Wik* litigation: see H. Reynolds, 'Native title and Pastoral Leases', *Aboriginal Law Bulletin*, 3 (85), Oct 1996, 14-5 and H. Reynolds and J. Dalziel, 'Aborigines, Pastoral Leases and Promises by the Crown: Imperial and Colonial Policy, 1826-1855', *University of New South Wales Law Journal*, 1996 19, 315. For a critical review of the Court's favourable reception of Reynolds in the *Wik* case see J. Fulcher, 'Sui Generis History? The use of history in *Wik*' in G. Hiley (ed), *The Wik Case – Issues and Implications*, Sydney, Butterworths, 1997 and J. Fulcher, 'The *Wik* Judgment, Pastoral Leases and Colonial Office Policy and Intention in NSW in the 1840s', *Australian Journal of Legal History*, 1998 4, 33-56.

⁹⁸ M. Connor, 'Error Nullius Revisited', *Upholding the Constitution: Papers of the Samuel Griffith Society*, 16(4), p.3.

invoke *terra nullius*, though in the manner of Bob Roberts singing, 'the times they are a changing, they are a changing back.'⁹⁹ In these arguments over the meaning of '*terra nullius*', whether at an historical or historiographical level, what is occurring is a contest over the present. Indeed, if the rhetorical 'rejection of *terra nullius*' became a metaphor for the (then) Prime Minister's broader denunciation of Australia's monocultural past, then the current assault on Reynolds from the right is redolent of the wholesale destruction of the Keating agenda by the government of John Howard.

Terra nullius was doctrinally irrelevant to the recognition of native title in *Mabo* and is not germane to the native title process now. Yet the inconsequence of *terra nullius* to the decision in *Mabo*, does not mean that the decision should have been differently decided and no amount of reconsideration of the legal history of Henry Reynolds can have the sensible implication as a matter of law, that the recognition of native title should be reversed. Native title is well established throughout the common law world and has now become assimilated within the mainstream of Australian jurisprudence and legal administration. Nevertheless, the politics of *terra nullius*, a doctrinally irrelevant phrase from a dead language, remains animated. The 'rejection of *terra nullius*' has its own shifting historiography; a context for ongoing debate about the present.

⁹⁹ *Bob Roberts*, written and directed by Tim Robbins, 1992. The plot involves a corrupt rightwing folksinger running a crooked election campaign while an independent muck-raking reporter tries to stop him. One of Bob Roberts' more memorable choruses is that 'the times they are a changing, they are a changing back.'

