Indigenous peoples' human rights, self-determination and local governance – Part 1

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Abstract

This is the first of two articles exploring the international human rights framework as it relates to Indigenous peoples' land rights and interests, with a focus on Australia. Over the past 30 years, the international community has increasingly recognised that special attention needs to be paid to the individual and collective rights of Indigenous peoples, as they are among the world's most marginalised peoples. For a long time, the Indigenous peoples of the world have used the international human rights system to tackle discrimination and abuses of their rights, and the United Nations has increasingly become a place for them to voice their concerns.

In Australia, there has been a long-running debate about the lack of recognition of the First Peoples in Australia's Constitution. Aboriginal and Torres Strait Islander peoples are increasingly demanding that the full suite of international human rights norms and standards are applicable to their affairs and to dealings with them, including the UN Declaration on the Rights of Indigenous Peoples.

This first article discusses the international human rights framework as it relates to the Indigenous peoples of Australia. The second article will take a closer look at how the land rights and interests of the Aboriginal and Torres Strait Islander peoples are being recognised at the national and state jurisdictional levels within Australia, with reference to recent comparable actions in Canada and New Zealand.

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Introduction: the Australian context

In Australia, the consent of the Aboriginal (and Torres Strait Islander) peoples[2] was neither sought nor given when the British Crown took possession of the land from 1788 onwards. In the legal theory of the formative years of the penal colony, Australia was *terra nullius* – no one's land – and the Aboriginal peoples were regarded as *"savage"* and *"uncivilised"* (Bhandar 2018, p. 96). British claims to sovereignty progressed throughout much of the 1800s, including in the Torres Strait in 1879, and the claims of the Aboriginal and Torres Strait Islander peoples were *"utterly disregarded"* by the law (British House of Commons Parliamentary Select Committee 1837, p. 125). It was not until the *Mabo v the State of Queensland (No. 2)* case in 1992 that the High Court of Australia provided a clear legal basis for the recognition of Indigenous peoples' pre-existing land rights.[3]

Until *Mabo (No. 2)*, the generally accepted legal position was that at the moment when the British Crown imposed its sovereignty over Australia, all land became the property of the Crown. The consent of the Aboriginal peoples was neither sought nor given. There were no treaties signed between Aboriginal peoples and the Crown – in contrast to the experience in other British colonies, such as Canada, New Zealand and the United States of America.[4]

The Aboriginal peoples of Australia have for several decades, and perhaps always, been openly stating the need to sit down and negotiate issues of sovereignty, self-determination and land rights through a treaty or treaties in a civil and peaceful way (Australian Institute of Aboriginal and Torres Strait Islander Studies 1988, 2003; Mansell 2016; Morris 2017; Wensing 2019, p. 107; Williams and Hobbs 2020). Neate (2008) argues that human rights standards are highly relevant to the land rights and interests of the Aboriginal and Torres Strait Islander peoples of Australia, namely:

> *in at least four ways: they inform international opinion about policy decisions taken by governments in Australia; they provide a framework for the development of legislation; they provide criteria against which such legislation can be assessed; and to the extent that*

[2] The term 'Aboriginal and Torres Strait Islander peoples' refers to the huge number of individuals, family groups, clans, language groups and others who are descendants of Australia's first peoples, the Aboriginal and Torres Strait Islanders Peoples. The author uses the plural to express respect for the fact that in 1788 there were over 500 Aboriginal and Torres Strait Islander nations scattered about the Australian continent, each with its own distinct laws and customs, land tenure systems (Wallace-Bruce 1989, p. 97) and land use planning and management systems (Wensing 2019).

[3] Acknowledging that the High Court of Australia had already indicated the potential for this in *Coe v Commonwealth [1979]* HCA 68 and notwithstanding the 23 statutory Aboriginal and Torres Strait Islander land rights grants/transfer schemes that were established prior to *Mabo (No. 2)* (Wensing 2016). The statutory land rights schemes can be viewed as acts of *"statecraft"* (Scott 1998, p. 77) or of *"grace or favour"* (Wensing and Porter 2015, p. 4) by the state because in most cases the state was responding to the Aboriginal land rights campaigns of the 1960s, '70s and '80s (Foley and Anderson 2006) and grasping for a quick and easy solution to the complex problems arising from not having recognised the pre-existing land rights and interests of the Aboriginal peoples at the time of colonisation and up to the time of *Mabo (No. 2)* (Wensing 2019, p. 58).

[4] The British and colonial governments made many treaties with Indigenous peoples in Canada (up to 1920), New Zealand (in 1840) (Aboriginal Victoria 2017) and in the United States (up to 1871; Gilio-Whitaker 2019, p. 131; Getches et al. 2005, pp. 128–139).

> *they are made part of the law of Australia by incorporation into domestic legislation,*[5] *they can be a measure against which to determine whether other domestic legislation is valid* [6] *or invalid.*[7]

As the footnotes in Neate's comments show, when the circumstances are right, international human rights standards can play a very significant role.

International standards and the human rights of Indigenous peoples

International human rights standards have come a long way since the Universal Declaration of Human Rights was adopted and proclaimed by the General Assembly of the United Nations (UN) on 10 December 1948 (UN 1948).

Membership of the UN is based on statehood. Statehood gives clear status under international law, which is not easily gained or granted. As nation-states are collectives of people, the term 'people' is defined very technically. In short, the prevailing view in the early years of the UN was that surviving Indigenous peoples[8] did not qualify as 'peoples' for the purposes of international law. This denied them statehood and limited their access to the international human rights system as non-state actors.

However, since WWII Indigenous peoples have achieved extraordinary things thanks to the rise of international human rights law and its work to moderate and regulate the conduct of states towards citizens. From the late 1940s to the present, a suite of human rights conventions and declarations have emerged from the UN. For historical reasons, human rights law is very interested in the treatment of marginalised minorities. Indigenous minorities are among the world's most marginalised peoples (UN-DESA 2009, 2016, 2017). Thus, they are supported by the international human rights law movement and have used the human rights system to tackle discrimination and abuses of their rights. The UN has increasingly become a place for Indigenous peoples from around the world to voice their concerns, and

[5] For example, the Racial Discrimination Act 1975 (Cth) includes the International Convention on the Elimination of All Forms of Racial Discrimination as a Schedule to the Act, thereby enshrining the convention in law in Australia.

[6] For example, Section 19 of the Anangu Pitjantjatjara Land Rights Act 1981 (SA) and the High Court of Australia's decision in *Gerhardy v Brown* (1985) [1985] HCA 11.

[7] For example, the Queensland Coast Islands Declaratory Act 1985 (Qld) which was held to be inconsistent with the Racial Discrimination Act 1975 (Cth) by a majority of the High Court of Australia in *Mabo v State of Queensland (No. 1)* (1988) 166 CLR 186.

[8] The term 'Indigenous peoples' has been the subject of considerable discussion and study and there is no universal, standard definition thereof (World Intellectual Property Organisation 2019). The term 'Indigenous' has evolved through international law and acknowledges a particular relationship of First Nations peoples to the territory from which they originate and refers to the diverse international community of Indigenous peoples, whose distinct identity and rights are recognised in international law (ie the United Nations Declaration on the Rights of Indigenous Peoples (UN 2007). For practical purposes, the understanding of the term commonly accepted is the one provided in the Martinez Cobo (1983) study, which as Castellino and Doyle (2018, p. 36) note is not without its weaknesses. In this paper, the term 'Indigenous peoples' is used to refer to the diverse international community of Indigenous peoples, unless otherwise specified. Where the term Indigenous is used by government agencies or other sources, their use of the term is reflected.

over the past 30 years the international community has increasingly recognised that special attention needs to be paid to their individual and collective rights.

International instruments, and their Articles of particular relevance to the rights of Aboriginal and Torres Strait Islander peoples of Australia, are shown in Table 1**.** Only two of the international instruments are entirely focused on the rights of Indigenous peoples. They are the International Labour Organisation (ILO) Convention No. 169 Indigenous and Tribal Peoples Convention (ILO 1989) and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (UN 2007). Only the ILO Convention No. 169 is legally binding on its signatories, but Australia is not a signatory. UNDRIP is not legally binding on states that endorse the Declaration.

Table 1: International Instruments and Articles of relevance to the Indigenous peoples of Australia

UN Instrument	**Year of adoption by the UN General Assembly or the ILO**	**Articles of specific relevance to the Indigenous peoples of Australia**
United Nations Charter	1945	Article 1
Universal Declaration of Human Rights	1948	Article 2
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	1965	All
International Covenant on Civil and Political Rights (ICCPR)	1966	Article 27
International Covenant on Economic, Social and Cultural Rights (ICESCR)	1966	Article 1
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	1979	Article 1
Declaration on the Right to Development	1986	Article 5
ILO Convention No. 169 Indigenous and Tribal Peoples Convention (ILO 169)	1989	Article 1
Convention on the Rights of the Child (CRC)	1989	Articles 17, 29 and 30
Convention on Biological Diversity (CBD)	1992	Article 8j
Universal Declaration on Cultural Diversity	2001	Article 4
Convention on the Protection and Promotion of the Diversity of Cultural Expressions	2005	Preamble Para 8; Articles 2, 3 and 7
Declaration on the Rights of Indigenous Peoples (UNDRIP)	2007	All
Human Rights and the Environment	2021	Article 6

Sources: UN (1945, 1948, 1965, 1966a, 1966b, 1979, 1986, 2007); ILO (1989); Convention on Biological Diversity Secretariat (1992); United Nations Educational, Scientific and Cultural Organisation (UNESCO) (2001, 2005), United Nations Human Rights Council (UNHRC) (2021a)

UNDRIP was adopted by an overwhelming majority of UN Member States. Four countries voted against UNDRIP in 2007 (the common law 'CANZUS' countries of Canada, Australia, New Zealand and the United States) and 11 countries abstained (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).[9]

While the CANZUS group initially opposed UNDRIP, to varying degrees all four countries have subsequently reversed their positions (UN 2013, p. 16). New Zealand endorsed UNDRIP on 20 April 2010 (New Zealand Government 2010) and in April 2019 committed to developing an action plan to implement UNDRIP in relation to Māori (New Zealand Government 2019). Canada endorsed UNDRIP with qualification on 12 November 2010 (Government of Canada 2010) and re-endorsed the Declaration without qualification and committed to its full and effective implementation on 10 May 2016 (Government of Canada 2016). The United States of America also announced its support for UNDRIP (with qualifications) on 12 January 2011 (US Department of State 2011). Finally, Australia endorsed UNDRIP in 2009 (Macklin 2009), but it has yet to make the same kind of commitments to its implementation as have Canada and New Zealand.

The UN Declaration on the Rights of Indigenous Peoples

Australia's Aboriginal and Torres Strait Islander peoples are increasingly demanding that the full suite of international human rights norms and standards apply to their affairs and to dealings with them (Referendum Council 2017a, 2017b), including UNDRIP (UN 2007). UNDRIP may not be a direct source of law (UN 2013, p. 16), but it nevertheless carries considerable normative weight and legitimacy for several reasons: it was adopted by the UN General Assembly;[10] it was compiled in consultation with, and with the support of, Indigenous peoples worldwide;[11] and it reflects *"an important level of consensus at the global level about the content of Indigenous peoples' rights"* (UN 2013, p. 16). It also *"reflects the needs and aspirations of Indigenous peoples"* (Eide 2006, p. 157) as well as the concerns of States. As the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya,[12] reiterates,

[9] For a discussion of the reasons for the four CANZUS countries objecting to UNDRIP, see Ford (2013), Stavenhagen (2011, p. 151) maintains these reasons were indefensible because UNDRIP was adopted by "*an overwhelming majority of 143 states, from all the world's regions and that, as a universal human rights instrument, it* morally and politically *binds all of the UN member states to comply fully with its contents"* (emphasis added). See also: https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.

[10] The UN General Assembly has a long history of adopting declarations on various human rights issues, dating back to the Universal Declaration of Human Rights in 1948. Such declarations are adopted under Article 13(1)(b) of the UN Charter and are generally reserved by the UN *"for standard-setting resolutions of profound significance"* (UN 2013, p. 16).

[11] Erica-Irene Daes was Chairperson of the Working Group on Indigenous Populations and Special Rapporteur of the UN Sub-Commission on Human Rights from 1984 to 2001 and was instrumental in the preparation of UNDRIP. Daes (2008, p. 24) maintains that *"no other UN instrument has been elaborated with such an active participation of all parties concerned"*.

[12] James S. Anaya was the UN Special Rapporteur on the Rights of Indigenous Peoples from 2008 to 2014.

there are political and moral imperatives for implementing UNDRIP in addition to the legal imperatives (UN 2013, p. 18).

Furthermore, UNDRIP is an extension of the standards found in many other human rights treaties that have been ratified by and are binding on Member States, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination (UN 2013, p. 17). Amnesty International Canada (2012) maintains that UN declarations, unlike treaties, covenants and conventions do not need to be signed or ratified because they are adopted by the UN General Assembly and therefore considered to be universally applicable.

While UNDRIP elaborates the general principles and human rights standards contained in the other UN covenants and conventions as they specifically relate to the historical, cultural and social circumstances of Indigenous peoples, it does not create any new or special human rights. UNDRIP is based on the principles of non-discrimination and equality and its standards *"share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that Indigenous peoples have faced in their enjoyment of basic human rights"* and *"connect to existing State obligations under other human rights instruments"* (UNHRC 2008, p. 24). In addition to a statement of redress, it is also *"a map of action"* for *"guaranteeing, respecting and protecting Indigenous peoples' rights"* (Stavenhagen 2011, p. 150).[13]

Two key principles: self-determination and free, prior and informed consent

UNDRIP enshrines the principle of free, prior and informed consent as a *"critically important human right"* which is *"inextricably linked to the fundamental right of self-determination"* (Nosek 2017, p. 125). According to Anaya (2009, p. 186) *"self-determination is a right that inheres in human beings themselves"*. He suggests that self-determination *"derives from common conceptions about the essential nature of human beings"* and that human beings *"individually and as groups, are equally entitled to be in control of their own destinies, and to live within governing institutional orders that are devised accordingly"* (Anaya 2009, pp. 186–187).

Daes (2008, p. 25) asserts that it would be *"inadmissible and discriminatory to argue that Indigenous peoples lack the right to self-determination merely because of their indigeneity"*, and that nation-states therefore have *"a duty to accommodate the aspirations of indigenous peoples through constitutional reforms designed to expand the concept of democracy"*. Correspondingly, Indigenous peoples have a *"duty to try to reach an agreement, in good faith, on sharing power within the existing state and, to the extent possible, to exercise their right to self-determination by such means"*.

[13] Rodolfo Stavenhagen was the UN Special Rapporteur on human rights and fundamental freedoms of Indigenous peoples from 2001 to 2007.

Self-determination

The principle of self-determination is enshrined in the UN Charter of 1945. It is a collective right that can only be asserted by groups who are identified as peoples (Weller 2018, p. 119). Article 55 of the Charter places self-determination of peoples together with the principle of equal rights as the basis for international peace and stability (Strelein et al. 2001, p. 116). Since that time the concept of self-determination has evolved into Common Article 1 in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both adopted in 1966 (UN 1966a, 1966b) with identical language: *"All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."*

Initially, Article 1 applied to the whole populations of sovereign states and was not viewed as applying to Indigenous peoples (Tobin 2014, p. 34). Indeed, Britain and other European empires *"had no compunction in denying"* that the principle of self-determination had any application in the territories they invaded (Johnson 1970, p. 268; Weller 2018, pp. 117–125). This changed over time[14] and by 2007, when the UN adopted UNDRIP (UN 2007), Article 3 provided that: *" Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."*

Articles 4, 5, 18 and 23 also include references to or express provisions supporting Indigenous peoples' right to self-determination. In the course of developing UNDRIP, nation-states were concerned that self-determination of Indigenous peoples would pose *"a fundamental challenge"* to state authority which the State claimed to be a *"uni-polar right"* (Weller 2018, p. 121). To address this concern, in the closing stages of the negotiations over the content of UNDRIP it was agreed between nation-states and Indigenous peoples to include Article 46, which provides that nothing in the Declaration may be interpreted as implying that any State, people, group or person has any right to engage in any activity which may be contrary to the Charter of the UN or could be construed as authorising or encouraging any action which would dismember or impair the territorial integrity or political unity of sovereign and independent States. Article 46 therefore alleviates nation-states' concerns that the right to self-determination would confer a special status on Indigenous peoples above the right to self-determination that peoples generally enjoy under international law (Anaya 2009, p. 184; UN 2013, p. 19). It also prevents the use of UNDRIP as a basis for challenging *"the power imbalance they* [Indigenous peoples] *are locked into with states"* (Woons 2014, p. 10); and confirms that *"external forms of self-determination are off the table for Indigenous peoples"* (Engle 2011, p. 47). In addition, it provides that

[14] For an overview of how Indigenous peoples' rights reached the UN, see Diaz (2009, pp. 16–31) and Eide (2006, pp. 155–212). For an overview of how UNDRIP was adopted by the UN, see Eide (2009, pp. 32–46).

UNDRIP shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

Turning to Australian practice, the Australian Human Rights Commission (AHRC) gets around the imputation of independence from the nation-state by defining 'self-determination' as meaning Aboriginal and Torres Strait Islander peoples should have a choice in determining how their lives are governed, should be able to participate in decisions affecting them, and should have control over their lives and development (AHRC 2010, p. 24).

Three Australian jurisdictions have enacted Human Rights Acts: Victoria, Queensland and the Australian Capital Territory (ACT). Victoria's Charter of Human Rights and Responsibilities Act 2006 makes reference to self-determination as a matter to consider in reviewing the Act. The Victorian Equal Opportunity and Human Rights Commission (2019, p. 18) noted in its 2019 report on the operation of the Charter that the state has taken an important step towards self-determination of Aboriginal peoples with the establishment of the First Peoples' Assembly of Victoria, which has since been recognised as an elected voice for the Aboriginal people of Victoria to participate in future treaty discussions. Moreover, the Victorian government has committed to establishing a truth and justice process to formally recognise historic wrongs and address ongoing injustices for Aboriginal Victorians (Williams 2020; Power 2021).

Queensland's Human Rights Act 2019 makes reference to self-determination in its Preamble, but does not include any provisions to enact it. Neither the ACT's Human Rights Act 2004 nor the explanatory statement to the Human Rights Amendment Bill 2015 (ACT), which inserted certain Aboriginal rights into the Act, make any mention of self-determination for the Aboriginal and Torres Strait Islander peoples in the territory.

While these jurisdictions have enacted human rights statutes or charters with specific provisions for protecting the rights of Aboriginal and Torres Strait Islander peoples, they only protect individual rights, not group rights, and there are limitations on how they may be applied in relation to protecting Aboriginal and Torres Strait Islander peoples' collective rights to their traditional lands in land use and environmental planning processes and decision-making (Wensing and Porter 2015).

Free, prior and informed consent

The principle that the free, prior and informed consent (sometimes referred to as 'FPIC') of Indigenous peoples *"should be obtained in relation to matters connected with their fundamental human rights and capable of producing significant negative effects on their cultures and their lives"* (Barelli 2018, p. 250)

is enshrined in several Articles of UNDRIP (UN 2007).[15] In particular, Articles 19 and 32 detail what is entailed in enacting free, prior and informed consent (Figure 1).

Figure 1: UNDRIP Articles enacting free, prior and informed consent

Article 19
States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 32
1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Source: UN (2007)

The principle of free, prior and informed consent therefore has four interlinked elements, or 'concepts':

- **Free** means no coercion, force, bullying, pressure, or improper influence.
- **Prior** means that Indigenous peoples have been consulted before the activity begins.
- **Informed** means Indigenous peoples are given all of the available information and informed when that information changes or when there is new information. If Indigenous peoples do not understand this information then they have not been informed. An interpreter or other person might need to be provided to assist.
- **Consent** means Indigenous peoples must be consulted and participate in an honest and open process of negotiation that ensures:
  - all parties are equal, none having more power or strength;
  - Indigenous peoples' group decision-making processes are allowed to operate; and
  - Indigenous peoples' right to choose how they want to live and their worldviews are respected (AHRC 2010, p. 25; Working Group on Indigenous Populations 2005, para 56).

[15] In particular, Articles 10 (relocation), 11 (cultural property), 19 (regulatory measures), 28 (land and territories), 29 (environment) and 32 (development and use of land/territories). For more details, see Joffe (2013) and Southalan and Fardin (2019).

The UN's Food and Agriculture Organization (FAO) (2016, p. 15) argues that these elements *"are interlinked, and should not be treated separately"*. Its good practice guide on the concept of free, prior and informed consent states that:

> *…consent should be sought before any project, plan or action takes place (prior), it should be independently decided upon (free) and based on accurate, timely and sufficient information provided in a culturally appropriate way (informed) for it to be considered a valid result or outcome of a collective decision-making process (consent)* (FAO 2016, p. 15).

Applying these principles will create a process whereby governments, developers and Aboriginal and Torres Strait Islander peoples can talk to each other on an equal footing and come to a solution or agreement that all parties can accept (UNHRC 2009: Paras 36–57). It also means that Indigenous peoples must be involved in the design, development, implementation, monitoring and evaluation of all programmes, policies and legislation that affect them.

The principle of free, prior and informed consent raises the level of engagement with Indigenous peoples by switching the relationship from consultation to consent and provides a safeguard to Indigenous peoples' full participation in decisions affecting their rights and interests (Nosek 2017, pp. 119, 124). While the principle does not include a veto power, its articulation in UNDRIP does enable Indigenous people to say 'No': whether a state will choose to listen to them, even if it has followed the principle of free, prior and informed consent, is another matter.

Nevertheless, Indigenous peoples have also identified the principle of free, prior and informed consent as *"a requirement, prerequisite and manifestation of the exercise of their right to self-determination"* (UNHRC 2010a, 2010b). According to UNHRC (2009, pp. 14–15) those consent provisions are aimed at *"reversing the historical pattern of exclusion from decision-making, in order to avoid the future imposition of important decisions on Indigenous peoples, and allow them to flourish as distinct communities on lands to which their cultures remain attached"*. Violation of any of the elements of free, prior and informed consent may invalidate the outcomes of any purported agreement with the Indigenous peoples concerned (UNHRC 2011, p. 29).

While implementing free, prior and informed consent may seem *"deceptively simple"* (Southalan and Fardin 2019, p. 367) at the international level, complexities arise at the practical domestic level. Southalan and Fardin (2019, p. 367) argue that Australia has already engaged with some of the concepts of free, prior and informed consent which *"may have useful lessons for other jurisdictions"*. The native title system in Australia recognises the communal, group or individual rights and interests of Aboriginal and Torres Strait Islander peoples,[16] and there is both jurisprudence arising from court decisions and specifically legislated requirements for consultation and consent in the Native Title Act 1993 (Cth). As

[16] Section 223(1) of the Native Title Act 1993 (Cth).

such Australia has had to deal with matters arising from group identification and decision-making and the *"dynamics comprised within free, prior and informed consent"* that *"provide examples for others grappling with how to implement free, prior and informed consent"* (Southalan and Fardin 2019, p. 386). In summary, across the four concepts Southalan and Fardin found that:[17]

> ***Free*:** Australian courts *"have ruled meeting outcomes invalid where they were inappropriately arranged or interfered with"* by a third party, have struck down rulings *"where decisions were made without the Indigenous group being adequately informed"* and have held that where members of the applicant group *"have acted improperly (and contrary to their fiduciary obligations), they can be held liable to compensate the group for losses incurred"* (2019, p. 386).
>
> ***Prior*:** *"The courts have ruled various titles and government grants invalid for failure to comply with the relevant native title procedures"* (2019, p. 387).
>
> ***Informed:*** The native title system *"established the statutory funding and structures to assist Indigenous groups in understanding and exercising"* their procedural rights in the Native Title Act 1993 (Cth)[18] and the courts see these provisions within the Act as assisting *"the native title groups in making decisions on an informed basis"*. The courts also consider these elements of the native title system play a significant and important role in making the system workable (2019, p. 387). *"Equally important"* is the *"authorisation process requiring evidence (usually through meeting notice and procedures) that decisions have been made by the group"*, and the courts note that *"a group cannot give an informed decision if only part of the group knows of the matter"* (2019, p. 388).
>
> ***Consent*:** The notion of 'consent' means *"there must be an option to withhold consent"* but Southalan and Fardin find that this *"is not the case in Australia's native title law"*, because *"Court and Tribunal decisions have consistently ruled there is no domestic 'veto' for Indigenous groups under the national law"* (2019, p. 388). But, they claim, *"there is an obligation for governments and developers to negotiate in good faith, with laws and Court decisions prohibiting developments from proceeding where good faith negotiation had not occurred"*. They also argue that *"the validity of any 'group' decision is predicated on sufficient inclusion of individuals comprising the group"* and *"how the group's consent – or disputes about consent – is determined in practice"* are *"attendant considerations"*. These matters are also relevant to the appointment

[17] Case citations supporting these findings are not reproduced here. See footnotes 150 to 165 in Southalan and Fardin, (2019, pp. 386–388) for details.

[18] Including the establishment of Native Title Representative Bodies or Native Title Service Providers to assist native title claimants or holders with native title matters under Part 11 of the Native Title Act 1993 (Cth), and various procedural rights for future acts affecting native title rights and interests, including the right to be notified, the opportunity to comment, the right to be consulted or the right to negotiate depending on the nature of the future act. See Sections 24AA to 24OA and Section 233(1) of the Native Title Act 1993 (Cth) for details.

> and conduct of representatives, the conduct of meetings and whether decisions are made according to traditional or other practices (2019, p. 388).

Southalan and Fardin's (2019, p. 386) analysis shows that developments in Australian law and its related jurisprudence are relevant to the dynamics of applying the concept of free, prior and informed consent. However, they also reiterate and emphasise the fact that *"Australian laws do not replicate"* the key elements of free, prior and informed consent as reflected in UNDRIP (Southalan and Fardin 2019, p. 386).

Relevance of the international human rights framework

In the last two decades there have been several developments internationally that are increasingly pointing towards the adoption of human-rights-based approaches to policy, planning and development, especially when dealing with Indigenous peoples' rights. As the UN states, there are intrinsic and instrumental rationales for doing so:

- it is the right thing to do, morally and legally; and
- it will lead to better and more sustainable human development outcomes (UNICEF 2016).

As argued earlier, UNDRIP expresses rights and by doing so explains how Indigenous peoples want nation-states (and others) to conduct themselves in relation to matters that may affect their rights and interests. In that sense, there is an expectation by Indigenous peoples and others that UNDRIP imposes obligations on States and third parties to conform to the standards expressed in the Declaration; and that, as a consequence of endorsing UNDRIP, nation-states can no longer make decisions affecting Indigenous peoples' rights and interests by imposition, but rather have a duty to consult with Indigenous peoples on the basis of free, prior and informed consent.

Australia's lack of compliance

As noted earlier, Australia has yet to overcome its lack of political will and make a commitment to the effective implementation of UNDRIP, especially in so far as the Declaration applies to Aboriginal and Torres Strait Islander peoples' land rights and interests within Australia. Failure to protect Aboriginal and Torres Strait Islander peoples' laws and customs could also amount to a breach of Australia's international human rights obligations (Dodson 1998, p. 210), something Australia has so far not avoided.

The UN has a framework for monitoring and assessing the human rights practices of State parties around the world. Key elements of that framework include the UN Office of the High Commissioner for Human Rights (OHCHR), UNHRC, the Special Procedures of the UNHRC and seven human rights treaty

bodies that monitor the implementation of the core international human rights treaties.[19] The OHCHR supports the work of the treaty bodies and assists them in their monitoring and reporting requirements through their respective secretariats.

Through ratification of international human rights treaties, State parties (ie national governments) undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual complaints or communications are available at regional and international levels to help ensure that international human rights standards are indeed respected, implemented and enforced within States (OHCHR 2019).

One of those mechanisms is the Universal Periodic Review (UPR). The UPR was established by the UN General Assembly in 2006 as a unique State-driven peer review mechanism whereby the human rights record of all 193 Member States is reviewed every four and a half years, on equal footing, by fellow States during an inter-governmental Human Rights Council Working Group session in Geneva. All States, without exception, are provided with the opportunity to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations, and all States can actively engage in reviewing the human rights record of their peers and in making recommendations to them (UNHRC 2020). No other universal mechanism of this kind currently exists (UNHRC 2020). Each review is based on three documents:

- information provided by the State, which takes the form of a 'national report';
- information compiled from UN entities, including the UN human rights bodies, UN country teams and individual UN agencies, funds and programmes –which document is titled 'Compilation of UN information' and is prepared by the OHCHR; and
- information from other stakeholders, including national human rights institutions, NGOs and regional bodies, including regional human rights mechanisms, which is compiled into a document titled 'Summary of stakeholders' information', also prepared by the OHCHR.

During each review the nation-state presents its national report, which is followed by questions and recommendations from other States. The State under review has the opportunity to make preliminary comments on the recommendations, choosing to either accept or note them. The final report of the review then includes a clear State position on every recommendation and is adopted some three months later at a plenary session of the Human Rights Council and published on the Council's website (UNHRC 2020).

[19] The seven human rights treaty bodies are the Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee Against Torture (CAT), the Committee on the Rights of the Child (CRC), and the Committee on Migrant Workers (CMW).

Australia has participated in each of the UPR cycles since its inception, and appeared before the third cycle of the UPR in January 2021. In the UNHRC's *Compilation on Australia* report (UNHRC 2021b, p. 2), the Commissioner noted the Special Rapporteur on racism had found that Australia's Constitution provides no protection against racial discrimination and the Special Rapporteur on the rights of Indigenous peoples had found numerous disturbing reports on the prevalence of racism against Aboriginal and Torres Strait Islander peoples. The report also noted that the UN Committee on the Elimination of Racial Discrimination (UNCERD) regretted that Indigenous peoples' legal status was not enshrined in Australia's Constitution and noted UNCERD's concerns that the Indigenous peoples' land claims remain unresolved and that the Native Title Act 1993 (Cth) remains a cumbersome tool requiring claimants to provide a high standard of proof to demonstrate their connections with the land. Australia's response to the UNHRC's *Compilation on Australia* report (UNHRC 2021c) did not address these matters in any meaningful way.

The UPR Working Group's report on Australia (UNHRC 2021d) includes over 340 specific recommendations from various countries around the world, most notably recommending that Australia:

- ratifies the human rights instruments that it has not yet ratified (specifically ILO Convention 169, listed in Table 1);
- guarantees sufficient funding for the Australian Human Rights Commission so it can effectively carry out its work;
- strengthens measures to eliminate racial discrimination against its Indigenous peoples; and
- takes the necessary steps to develop a national plan of action to implement UNDRIP.

While the Working Group's report notes the Australian government's voluntary commitments to continue to work towards a referendum to recognise Aboriginal and Torres Strait Islander Australians in the Constitution, and to support that referendum when it has the best chance of succeeding, Australia is expected to respond to each of the recommendations in the Working Group's report to the UNHRC before the end of its forty-seventh session in July 2021.

As a signatory to the Convention on the Elimination of All Forms of Racial Discrimination (1965), Australia also comes under the scrutiny of UNCERD. Australia has included the Convention on the Elimination of All Forms of Racial Discrimination as a Schedule to the Racial Discrimination Act 1975 (Cth). As such, Australia is obliged to take steps to ensure compliance with the rights set out in the Convention.

Australia's actions (or lack thereof) with respect to the land rights of its Indigenous peoples have therefore been scrutinised on several occasions by UNCERD, the first human rights treaty monitoring body to adopt a specific general recommendation on the rights of Indigenous peoples to their traditional lands (Gilbert 2017).

Articles 5 and 6 of General Recommendation XXIII state the following:

> *5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.*
>
> *6. The Committee further calls upon States parties with indigenous peoples in their territories to include in their periodic reports full information on the situation of such peoples, taking into account all relevant provisions of the Convention* (UNCERD 1997).

In 1998 UNCERD found that the winding back of protections to native title rights and interests in that year's amendments to Australia's Native Title Act 1993 (Cth) went so far as to bring into question the Act's claim to be a 'special measure' within the meaning of Articles 1(4) and 2(2) of the Convention on the Elimination of All Forms of Racial Discrimination, as well as Australia's compliance with Articles 2 and 5 of the Convention (UNCERD 1999, p. 7). 'Special measures' in international human rights law are generally understood as encompassing measures regarded as 'affirmative action' or 'positive discrimination' (Hunyor 2009).

More recently, UNCERD in its eighteenth to twentieth periodic report on Australia (UNCERD, 2017) recommended that Australia:

- urgently amend the Native Title Act 1993 (Cth) in order to lower the standard of proof of Aboriginal and Torres Strait Islander peoples' title to land and simplify the applicable procedures;
- ensure that the principle of free, prior and informed consent is incorporated into the Act and other legislation as appropriate and fully implemented in practice;
- consider adopting a national plan of action to implement the principles contained in UNDRIP; and
- reconsider Australia's position and ratify the ILO Indigenous Tribal Peoples Convention 1989 (ILO No. 169) (ILO 1989).

In its latest 'concluding observations' on Australia's periodic reports, UNCERD has recommended that Australia accelerate its efforts to implement the principles of self-determination, as set out in UNDRIP (UNCERD 2017, p. 5) and as cited in the *Uluru Statement from the Heart* (Referendum Council 2017b), including by *"entering into good faith treaty-negotiation with Indigenous Peoples"*. UNCERD has also requested that Australia provide detailed information in its next periodic report on concrete measures taken to implement this recommendation (UNCERD 2017, p. 10).

A major turning point?

The Aboriginal and Torres Strait Islander peoples of Australia have long campaigned for recognition within the nation's founding document, the Australian Constitution (Lino 2018). Following almost two decades of public debate, 40 Aboriginal and Torres Strait Islander leaders met with the then prime minister and the opposition leader in July 2015 to determine the next steps towards holding a referendum to amend Australia's Constitution. The attendees presented the prime minister and the leader of the opposition with a document entitled *Statement on Constitutional Recognition* [20] which outlined their concerns about lack of recognition, emphasised the importance of leadership from the prime minister and the leader of the opposition, and called upon them to engage in a dialogue with the Aboriginal and Torres Strait Islander peoples of Australia to negotiate the wording of the question to be put to a Constitutional referendum.[21]

Following this meeting, the prime minister and the leader of the opposition agreed to establish a Referendum Council with roughly equal Indigenous and non-Indigenous representation to guide the dialogues with Aboriginal and Torres Strait Islander peoples around Australia (Referendum Council 2017a, p. 46). The council adopted an unprecedented deliberative process in which Aboriginal and Torres Strait Islander people from around Australia debated and ultimately reached broad agreement on their future within Australia's constitutional order. Indigenous leaders led 12 'Regional Dialogues' – intensive deliberative meetings of roughly 100 Aboriginal and Torres Strait Islander people, each designed to be broadly representative of the region in which they were being held. Each region then sent a delegation to the National Indigenous Convention that was held at Uluru in central Australia in May 2017 (Referendum Council 2017a, pp. 3–35).

After three days of intensive discussions and negotiations at Uluru, a national expression emerged from the convention in the form of the *Uluru Statement from the Heart* (Figure 2) (Referendum Council 2017b). The statement met with a remarkable degree of consensus amongst those present: a standing ovation and unanimous endorsement from the floor of the convention on its first reading.[22]

The three key elements in the statement are 'Voice', 'Treaty' and 'Truth' (Davis 2017, p. 131). The first element is a proposal for a constitutionally enshrined First Nations Voice to parliament, whose

[20] The statement is reproduced in full in the Aboriginal and Torres Strait Islander Social Justice Commissioner's *Social Justice and Native Title Report 2015* (2015, pp. 32–34).

[21] Section 128 of the Australian Constitution sets out the mode of altering the Constitution. The proposed law to alter the Constitution must be passed by an absolute majority of both houses of parliament and must then be put to the people by referendum. The referendum requires a majority of the electors in a majority of Australian states and a majority of all electors before the proposed law amending the Constitution can be presented to the governor-general for the Queen's assent. Voting by citizens over the age of 18 is compulsory.

[22] Nevertheless, because the statement was not as radical as some would have liked, a small group of Indigenous and non-Indigenous people protested at the convention and a handful of delegates walked out.

functions are to be determined by parliament but would involve the supervision of Section 51(xxvi)[23] and Section 122 of the Constitution.[24] While the Australian government has responded to this first element, in part, by co-designing a legislated 'Voice' proposal with a large group of Aboriginal and Torres Strait Islander people from across Australia (National Indigenous Australians Agency 2020), it falls well short of being included in the Constitution to protect it from the whims of government to abolish it, as has happened in the recent past (Appleby 2021; Davis 2021). The second element is a *makarrata* (treaty). *Makarrata* is a Yolngu word from north-eastern Arnhem Land, sometimes translated as *"things are alright again after a conflict"* or *"coming together after a struggle"* (Hiatt 1987). The third element (truth) is the creation of a Makarrata Commission by legislation that will enable localised truth-telling on a First Nations basis – that is, using geographical areas identified by the Aboriginal and Torres Strait Islander peoples based on language or clan ancestry and connections to Country,[25] rather than regions determined by the state.

The significance of the *Uluru Statement from the Heart* is that it *"was issued as an 'invitation' to the Australian people to work with First Nations peoples"* because it is the people of Australia who vote to change the Constitution (Davis and Williams 2021, p. 5).

[23] Section 51(xxvi) provides that: *"The Parliament shall, subject to the Constitution, have the power to make laws for the peace, order and good government of the Commonwealth with respect to:* […] *The people of any race for whom it is deemed necessary to make special laws."*

[24] Section 122 provides that: *"The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."*

[25] The term 'Country' refers to *"the collective identity shared by a group of people, their land (and sea)"* (Palmer 2001) and includes all the *"values, places, resources, stories, and cultural obligations"* (Smyth 1994) associated with Aboriginal and Torres Strait Islander peoples' ancestral lands and waters. Rose (1996, p. 10) in her ground-breaking work for the former Australian Heritage Commission, also found that 'Country' *"is synonymous with life"* and that *"life for Aboriginal people needs no justification"*. That Aboriginal peoples' conception of country is *"multi-dimensional"* consisting of *"all people, animals, plants, Dreamings, underground, earth, soils, minerals and waters, surface water, and air; that it has origins and a future; and that it exists both in and through time"*. All of these are identified by Aboriginal people as being integral parts of their particular country, and each country is surrounded by other unique and inviolable whole countries, ensuring that no country is isolated and *"together they make up some larger whole"*, each not knowing the full extent because *"knowledge is, of necessity, local"* (Rose 1996, pp. 9, 12, 13).

Figure 2: Uluru Statement from the Heart, May 2017

ULURU STATEMENT FROM THE HEART

We, gathered at the 2017 National Constitutional Convention, coming from all points of the southern sky, make this statement from the heart:

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.

This sovereignty is *a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty.* It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.

How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is *the torment of our powerlessness*.

We seek constitutional reforms to empower our people and take *a rightful place* in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

Makarrata is the culmination of our agenda: *the coming together after a struggle.* It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.

In 1967 we were counted, in 2017 we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.

Source: Referendum Council 2017b

As Megan Davis, one of the Aboriginal members of the Referendum Council, argues, the National Indigenous Convention was deliberately seeking *"to engage the hearts and minds of the Australian people, because it is they who understand the current climate of policy inertia and it is they who*

ultimately can change the Constitution's text" (Davis 2017, p. 132). While the Uluru Statement from the Heart has met with a lacklustre response from the Australian government (Turnbull 2017; Conifer 2017), it may well prove a major turning point for the relationship between the Indigenous peoples of Australia and the people and country as a whole, including other levels of government and the corporate and non-government sectors. For example, as a consequence of the statement, four state and territory governments in Australia are now embarking on establishing mechanisms in their own jurisdictions to give Aboriginal and Torres Strait Islander peoples a voice, and also on moves towards treaties or equivalent agreements. These matters will be explored in more detail in the second article in this series.

Conclusion

While the Australian Government's commitment to real constitutional reform in Australia continues to wax and wane, the country's Indigenous peoples continue their pursuit of applying the international human rights framework to the way they are treated. As Davis (2017, p. 144) notes, Aboriginal and Torres Strait Islander peoples have asked for *"the Constitution to be amended to compel the Parliament to hear Indigenous views before making decisions about Indigenous rights"*. And they have also asked the nation to engage in truth-telling and to consider a treaty or treaties *"to capture their aspirations for a fair and truthful relationship with the people of Australia"* (Referendum Council 2017b). This paper has sketched out the international human rights framework and its key elements and how it applies to Australia, while also drawing attention to the fact that Canada and New Zealand have recently made clear commitments to applying UNDRIP in their respective jurisdictions.

The second of the author's two articles will take a closer look at how the land rights and interests of Australia's Aboriginal and Torres Strait Islander peoples are being recognised at both national and state/territory levels, including through amendments to state constitutions, native title settlements, non-native title processes and treaty negotiations. It will draw some further comparisons, in particular with Canada and New Zealand, given our shared histories as part of the Commonwealth of Nations.

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