

Corroboree
2013 Mabo Oration
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First Peoples

Playhouse
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INTRODUCTION

Since the United Nations adopted the *Declaration on the Rights of Indigenous Peoples* I have turned my attention to the situation of the Aboriginal and Torres Strait Islander peoples in Australia. My priorities have been to address the political status of our peoples and to ensure that our peoples are able to sustain their Indigenous identity through control over their lands, territories and resources.

I have focussed upon the comparison between native title law and land rights aims. While I will continue that comparison in this oration, I wish to also address the element of Aboriginal 'sovereignty' by proving international law supports the sovereignty of Indigenous peoples of the world, and revealing the duty of Australia. This State by virtue of its membership of the United Nations should respect and definitively address the sovereignty of the Aboriginal and Torres Strait Islander peoples.

The title of this oration - *Corroboree* - is to remind us that not only is *terra nullius* ('a land without people') a fiction in the history and law of the continent, but also to emphasise the First Peoples' sustained institutions and systems for governance. These systems thrived for tens of thousands of years and still exist under the encumbrance of the Australian State. Our goal to survive as Indigenous peoples - custodians with inherent obligations to the natural and spiritual environment - is a legitimate one.

In my traditional language group the word 'corroboree' has a specific meaning. It is actually two words combined, being 'ngari' 'boree' which means 'initiates' 'fire ceremony'. I do not know if that meaning is universal across Aboriginal languages or if there are other interpretations, but I suspect this meaning is consistent. In our contemporary usage 'corroboree' is now taken to depict 'Aboriginal dancing, usually at night around a campfire'.

Technically ngari-boree is a specific ceremony to announce that young Aboriginals have graduated in Aboriginal law. I wish to emphasise this feature because there is enough body of evidence available to show that the First Peoples of Australia, in demonstrating awareness of the cosmos, hold law, have traditional orderliness and social organisation which is inherent, govern through organised assemblies, and bind the individual to common obligations.

These are characteristics which define peoples and are fundamental to sovereign rights.

THE DECLARATION IS ADOPTED

On 13 September 2007 the United Nations General Assembly met for the final sitting of the sixty-first annual session. There were only six items on the agenda for this day and the attending ambassadors expected the meeting to finish early.

Nevertheless it was a day filled with tension and apprehension, as hundreds of Indigenous people occupied the available seats in the gallery and a large number of Indigenous people were also seated as guests at the floor level of the chamber.

They were waiting expectantly for the General Assembly to adopt the drafted *Declaration on the Rights of Indigenous Peoples*. They hoped for a positive result, but many could not forget what happen almost a year earlier. At that time the United Nations voted to defer the adoption of the *Declaration*, allowing opportunity to amend the draft.

At last the *Declaration* had returned to the General Assembly for a decision. Over that past year Indigenous peoples had strongly resisted amendments to the *Declaration* and had succeeded in keeping any changes to the document to a minimum. The *Declaration* had for all intents and purposes remained intact since the rejection a year ago.

It was the last day of the session. It was the last item on the agenda. If the *Declaration* was not adopted on this day then Indigenous peoples knew it would lapse forever, and twenty-five years of negotiations at the United Nations by Indigenous peoples will have come to a dismal end.

But this could otherwise be a momentous day - a day in history - for the 350 million Indigenous peoples of the world, and the 192 members States of the United Nations.

As time arrived and the last item on the agenda was announced, Ambassador-Delegate Luis Chavez of Peru, took the floor and introduced the *Declaration* to the General Assembly. He promptly called upon the General Assembly to adopt the *Declaration* by consensus, without a vote.

Silence then hit the room as Ambassador Chavez' request, that the *Declaration* be adopted by consensus, met with opposition.

Australia, New Zealand, and the United States requested the floor and read out a joint statement calling for a formal vote. Canada then made a separate request for a vote. These four States are known in the UN system as the CANZUS group. By calling for a vote, they were announcing their opposition to the *Declaration* and were attempting to prompt negative responses from other States.

CANZUS said it continued to oppose the provisions in the *Declaration* concerning self-determination; lands, territories and resources; and the principle of free, prior and informed consent.

New Zealand argued that the provision regarding land rights (Article 26) created a situation where '... the entire country is potentially caught within the scope of the Article',

while articles 19 and 32(2) regarding free, prior and informed consent '...imply that Indigenous peoples have a right of veto over a democratic legislature and natural resource management' and concluded that New Zealand '... must disassociate itself from this text'.

The United States followed, arguing that the 'text as a whole is unacceptable' and explaining that they would be voting against 'this flawed document'.

None of this was surprising. What was significant about their opposition was that the CANZUS States had so far failed to attract wider support from the UN member States.

Following the CANZUS call for a vote, the attention turned to the big screen in the chamber where each State would register their vote.

The President of the General Assembly called for the States to cast their vote. The Indigenous peoples held their breath as the votes quickly lit up the screen.

There was suddenly an eruption. The giant screen set above the podium glowed green as each State delegations voted 'yes' by pressing the buttons on their desks. The scale of support within the General Assembly was overwhelming. Green, green, green everywhere.

The final vote registered as 144 in favour, 4 against (CANZUS) and 11 abstentions.

Kenneth Deer of the Mohawk Nation stood up in the gallery of the General Assembly chamber and happily led the loud and long applause which rang throughout the room.

The President of the General Assembly banged the gavel, and said 'So decided'.

WHO ARE INDIGENOUS PEOPLES

It is estimated that the Indigenous population living around the world is almost 400 million people living in up to 80 different countries, and on all continents except Antarctica.

Indigenous peoples are the first peoples; each with strong physical, religious and spiritual relationships with their territory, and with legitimate societies, systems of order and institutions.

Indigenous peoples also hold most of the world's cultural diversity, including over 90% of the world's languages, and live in the areas of most interest relating to biological diversity.

Indigenous peoples have been and continue to be colonised, disempowered, dispossessed, economically exploited and subject to racial discrimination.

Violations of the human rights of the Indigenous peoples are often committed by the very same governments that have the international obligations to promote and protect all human rights and interests; but governments are ultimately influenced by the economic interests of multinational companies and wellbeing of the settler populations.

In adopting the *Declaration on the Rights of Indigenous Peoples*, the General Assembly was responding to the evidence gathered within the UN system over a quarter of a decade which highlighted the plight of Indigenous peoples and the common experience of historical land and resource injustices, severe social and cultural disadvantages, and continued political and economic domination by colonial interests.

The resolution from the General Assembly acknowledged that:

'indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests'.¹

The General Assembly accepted there was the

'urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources'.²

The resolution also affirmed that the situation of Indigenous peoples around the world was no longer exclusively a matter for domestic concern but

‘that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples’.³

THE DECLARATION HAS POSITIVE EFFECT

This consciousness and commitment by the United Nations to establishing a human rights standard for Indigenous peoples is no minor revelation. It brings into play some fundamental and important principles, norms and rules established under global governance by the United Nations.

At that instant, when the *Declaration* was adopted by the General Assembly on 13 September 2007, the political and legal status of the Indigenous populations around the world immediately changed - a fact understood to a certain extent in the grounds of the United Nations. But very few governments, or people, around the world understood or now understand the significance of this decision and the impending changes that this decision must make to political relationships around the world.

The four States who voted against the *Declaration* in 2007 - Canada, Australia, New Zealand and the USA - were perhaps aware that political changes might be imminent in their own countries; aware enough to register opposition to the *Declaration* and to call for other States to reject this new instrument.

In the five, almost six, years since the *Declaration* was adopted there have been various developments within the domain of States. One State has implemented the *Rights of Indigenous Peoples* into the Constitution, another has enacted national legislation to deploy the *Declaration on the Rights of Indigenous Peoples*.

This instrument now has status as a universal human rights standard. As such, the *Declaration* is not, in itself, a legally-binding instrument, but the *Declaration* does have explicit purpose and impact upon human rights law.

The first detail to understand is that the *Declaration* does not create any new human right. It does instead establish better understanding. That is, acknowledgement that the human rights of Indigenous peoples have been historically and calculatedly denied; and acceptance that actions are required and expected to restore and safeguard those human rights.

Therefore the *Declaration* is about equality, and redress of racial discrimination, and not about the creation of new human rights for Indigenous peoples.

ALL PEOPLES HAVE THE RIGHT OF SELF-DETERMINATION

The *Declaration* confuses many of us because it asserts that Indigenous populations have status as ‘peoples’, peoples with the right to self-determination. They are totally unfamiliar with the importance of the term ‘peoples’.

It is perhaps best explained using the Preamble of the *Charter of the United Nations*, which begins with the phrase:

‘We the **peoples** of the United Nations’ (emphasis added).

and goes on to say - as I might paraphrase - we are the peoples determined:

- to end the scourge of war,
- to reaffirm fundamental human rights,
- to establish justice and respect for international law, and
- to promote better standards of life and freedom, etc.

And then the Preamble concludes:

‘Accordingly, our respective Governments ... do hereby establish an international organization to be known as the United Nations.’

So the *Charter of the United Nations*, the foundation for modern global governance and international law, sets in place the definition of ‘peoples’ as the population of a State, and these peoples are represented at the United Nations by their political institution, being their government.

The *Charter* provides further foundation for the identity of peoples in this global governance framework. If we look at Chapter XI of the *Charter* we see that this section addresses the administration of ‘Non-Self-Governing Territories’.

This Chapter begins with the following declaration:

‘Members of the United Nations which have or assume responsibilities for the administration of territories whose **peoples** have not yet attained a full measure of self-government ... accept as a sacred trust the obligation... to develop self-government, to take due account of the political aspirations of the **peoples**, and to assist them in the progressive development of their free political institutions’⁴

(emphasis added).

These elements of Chapter XI can also be found in the *Declaration on the Rights of Indigenous Peoples*. By cross-referencing the *Declaration* with the UN *Charter* we can begin to understand Articles 3 & 4 of the *Declaration* which state:

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

and

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

There has been resistance amongst UN member States to the concept that Indigenous peoples are peoples and have the right of self-determination. Not only has the CANZUS group presented that argument as part of the process to vote against the adoption of the *Declaration*, but a number of other States want ‘self-determination’ for Indigenous peoples to be a qualified right, limited to internal application within the States’ right of self-determination. For example, the USA argues that the native American tribes are sovereign entities within the sovereign identity of the State.

While the right of self-determination might remain as a point of contention for a number of States it cannot be misunderstood or misinterpreted when the UN General Assembly Resolution affirms:

‘Indigenous peoples are equal to all other peoples.’

This argument has been presented during the process of negotiations over and drafting of the text of the *Declaration on the Rights of Indigenous Peoples*. But the General Assembly has clearly and unambiguously affirmed Indigenous peoples are ‘peoples’ and as such ‘are equal to all other peoples’.⁵

SOVEREIGNTY VS SELF-DETERMINATION

Advocates in Australia for the rights of the Aboriginal and Torres Strait Islander peoples continue to claim sovereign status, primarily on the argument that sovereignty has never been ceded to the Australian nation. I will not expand on this reasoning because I have not heard as yet the legal proposition, though I have asked proponents to give further explanation. I am not opposed to the argument of sovereign status, but I have not been able to build a detailed case to advocate.

We know that sovereignty is generally used to refer to the supreme power without restraint or restriction within the State. Until the nineteenth century the sovereignty of the State was absolute, but international law came to recognise that a sovereign could exist under the protection of a greater sovereignty without losing its sovereignty. In contemporary times we know that States are all limited by treaties and customary international law and therefore State sovereignty is limited.

Through my international experience I am becoming more aware of the situation in the USA where 'tribal sovereignty' is acknowledged by both the government political and legal systems. The concept rests upon the notion that native American tribes possess a nationhood status and retain inherent powers of self-government. The USA government describes the status in this way:

'The Native American population dominated the North American continent. Their strength in numbers, the control they exerted over the natural resources within and between their territories, and the European practice of establishing relations with countries other than themselves and the recognition of tribal property rights led to tribes being seen by exploring foreign powers as sovereign nations, who treated with them accordingly. However, as the foreign powers' presence expanded and with the establishment and growth of the United States, tribal populations dropped dramatically and tribal sovereignty **gradually eroded**. While tribal sovereignty is limited today by the United States under treaties, acts of Congress, Executive Orders, federal administrative agreements and court decisions, what remains is nevertheless **protected and maintained by the federally recognized tribes against further encroachment by other sovereigns**, such as the states. Tribal sovereignty ensures that any decisions about the tribes with regard to their property and citizens are made with their participation and consent' ⁶ (emphasis added).

In examining the legal status of the Native American peoples, law professor Philip Prygoski concludes:

'At least two troubling aspects of the Court's treatment of the sovereign rights and powers of Indian tribes emerge from a look at the development of the doctrine of tribal sovereignty. First, the Court has moved away from the concept of intrinsic tribal sovereignty that predated the coming of the European conquerors, and has adopted the view that tribal sovereignty, and the concomitant freedom of the tribes from encroachments by the states, **exists solely because Congress has chosen to confer some protections on the tribes**. Second, whatever the doctrinal underpinnings of tribal sovereignty may be, it is clear that the sovereignty of American Indian tribes has been progressively and systematically diminished by the actions of the federal government, including the Supreme Court' ⁷ (emphasis added).

I am not aware of other examples around the world which might help us to define in legal terms the legal sovereignty of Indigenous peoples.

However the right of self-determination, I have consistently argued, does have distinct definition and meaning in law and provides the framework by which Indigenous peoples can establish their legitimate rights to autonomy, self-government, ownership and control of territory and sovereignty over their natural resources.

THE RIGHT TO PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

The Commission on Permanent Sovereignty over Natural Resources was established by the General Assembly in 1958 to consider the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination.⁸

Consequently, in 1962 the UN General Assembly adopted its *Resolution on Permanent Sovereignty over Natural Resources*⁹. In this Resolution the General Assembly recognised the importance of promoting the economic development of developing countries and securing their economic independence, and determined there be further consideration by the United Nations of the subject of permanent sovereignty over natural resources. The first article in this resolution stated:

'The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.'

The next article in the Resolution stated that the exploration and development of such resources

'should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable'.

Permanent sovereignty over natural resources became a general principle of international law in 1966 when it was included in common article 1 of both international covenants on human rights, i.e. the *Covenant on Civil and Political Rights* and the *Covenant on Economic, Social and Cultural Rights*.

'1. All 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.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.'¹⁰

Each of these Covenants also affirms in other articles that:

'Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.'¹¹

In 2004, the UN special rapporteur Erica-Irene Daes presented her final report to the UN Commission on Human Rights on the topic of Indigenous peoples' permanent sovereignty over natural resources.¹² This report was presented under the agenda item on Prevention of Discrimination. In her report Madam Daes presents a number of recommendations including the following.

'In consultation with indigenous peoples, States must amend their laws and constitutions and take all necessary legislative and administrative measures to assure that indigenous peoples enjoy ownership of and benefits from the natural resources on or under or otherwise pertaining to the lands they historically occupy and use.'¹³

'States must also recognize the authority of indigenous peoples to manage, conserve, and develop their resources according to their own institutions and laws.'¹⁴

'In situations where indigenous peoples, for valid legal reasons, do not own or control the natural resources pertaining to all or a part of their lands or territories, the indigenous peoples concerned must nevertheless share in the benefits from the

development or use of these resources without any discrimination and must be fairly compensated for any damage that may result from development or use of the resources.’¹⁵

Madam Daes also recalled a 1955 report of the UN Secretary-General where it was acknowledged the right of self-determination

‘included the simple and elementary principle that a nation or people should be master of its own natural wealth or resource’,

and its purpose was intended

‘to warn against such foreign exploitation as might result in depriving the local population of its own means of subsistence.’¹⁶

Madam Daes addresses the authority of sovereignty to be a permanent state because it is coupled to an inalienable human right of Indigenous peoples.

... this right arises out of the right of self-determination, the right to own property, the right to exist as a people, and the right to be free from discrimination, among other rights, all of which are inalienable. The word “permanent” is also intended to emphasize particularly that indigenous peoples are not to be deprived of their resources as a consequence of unequal or oppressive arrangements, contracts or concessions, especially those that are characterized by fraud, duress, unfair bargaining conditions, lack of mutual understanding, and the like. This is not to say that the indigenous people that own the resources can never sell or dispose of them. Rather it is to say that the indigenous peoples have the permanent right to own and control their resources so long as they wish, free from economic, legal, and political oppression or unfairness of any kind, including the often unequal and unjust conditions of the private marketplace.’¹⁷

In Australia the law considers that the mineral resources belong to the Crown and that acknowledgement that Aboriginal and Torres Strait Islander peoples might have rights to these resources would be discriminatory and create unequal treatment to non-Indigenous Australian peoples. This argument is rejected by the report of Erica-Irene Daes.

‘... in many countries, subsurface resources are declared by law to be the property of the State. Such legal regimes have a distinct and extremely adverse impact on indigenous peoples, because they purport to unilaterally deprive the indigenous peoples of the subsurface resources that they owned prior to colonial occupation and the creation of the present State. Other property owners in the State never owned such resources and thus were never deprived of them. Thus, the system of State ownership of subsurface resources is distinctly discriminatory in its operation as regards indigenous peoples. The result of these legal regimes is to transfer ownership of indigenous peoples’ resources to the State itself. Of course, in some situations, the ownership of the resources in question was transferred freely and lawfully by the indigenous people who held it. These situations do not concern us here. However, as a general matter it is clear that indigenous peoples were not participants in the process of adopting State constitutions and cannot be said to have consented to the transfer of their subsurface resources to the State.’

The UN report of Madam Daes and her recommendations preceded the adoption of the *Declaration on the Rights of Indigenous Peoples*. It was not until 2007, three years after the UN report was tabled, that the General Assembly passed the resolution affirming the status of Indigenous peoples as ‘peoples’. Thus the legal interpretation, that the right to permanent sovereignty over natural resources was derived from the right of self-determination, was not given due consideration in the United Nations human rights bodies at the time of presentation.

However we should not overlook that the International Labour Organisation *Indigenous and Tribal Peoples Convention*, 1989 (No. 169) also addresses the rights of 'peoples' to their natural resources. The ILO Convention, as an international treaty, is a legally-binding instrument. I will mention more on this Convention later in this paper. The Convention states, in Articles 15 and 7 respectively:

"1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specifically safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources."¹⁸

"1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development..."¹⁹

RIGHTS OVER LANDS, TERRITORIES AND RESOURCES

When the Whitlam Government took power in 1972, Justice Woodward was commissioned to inquire into the land rights of the Aboriginal people in the Northern Territory. In his report Justice Woodward concluded that:

- Aboriginal people should own reserve lands and be able to claim vacant crown lands.
- Aboriginal sacred sites be protected.
- Aboriginal land councils be established to administer Aboriginal land.
- Aboriginal people have control over mining and developments on their land.
- Mining royalties should be paid to traditional land owners.

These recommendations were for the most part made into law under the *Aboriginal Land Rights (Northern Territory) Act 1976*. They also became the basis for core elements of the proposed national land rights legislation, promised by the Hawke Labor Government in 1983. The Hawke Government reneged on this promise for national land rights law in 1985.

Seven years later the High Court *Mabo* judgement established the legal precedent for recognition of Aboriginal and Torres Strait Islander continued ownership of their lands. The significant element of this judgement was:

- (1) The acceptance that Aboriginal and Torres Strait Islander peoples owned their lands prior to colonisation; and
- (2) The continued ownership by the Aboriginal and Torres Strait Islander people is still recognisable under common law of Australia.

In 1998 the Howard Coalition Government passed legislation - actually amending legislation - intended to overtake the High Court findings, and create some specific procedures for Aboriginal and Torres Strait Islander peoples to follow in order to claim land ownership by application and test procedures before courts. The amended native title law²⁰ does not have the higher purpose to return lands to Aboriginal and Torres Strait Islander ownership, but to require Aboriginal and Torres Strait Islander aspirations to be tested before the Australian legal system. This cannot possibly be seen as being in the spirit of the *Declaration on the Rights of Indigenous Peoples*.

Native title law is at odds with the rights of Indigenous peoples to own and control their lands, territories and resources. In reality they inhibit these rights, though apologists for the native title laws, endeavour to highlight outcomes which are not rights-based.

To justify this statement I now quickly compare native title in Australia with the core elements of the *Aboriginal Land Rights (Northern Territory) Act 1976* - a standard set by the Government of Australia in 1976 - the UN *Declaration on the Rights of Indigenous Peoples* and the *ILO Convention No. 169*.

The before examining five core elements of land rights as contained in the *Declaration on the Rights of Indigenous Peoples*, i.e. the universal human rights standards, it is important to affirm again the right of peoples to self-determination. The *Declaration on the Rights of Indigenous Peoples* describes the right of Indigenous peoples to exercise sovereign control over their territories and resources, and maintain their human rights to subsistence and economic development. Ownership and control includes autonomy or self-government in making decisions about their futures. This foundation is critical. In Australia the Aboriginal and Torres Strait Islander people, in the pursuit of the right to self-determination and sovereignty over their lands, territories and resources, are being kept dependent upon native title procedures and services managed through government.

The first core element is the right to own their lands, territories and resources.

Articles 25 and 26 of the *Declaration* state that Indigenous peoples have the right to own, use, develop and control their lands, territories, waters and resources; to maintain and strengthen their distinctive spiritual relationship with these, and to uphold their responsibilities to future generations.

This correlates with the Woodward proposal for ownership of lands and protection of sacred sites. Australian law does not support the Aboriginal and Torres Strait Islander peoples' rights to own and to develop their resources.

The second core element is fair adjudication of rights relating to lands, territories and resources.

Article 27 of the *Declaration* calls for a fair, independent, impartial, open and transparent process, to recognise and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources. This process is to occur in conjunction with the Indigenous peoples, giving due recognition to their laws, traditions, customs and land tenure systems.

Australian law does not recognise rights of Indigenous peoples beyond the residual elements of the *Mabo* judgement and heritage protection. Adjudication of Indigenous peoples' disputes, which are in no minor way disputes with the governments, rests with the Australian legal system under the limitations held in the discriminatory *Constitution of Australia*. These institutions are not able to be seen as operating in conjunction with the Indigenous peoples, nor as independent and impartial regarding adjudication of Aboriginal and Torres Strait Islander rights to lands and resources.

The third core element is the right to redress.

Article 28 of the *Declaration* calls for redress through restitution for lands, territories and resources which have been taken without free, prior and informed consent. Where restitution is not possible, then just, fair and equitable compensation is required.

The Australian Government has established the Aboriginal Land Corporation to acquire lands for Aboriginal and Torres Strait Islander peoples. The investment by the Government in this Corporation is \$1.4 billion, presumably as compensation for lands and resources taken without free, prior and informed consent. It would be unfair and remiss to overlook the compensation package provided also under the *Aboriginal Land Rights Act 1983* (NSW).

The fourth core element is the management of the lands, territories and resources.

Article 29 states Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. Article 32

states that Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and resources.

This element is missing from the Australian 'solutions' to Aboriginal and Torres Strait Islander demands for recognised ownership and control of their traditional lands. Neither the *Aboriginal Land Rights (Northern Territory) Act 1976* nor the *Native Title Act* give due attention to the right of the Aboriginal and Torres Strait Islander peoples to protect or develop their natural resources. The Australian Government provides some environmental management funding to Aboriginal and Torres Strait Islander communities. The funding is not universally available to communities holding or managing lands and resources, and the available funding has limited purposes and application, depending upon government policies and priorities from time to time.

Funding for economic development in the territories of the Aboriginal and Torres Strait Islander peoples is very limited. In Australia the Government expects either that extractive industries or other exploitative development might occur in Indigenous-owned territories where resources exist, or that the Aboriginal and Torres Strait Islander peoples will develop private enterprise within their communities and on traditional lands.

Unlike many Indigenous peoples in other parts of the world, Aboriginal and Torres Strait Islander communities do not have access to funding from international aid agencies or development banks. However the Government has established, under control of Government, the statutory bodies of the Indigenous Lands Corporation and Indigenous Business Australia. These authorities are not community-owned or community-controlled institutions and may have purposes which are more akin for the Aboriginal and Torres Strait Islander peoples to transition into the mainstream economic life of Australia.

The fifth and the last of these core elements is the right to maintain, control and protect the culture, cultural heritage and Indigenous knowledges including intellectual property.

Article 31 of the *Declaration* addresses these rights including the right to develop culture.

A few of these rights are partially addressed in Australian law. There are Aboriginal heritage protection laws, albeit inadequate, both at the national and state/territory levels. Assistance for languages also is available but at a minimum, far from requirements to maintain more than 200 Aboriginal languages.

These five elements are also supported, for the most part, in *ILO Convention No. 169*²¹ which was adopted by the International Labour Organisation in 1989. The *Convention*, as an international treaty, would have legal effect in Australian law if the Government of Australia decides to become a signatory to the treaty and to ratify the treaty. In 2011 the Human Rights Council, in reviewing the human rights record of Australia over a five-year period under the Universal Periodic Review procedures, recommended, inter alia, that *ILO Convention 169* be ratified by the Government of Australia. Australia responded two years ago and again a month ago to the Human Rights Council that it would look to implement that recommendation. We can only hold our breath.

EXAMINING THE THE POLICIES OF GOVERNMENT

It is now more than five years since the *Declaration* was adopted, and some changes have already taken effect. The CANZUS States have each abandoned their official opposition to the *Declaration*, and openly declared their support for the *Declaration*.

Australia was the first to express support when it announced on 3 April 2009 that it would now support the *Declaration*. Not much has happened since.

Recently the UN Expert Mechanism on the Rights of Indigenous Peoples asked States to respond to its questionnaire designed to discover how States were proceeding to implement the *Declaration on the Rights of Indigenous Peoples*. Six questions were asked, as follows:

‘1. Does the state have an overarching national implementation strategy to attain the goals of the Declaration?

...

2. Have specific legal, policy or other measures been adopted especially to implement any or all rights in the Declaration?

...

3. When devising laws, policies or other measures that affect indigenous peoples, do governmental bodies routinely take into account the Declaration (including indigenous peoples’ rights to participate in decision making that affects them)?

...

4. Has the Government endeavoured to raise awareness about the Declaration to various levels of the community and governance to enhance the prospects of its implementation?

If yes:

- please explain the initiatives the Government has undertaken.
- does this include translation of the Declaration into different languages?
- has the Declaration been disseminated widely?

If not:

- what steps, if any, are planned to raise awareness about the Declaration?
- if there are no plans to raise awareness about the Declaration, why not?

5. What are the main challenges encountered in adopting measures and implementing strategies to attain the goals of the Declaration?

6. In the light of the information provided above, what are your views on best practices regarding possible appropriate measures and Implementation strategies to attain the goals of the Declaration? Please also consider and, if relevant, comment on the role that can be played by international institutions, including the Expert Mechanism on the Rights of Indigenous Peoples, to assist states in adopting measures and implementation strategies to attain the goals of the Declaration.’

I will leave it to you to ponder the position of the Government of Australia on these points. But you can find an official response by Australia to the questionnaire on the internet at the website of the UN Expert Mechanism on the Rights of Indigenous Peoples. Let me say, that Australia expresses the view that it is already implementing 'the spirit of the Declaration'.

‘The Government’s Indigenous policies are broadly consistent with the spirit of the Declaration and relevant agencies within the Government liaise closely on relevant issues to ensure that these issues are taken into account in policy and program development.’²²

Much remains to be done in Australia to ensure that the Aboriginal and Torres Strait Islander peoples are able to enjoy their rights. While the politics continues to dance around the important issues, the culture of the settler society remains and subsequently there remains no intention to recognise the sovereignty and right of self-determination of the Aboriginal and Torres Strait Islander peoples. This is evidenced by the unwillingness of Government to enter into a dialogue on the merits and weaknesses of Aboriginal and Torres Strait Islander assertions.

For me the matter hinges upon Article 3 of the *Declaration* - not the part that refers to self-determination - but the part that states Indigenous peoples have the right to determine their political status. Over many years I have asked this question which no-one is either prepared or capable of answering: What is the political status of our peoples? Yes, there is an obvious and simple response: 'The Aboriginal or Torres Strait Islander person is a citizen of Australia and has the same political status as any Australian.'

I have never accepted that answer and believe it cannot be the answer for as long as no agreement is reached with the Aboriginal and Torres Strait Islander peoples. The future of Aboriginal and Torres Strait Islander peoples rests upon the reaching of agreement on the political status.

My work on the rights of Indigenous peoples took me to the United Nations. The United Nations answered the question of the Indigenous peoples in 2007 when it adopted the *Declaration on the Rights of Indigenous Peoples*. From 2007 I have been searching for the answers in Australia but the answers are still elusive. Is it time to go back to the United Nations to determine the next steps? I hope not. I hope that this nation can see far enough ahead, take enough interest to know when it is about to be threatened by international concern, and act to directly address the agenda on the status of the Indigenous peoples.

In just over one year's time, in September 2014, the UN General Assembly will be challenged by the Indigenous peoples of the world on continuing violations by the States of their human rights. The occasion will be the World Conference on Indigenous Peoples, a high-level segment of the General Assembly. Already the Indigenous peoples of the world have prepared for this event. In April 2013 the National Congress of Australia's First Peoples and the NSW Aboriginal Land Council hosted the preparatory meeting of the Indigenous Peoples of the Pacific region.

Last month, in June 2013, 400 Indigenous people from around the world gathered in Alta, Norway, for their global conference in preparation for the World Conference. The outcome document from that meeting is completed and in the process of being transmitted to the United Nations.

The complaints could be that States have not adjusted and responded since the *Declaration* was adopted. The process has already started. Australia must become aware, learn and react positively to the 'dark clouds' looming on the horizon.

ENDNOTES

- ¹ United Nations, *Declaration on the Rights of Indigenous Peoples*, preambular paragraph 6.
- ² *ibid*, preambular paragraph 7.
- ³ *ibid*, preambular paragraph 20.
- ⁴ *Charter of the United Nations*, Chapter XI, Article 73.
- ⁵ *ibid*, preambular paragraph 2 and Article 2.
- ⁶ Bureau of Indian Affairs, Frequently Asked Questions, <http://www.bia.gov/FAQs/> (accessed 18 July 2013) .
- ⁷ Philip J Prygoski, *From Marshall to Marshall: The Supreme Court's changing stance on tribal sovereignty*, http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/marshall.html (accessed 19 July 2013).
- ⁸ General Assembly resolution 1314 (VI).
- ⁹ United Nations General Assembly resolution 1803 (XV11).
- ¹⁰ Article 1, *International Covenant on Civil and Political Rights*; Article 1, *International Covenant on Economic, Social and Cultural Rights*.
- ¹¹ Article 47, *International Covenant on Civil and Political Rights*; Article 25, *International Covenant on Economic, Social and Cultural Rights*.
- ¹² UN document E/CN.4/Sub.2/2004/30, 13 July 2004.
- ¹³ *ibid*, Para 67.
- ¹⁴ *ibid*, Para 69.
- ¹⁵ *ibid*, Para 70.
- ¹⁶ *ibid*, Para 13.
- ¹⁷ *ibid*, Para 47.
- ¹⁸ International Labour Organisation, *Indigenous and Tribal Peoples Convention*, 1989 (No. 169), Article 15.
- ¹⁹ *ibid*, Article 7.
- ²⁰ *Native Title Amendment Act 1998* (Cth).
- ²¹ International Labour Organisation, *Indigenous and Tribal Peoples Convention*, 1989 (No. 169).
- ²² United Nations, Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/QuestionnaireDeclaration.aspx>