THE INTERNATIONAL INDIGENOUS HUMAN RIGHTS MOVEMENT AND THE CONTEXT IN AUSTRALIA

JUSTINE CURATOLO*

Introduction

The UN Working Group on Indigenous Populations (UNWGIP) is a group made up of Indigenous people; it was created by the UN to address specific Indigenous issues and at its second session, released a formal definition of what it means to be Indigenous.

> Indigenous communities, peoples and nations are those which have a historical continuity with pre-invasion and pre-colonial societies that develop their territorial, consider themselves distinct from other sectors of societies now prevailing in those territories…[1]

There is no treaty between the Australian Indigenous peoples and the Government of Australia, despite the popular promises made by past leaders; our international human rights obligations; and the criticism leveled against the Government both internally and externally for their continued human rights abuses against Indigenous Australians.

The Northern Territory Intervention, which was initiated by the Howard Federal Government in 2007, still continues today under the Gillard Federal Government. It has been four years, and a change of three leaders and two political parties, yet the systematic human rights abuse of Indigenous people living in the Northern Territory continues. 'They are refugees on their own land that has been their home, traceable for centuries'. [2]

Internationally, much progress has been made for the Indigenous rights movement, however, most of that has come within the last decade. The successful women's rights movement can provide many invaluable lessons for the Indigenous movement. For example:

> In the twenty-year period from 1975 to 1995, masses of women moved from portraying themselves as victims at the mercy of male rulers in the private and public sectors to taking leadership roles in demanding their human rights.[3]

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* Justine Curatolo has a Bachelor of Business (Major in Chinese and Management), Master of Law (Human Rights Law). She has worked extensively in the social welfare sector including people with disabilities, children with violent behavior and most recently in the family violence sector. She is currently training to become a horse therapist.

[1] Second session of the UN WGIP, definition of Indigenous people.

[2] Natasha Robinson, Tony Koch and Michael Owen, 'Homeless', *The Weekend Australian*, (16 August 2009), 15.

[3] Arvonne S. Fraser, 'Becoming Human: The origins and development of women's human

PART ONE – INTERNATIONAL HUMAN RIGHTS LAW AND THE INDIGENOUS HUMAN RIGHTS MOVEMENT

What are Human Rights?

Human rights are standards which guide the way human beings should be treated and should treat others. The United Nations (UN) was developed from the League of Nations as a way to prevent a repeat of the human rights atrocities experienced during the World Wars. As the authority on international human rights law, the UN created the Universal Declaration of Human Rights (UDHR) which as a document articulates the rights that every human being has by virtue of being a human being. On December 10, 1948, the UN General Assembly adopted the UDHR and whilst some conjecture exists about the 'Westernised' influence of the UDHR, there still appears to be widespread acceptance that UDHR was a crucial first step in the instigation of the human rights movement worldwide.

Although, with growing momentum comes more analysis and a deeper understanding of the true value and application of human rights. Consequently, today, more than fifty years on from the proclamation of the UDHR there are currently nine different human rights conventions which articulate additional protection for specific groups of human rights and allow for legal enforceability.

These documents have become powerful instruments of change in safeguarding the rights of the individuals they seek to protect as they have the capacity to become legally binding and thus hold States accountable. However, it appears that not all groups of human rights which have been identified by the UN as needing additional protection are treated equally. As a group, Indigenous people have been identified as needing specific and additional protection, yet their human rights document is neither legally binding nor enforceable, instead the Declaration on the Rights of Indigenous Peoples is only aspirational and leaves the responsibility up to the States to implement thr rights entrenched within it.

A brief overview of the human rights' functions of the UN

The UN has two main systems which monitor human rights: the first is *Charter-based organs*, and the second is *Treaty-based organs*. 'The Charter-based bodies are political organs which have a much broader mandate to promote awareness, to foster respect and to respond to violations of human rights standards.'[4] Their mandate is, in general terms, provided by the provisions of the Charter.

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rights' (1999) 21(4) *Human Rights Quarterly* 902.

[4] Henry J. Steiner, Philip Alston, Ryan Goodman, *International Human Rights in context: Law, Politics, Morals* (3rd ed, 2008) 740.

The role of international human rights law in each of these charter-based bodies has transformed over time into a more symbiotic relationship today. For example, previously, the Security Council had been reluctant to become involved in human rights matters as it saw security and human rights as two distinct areas, but within the last two decades, there has been a significant change and it has taken a more proactive role in the promotion of human rights through security. 'Since the end of the Cold War, international security and humanitarianism have become more complex than ever before.'[5]

Under the Secretary-General, the official with principal responsibility for human rights is the *High Commissioner for Human Rights*. In 2006, the Human Rights Committee (which replaced the Commission on Human Rights) was created with the aim to report directly to the General Assembly.

In addition to charter-based bodies to monitor human rights, the UN also has treaty-based bodies. Treaties are legally binding agreements made between the State and the party in question and are distinguished by

> … a limited mandate reflecting the terms of the treaty; a limited range of procedural options for responding to violations; consensus-based decision-making as far as possible; and a particular concern with addressing issues in ways that contribute to developing the normative understanding of the relevant rights.[6]

The role of treaties in protecting human rights

'A treaty is a settlement or agreement arrived at by 'treating' or negotiation. A treaty gives rise to binding obligations between the parties who make it.'[7] In terms of providing human rights protection, treaties have an advantage over charter based functions, because they are able to create and define the powers and jurisdictions of the participants and are not limited to state parties.

Article 26 of the Vienna Convention on the Law of Treaties states that; 'Every treaty in force is binding upon the parties to it and must be performed in good faith.'

Treaties can provide a platform for change and accountability when there is a legal duty placed on states for the full realisation of a right to come into existence.

The role of treaties and Indigenous peoples' human rights

Compared to other international rights movements, treaties have historically

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[5] Malcolm Fraser, *Common Ground* (2003) 109.
[6] Steiner et al, above n 5, 741.
[7] Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (2009) 328.

been an important source of international human rights law protection for groups of indigenous peoples around the world.

Canada

The Royal Proclamation of 7 October 1763 is a treaty made between the Indigenous people and the invading nation which recognised the existing rights of the Indigenous peoples there. Yet, it was never properly domestically enforced and as a result, despite the international legally binding nature of the treaty, Indigenous people in Canada still suffered massive human rights violations.

Although, this foundation for the legal recognition could not be completely destroyed, and 220 years later in 1982, the Canadian government amended its Constitution to formally acknowledge the treaty and the rights of the Indigenous people it originally sought to protect. An inclusion was made, Article 35 (1) which states that: '[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'. Canada has since taken great strides with reconciliation and repatriation with its Indigenous peoples and as a result its initiatives provide models for best practice for other countries.

New Zealand

The existing rights of the Indigenous people in New Zealand were also recognised by a treaty made between them and the invading nation. 'The Treaty of Waitangi was signed on 6 February 1840 by 40 chiefs and by September 500 had signed.'[8] The treaty transferred sovereignty from the Maori Chiefs to the British Crown in return for the Queen's 'royal protection' and to enjoy the equal rights and privileges of all English subjects.

However, similar to the experience in Canada, despite the existence of an internationally binding treaty, massive human rights violations of the Indigenous peoples still occurred. Also just like Canada, today, more than 150 years later, Indigenous people of New Zealand have been able to reassert the protected rights of this treaty and therefore, today have made significant gains in the legal protection of their culture and specific human rights.

Australia

In contrast, the Australian Indigenous population still has no constitutional protection or formal legal recognition of their distinct rights and is still subject to systematic governmental discrimination in some parts of Australia.

[8] Larissa Behrendt, 'New Zealand' (2009) *Hot Topics 68: Indigenous Peoples.*

Captain Cook landed in Botany Bay in 1770 and he (wrongfully) claimed possession of Australia for Britain using the doctrine of *terra nullius*. Eighteenth Century international law clearly defined how one country could take possession of another, yet Captain Cook knowingly did not abide by these regulations and as a consequence, there were numerous violent encounters with the Indigenous people, often resulting in bloodshed.

It was generally accepted that 'cultivating land established a greater right to land than did hunting or gathering.'[9] Australian Indigenous peoples lived a nomadic lifestyle, therefore, the evidence of this type of cultivation of land was not obvious to the sedentary farming ways of the English. Therefore, based on this principle, no treaty was made between the Indigenous people and the occupiers despite the fact, that under international law at the time, Captain Cook was compelled to 'respect the rights of the indigenous people'.

Two attempts were made, one in 1897 and the other in 1898 to amend the Constitution to include protection against racial discrimination (which would benefit Indigenous peoples), yet both attempts were rejected by Parliament. Then 70 years later, in 1967, there was a referendum in which over ninety percent of the Australian population voted to include Indigenous people in the national census, the most successful referendum in Australia's history.

Then in 1988, the prime minister of Australia Bob Hawke, while attending the Barunga Festival, (an indigenous cultural event) said that 'there would be a treaty with Indigenous people within the life of the current Parliament.'

Yet, 20 years later there is still no treaty.

In June 1992, the High Court of Australia in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('*Mabo*') delivered its historic decision in which it overturned the doctrine of *terra nullius* because it recognised that Indigenous people had a special relationship to the land which existed prior to colonisation and still exists today. 'The common law of this country recognises a form of native title….in accordance with their laws or customs, to their traditional lands…'[10]

Yet, *still* the government refused to make a treaty with the Indigenous people of Australia.

In 2007, the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples (the Declaration), although Australia (along with Canada, NZ and the USA) refused to sign because they said the Declaration went too far in giving Indigenous peoples ownership of traditional lands and control of local resources.

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[9] James Anaya, *Indigenous people and International Law* (Oxford University Press, 2004) 16-19.

[10] *Mabo v Queensland* (No 2) [1992] HCA 23, 1.

Then there was a change in the Federal government, and their position regarding Indigenous people was reviewed. Finally, in 2009, the Australian government formally endorsed the Declaration though not legally binding, the Federal Minister for Indigenous Affairs said that it 'sets up important international principles'.

But there is *still* no treaty.

The role of international treaties in effecting change in Australia

'This method of internalising treaty norms into the domestic legal system…. constitutes one of the most powerful ways in which treaty norms could be enforced on the local level.'[11] International treaties can also have an impact on the substantive outcome of cases in the domestic courts. The case of *Teoh* (1995)[12] is a prime example of this where the Convention of the Rights of the Child which Australia had ratified at the time, significantly impacted on the outcome. The court declared that there was a 'legitimate expectation' that the ratified treaty would be taken into consideration when the domestic laws of Australia were being applied to *Teoh*.

The role of international human rights law in effecting change in Australia

The Court's role in bringing international human rights laws and standards into Australia is becoming more relevant.

> The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental human rights, may be used by the courts as a legitimate guide in developing the common law. [13]

With reference to the judgment in *Mabo*, Justice Michael Kirby writes that 'a new recognition has come about of the use that may be made by judges of international human rights principles and their exposition by the courts…'[14] Further, he notes that Brennan J in his judgment makes reference to the importance of international law in developing common law standards, especially in terms of universal human rights.

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[11] Christof Heyns and Frans Viljoen, 'The impact of the United Nations Human Rights treaties on the domestic level' in Steiner et al (eds), *International Human Rights in context: Law Politics Morals* (2008) 1088.

[12] *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

[13] See: <www.butterworthsonline.com>.

[14] Michael Kirby, 'The role of international standards in Australian Courts' in Steiner, Alston, Goodman (eds), *International Human Rights in context. Law Politics Morals* (2008) 1111.

The Declaration on the Rights of Indigenous Peoples

Whilst the Declaration does not carry the weight that a Convention would, it is still an important document for two main reasons:

> … it gives indigenous peoples around the world long-awaited protection of their rights. Second….it significantly contributes to the clarification and evolution of several areas of international law.[15]

Despite international recognition of the need for special protection of the rights of Indigenous people, the Australian Government still views any progress for Indigenous people with deep suspicion.

In her speech to Parliament, Jenny Macklin, the Federal Minister for Indigenous Affairs said, 'while it is non-binding and does not affect existing Australian law, it sets up important international principles for nations to aspire to.'[16] Why was it considered necessary to include the statement that 'existing Australian laws won't be affected', was this to reassure those who feared the Declaration would give Indigenous people too much power?

Furthermore, there is the underlying paranoia by the government that Indigenous people are going to takeover Australia, cause a civil uprising and force everyone off the land as is evident throughout the Ministers speech. For example: 'Article 46 makes it clear that the Declaration cannot be used to impair Australian territorial integrity or political unity.'[17] For the government to even suggest that Indigenous Australians might use the Declaration to 'overthrow' the government and create anarchy is simply ludicrous and typical of their ill-informed and fear based approach towards Indigenous Australians.

The Declaration also adds weight to areas which international law had been reluctant to address, including Indigenous people's right to 'own, use, develop and control' the natural resources of the lands they possess, and to their right to reparations for past wrongs.

Regardless of its non-binding status, the Declaration still has the capacity to create and influence positive change for Indigenous peoples worldwide when it is used by national and international bodies as an authority on Indigenous standards.

> It is hoped that shortly the Declaration will be widely recognized as the interpretative source of human rights treaties on Indigenous rights, and that its position as the international benchmark by which Indigenous policies are judged will be

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[15] Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10(1) *Melbourne Journal of International Law* 37.
[16] Jenny Macklin, *Statement on the UN Declaration on the Rights of Indigenous Peoples*, speech delivered at Canberra (3 April 2009).
[17] Ibid.

unquestionable. [18]

Perhaps more importantly, the Declaration's real achievement lies in its very existence, it in itself is proof of a collaborative effort across many borders, physical and otherwise which in the past may have prevented a unified force of Indigenous rights activists. Hopefully the fact the Declaration even exists and was written by and for the Indigenous peoples who will use it, is a sign that the Indigenous rights movement is becoming more organised and assertive in demanding their full entitlements.

When compared to the international women's rights movement which was very successful in gaining international solidarity and political support in a reasonably short time, the Indigenous rights activists are clearly on the right track for paralleled success.

PART TWO – AUSTRALIA AND INDIGENOUS CULTURE

Self-Determination

Perhaps one of the most contentious and public debates regarding the cultural and rights issue for Indigenous peoples is that of self-determination.

Many governments across the world have shown extreme resistance in legally recognising Indigenous peoples right to self-determination, despite the existence of international human rights law. In both the ICCPR and the ICESCR, the right to self-determination is enshrined in Article 1, yet, it doesn't apply to Indigenous peoples in the broader terms of land rights.

The UN has a history of not wanting to aggravate States and obviously the complexities surrounding Indigenous peoples claims to land rights is one the UN has deferred to claims of state sovereignty in order to avoid taking interventionalist action. 'History shows us the world's reluctance to accept humanitarian intervention as a reason for aggression against a State.'[19]

Therefore, in addition to the lack of support from international human rights instruments, worldwide, Indigenous peoples have struggled to assert their claim to self-determination due to the complexities and socially constructed barriers placed in front of them. Indigenous people 'continue to find it hard to fit their claim into the rubric that requires them to show distinct territorial boundaries since much of their lands were stolen during the colonisation process.'[20]

The Australian Government has received considerable criticism from

[18] Alexandra Xanthaki, above n 16.
[19] Malcolm Fraser, above n 6, 120.
[20] Behrendt et al, above n 8, 300.

international human right bodies over their inactive approach towards the right of self-determination for Indigenous Australians. In 2000, the CERD Committee said 'the State party should ensure effective participation by Indigenous communities in decisions affecting their land rights.'[21] In addition, later that year, the HRC expressed their concern that the Australian Government used the terms of 'self-management' and 'self-empowerment' instead of 'self-determination' to 'express domestically the principle of indigenous peoples' exercising meaningful control over their affairs. The Committee is concerned that sufficient action has not been taken in that regard.'[22]

Then in 2007, when the Declaration was formally endorsed by the Australian government, Jenny Macklin acknowledged 'the entitlement' to self-determination of Indigenous people, but she also made it abundantly clear that the Declaration was only aspirational and non-binding in Australia. Internally, there was also pressure on the Federal Government as the Royal Commission into Aboriginal Deaths in Custody recommended in their final report that the principle of self-determination be applied in the policies and programs which affect Aboriginal people.

This fear of Indigenous people and their inherit right to self-determination is deeply entrenched in the Australian government's psyche, as right from the very beginning there was massive resistance to Indigenous people and their right to the land they have been living on for thousands of years.

In 1897, the Tasmanian Attorney-General, Andrew Inglis Clark wanted a clause inserted into the Australian Constitution which protected racial discrimination, but it was rejected. The following year, Richard O'Connor from Melbourne also tried for this clause to be included, but again it was rejected.

> The clause was rejected on both occasions primarily because of fears as to the effect it would have on policies in Western Australia limiting the mining rights of coloured people and legislation in Victoria that discriminated against Chinese labourers.[23]

Culture and Indigenous people

Culture is a living thing, it changes with time, people, influences and the environment and it can be a positive experience, one which adds value and even enhances your sense of identity. Whereas de-culturalisation is the opposite, it strips people of their identity and forces them into an unknown definition of self which can cause complete devastation.

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[21] UN Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia (2000).

[22] Concluding observations of the Human rights Committee: Australia, 24 July 2000 UN Doc A/55/40.

[23] See: <www.nswbar.asn.au/docs/resources/lectures/bill_rights>.

The process of de-culturalisation is when the oppressed society's cultural 'ceremonies and practices of self-value are superseded and overwritten, the protective "social security system"… mechanisms break down and are unable to provide the sustenance of a sense of safety and belonging'.[24] Ultimately, the result of this loss of a safety net is extreme emptiness which leads to life becoming unpredictable as the 'new' culture slowly replaces the familiar sense of self.

> Raw emotions surface as violence and aggression, and a cycle of trauma is perpetuated as collective anger is turned inwards onto one's self and one's family. With the breakdown of Indigenous cultural expression, the traditional means of grieving breakdown are substituted with alcoholism and substance abuse, self-harm and suicides.[25]

In Australia, the systematic deconstruction of parts of Indigenous culture has been justified by the government as necessary to lift the 'uncivilised' living conditions of Indigenous people up to international standards. The Australian government saw (and in some respects, still does see) the role of Indigenous culture as a barrier to the progress of the standards of Indigenous people. For example, even as recently as 2009, the Human Rights Committee noted that the Federal Government still refused to engage Indigenous peoples in meaningful discussion regarding the decision making process for their own community.[26]

When culture is understood as something which is contested and can be used to legitimise power and authority, then it 'undermines those who resist changes that would benefit weaker groups in the name of preserving "culture" and it encourages human rights activists to pay attention to local practices'[27] In this sense, culture no longer acts as a barrier to the mobilisation of human rights but rather as a context which can define meaning and relationships. If only the Australian Government were less fearful of and hostile towards Indigenous culture and instead looked to accept and embrace these cultural differences, then Australia would be a better place for everyone.

Culture and human rights

There are two predominant perspectives on human rights standards: they are either universal or culturally relative. The univeralists claim that international human rights are the same everywhere and for everyone because we are human, whereas 'advocates of cultural relativism claim that (most, some) rights and

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[24] Zohl De Ishtar and Holding Yawulyu (eds), *White culture and black women's law* (2005) 37.
[25] Ibid.
[26] HRC, 'Concluding observations of the HRC' Considerations of Reports Submitted by States Parties under Article 40 of the Covenant (2009).
[27] Sally Engle Merry, 'Human Rights and Gender Violence in Steiner, Alston, Goodman (eds) *International Human Rights in context: Law, Politics, Morals* (3rd ed, 2008) 525.

rules about morality are encoded in and thus depend on cultural context.'[28]

In Australia, Indigenous culture has historically been viewed by the government and often the mass media as uncivilised and unstructured usually to gain public support for more restrictions to be implemented and less control given to Indigenous people. The Australian government has (in)famously implemented policies to force assimilation and deconstruct Indigenous culture with complete disregard to the human rights violations they caused in the process.

'I cannot imagine any practice which is more likely to involve the Government in criticism for violation of the present day conception of human rights.'[29] Wrote the Government Secretary in a report regarding the policy for the removal of Aboriginal children from their families, in as early as 1949.

Furthermore, throughout the century, the Australian Government heavily regulated and actively disrupted Indigenous people's culture with the expressed view of protecting the vulnerabilities and weaknesses Indigenous people allegedly possessed. It was a common belief of the time by politicians that Indigenous peoples were a weaker race and that if left alone, they would die out, therefore, they put a lot of effort into 'saving' the mixed blood Aborigines who allegedly had more potential of long term survival. Consequently, this (mis)belief formed the basis for the interventionalist policies aimed at 'protecting' the mixed blood Aborigines, but instead caused generations of pain, loss and complete devastation to many communities still being felt today.

Yet, despite these government intervention policies 'Indigenous people did not enjoy the protections, rights and benefits bestowed on other subjects and citizens.'[30]

Given the past experience and the tragic outcome of previous government approaches to Indigenous issues, perhaps it is time for the Government to adopt a new approach. 'Only when Whites are able to think outside the rigid 'barriers of control' of the dominant society, to be creatively rebellious will we be able to stand as allies with Indigenous peoples.'[31] Of course, one only hopes that our leaders are brave enough to be *creatively rebellious*.

The relationship between culture (local) and international human rights (global) has sometimes been one of conflict, often conceptualised as the opposition between culture and rights, or culture and civilisation. Thus, those who would defend cultural practices and values would be seen as 'uncivilised' and rejecting the international standards of human rights. This approach

[28] Fraser, above n 6, 517.
[29] Ibid 212.
[30] Behrendt et al, above n 8, 142.
[31] De Ishtar and Yawulyu, above n 25, 282.

unfortunately was recently used by the Australian (Howard) Government to fend off criticisms of their legalised human rights violations with the Northern Territory Intervention.

1. The Northern Territory Intervention 2007 (example when rights and culture are in conflict)

In 2007, the *Little Children are Sacred Report* was released which looked into child sexual abuse in the Northern Territory. Its findings were very concerning and there was general consensus that some sort of urgent action was needed to protect Indigenous children, however, the Howard Government's response has not only attracted intense criticism, both domestically and internationally, but has also caused a human rights complaint to be lodged with the UN through the Committee formed under the CERD.

In summary, the NT Intervention not only failed to implement the report's recommendations but also returned to the Federal Government's paternalistic and damaging practices of the last century in a misguided campaign to 'protect' Indigenous children. The Intervention 'is in sharp contrast to the human rights approach advocated for in much of the research and literature nationally and internationally with respect to Indigenous child welfare.'[32]

In 2009 the Human Rights Committee condemned the NT Intervention and the human rights abuses it was perpetrating when it recommended that the 'State party should redesign NTER measures in direct consultation with the Indigenous people concerned, in order to ensure that they are consistent with the RDA 1996 and the Covenant.'[33]

Another example of the government's systematic lack of engagement with the Indigenous people and disregard towards human rights is illustrated in the special investigation by one of the mainstream newspapers into the effects of the NT Intervention two years onwards. The reporter had quoted government officials who insisted that Indigenous people who lived in remote 'filthy and overcrowded town camps' were 'happy that there are not any new houses for them.'[34]

Not only is this point of view ludicrous, it is also telling of the Government's apathetic approach to Indigenous living conditions. It also makes one wonder if the government officials would have the same attitude if it was a 'white' Australian family living in the same conditions.

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[32] Behrendt et al, above n 8, 84.

[33] Human Rights Committee, 'Concluding Observations of the Human Rights Committee', Consideration of Reports submitted by State Parties under Article 40 of the Covenant (2009).

[34] Natasha Robinson, Tony Koch and Michael Owen, 'Homeless', *The Weekend Australian*, (16 August 2009) 15.

Therefore, the NT Intervention is a recent example of the Australian Government asserting their 'standards' recklessly and dangerously onto a culture who expresses and protects these rights differently to the mostly Anglo-Australian population of the country.

It has also been suggested that the NT Intervention is part of the Government's agenda to disband the kinship network and community ownership central to many Indigenous tribes by forcing them into '…individual aspirations of private home ownership, career and self-improvement.'[35] Therefore, this devastation of the communal nature and infrastructure of the Indigenous groups, especially in remote parts of Australia, would ultimately mean an end to the traditional Indigenous way of life for those groups. Unfortunately, four years later and with two changes of Prime Ministers and there is *still* systematic and legalised human rights violations of Indigenous people occurring today in this country under the NT Intervention.

2. The Kapululangu Women's Law and Culture Centre (example when rights and culture are in harmony)

Colonisation of Australia meant the replacement of local Indigenous culture and practices with the new ways of the colonisers, this in turn has led to the destruction of the living element of Indigenous culture as new generations are not being taught the ways of old or of their cultural heritage.

Fortunately, some people are taking action to repair this damage and attempting to stop the loss of their Indigenous culture, for example, in the Great Sandy Desert in Western Australia, the Indigenous people of Wirrimanu, wanted to preserve and ensure the regeneration of their unique culture.

> Wirrimanu's women elders have always been at the forefront of cultural resistance – driven there by a firm belief that spiritual turmoil is the inevitable outcome of the disintegration of their rich cultural heritage.[36]

In Australia, when colonisation took over the country, the rights, practices and history of Indigenous people were stolen or denied to them. Indigenous children were removed from their families and their way of life and instead placed in homes of foreign people with foreign values and practices. For the Wirrimanu elders, they were concerned about the loss of local cultural skills and knowledge which in the past had been passed down from mother to daughter then to grand-daughter.

So in order to preserve their culture and traditions, the Wirrimanu women elders became organised and together with the support of the government were

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[35] Melinda Hinkson and Jon Altman (eds), *Coercive reconciliation: Stabilise, Normalise, Exit Aboriginal Australia* (Arena Publications, 2007) 1-12.
[36] De Ishtar and Yawulyu, above n 25, 243.

able to create a real solution to reinvigorate their cultural identity, making it sustainable for future generations. Using the funds and government resources available to them, the women established the Kapululangu Women's Law and Culture Centre. The Centre was created by the women elders as 'a place for women where ritual was paramount and the power of culture as a living entity could be actively facilitated and encouraged.'[37] It was a place of learning for the next generation which was established in the authority and experiences of the past.

The Kapululangu Women's Law and Culture Centre is a tribute to the approach of combining rights, empowerment, culture and government. However, perhaps the key to the Centre's success is that it was driven by the local Indigenous people who clearly had an intimate knowledge and understanding of the local and traditional Indigenous culture there. Thus, they were able to design, implement and run a successful program aimed at empowering local Indigenous people using local Indigenous culture in conjunction with government support.

3. Indigenous Courts and Circle Sentencing (another example when rights and culture are in harmony)

In every Australian state and territory, Indigenous people are incarcerated at much higher rates than non-Indigenous people, nationwide the figure stands at 12.9 times higher. It's also been widely noted that Indigenous people, as both offenders and victims lack the same access as non-Indigenous people to the programs and services offered by the criminal justice system.[38]

In 1986, an inquiry was held by the Australian Law Reform Commission into Indigenous customary law and the issues of recognition, and it recommended some major changes, including that legislation should give consideration to the customary law of the offender's community and also, where relevant, the victim's community when sentencing the offender.

As a result of the Commission's findings, a new approach was developed for Indigenous people entering the justice system. This new approach was a collaborative justice system for Indigenous people based on the cultural values and recognition of traditional practices for Indigenous people whilst also being founded in Australian domestic law. This collaborative justice system is also known as Indigenous Courts and Circle Sentencing.

Over the last decade, with the exception of the NT, all other states of Australia have established Indigenous courts and circle sentencing for Indigenous offenders. Both circle sentencing and Indigenous courts are recognised legal

[37] Ibid.
[38] Behrendt et al, above n 8, 158.

processes and as such can result in convictions and criminal records for offenders. The major area of distinction between the two systems are; in circle sentencing the judge is able to over-ride the sentencing recommendations of the circle if they deem it to be inappropriate; and the victim can play a greater role in sentencing than they can in the Indigenous court process.

In Victoria, the Indigenous Koori court system was evaluated and found that:

> … there were reduced levels of recidivism among participants, and reductions in breach rates for community corrections orders. In addition there was increased participation and ownership of the program by the local koori community.[39]

Clearly, the benefits are obvious when Indigenous people and culture is used in designing programs to address issues within the Indigenous community. As the acting president of Australians for Native Title and Reconciliation explains; 'Indigenous disadvantage must be addressed, but in ways that allow for government to work in partnership with Indigenous peoples' own institutions and decision making bodies.'[40]

PART THREE – LESSONS FROM THE INTERNATIONAL WOMENS RIGHTS' MOVEMENT

The beginning of two international rights' movements

Prior to the 1900s, there had been many individual acts and localised efforts around the world to promote and protect women's rights, but it wasn't until the end of the nineteenth century that the women's movement really became an international movement.

Women's suffrage became the most visible issue for women's rights and a cause for women to unite, and as a result in 1902 Washington, America, the first international conference for women's suffrage was held, then two years later a second conference was held in Berlin, Germany. *Women worldwide were organising and becoming organised.* For these women, suffrage was a means, not an end and they were able to prioritise issues and create clear objectives for the long term. A great example of this level of planning is that as early as 1920, the women's movement had adopted a charter of women's rights which would eventually form the foundation for the Convention on the Elimination of Discrimination against Women (CEDAW) in 1979. Therefore, within twenty years, women rights activists had mobilised to create a united and powerful international network which was protected with a legally binding international human rights Convention.

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[39] Ibid 166.

[40] Tara Ravens, 'UN Indigenous expert slams NT intervention', *National Indigenous Times,* (3 September 2009), quoting Angus Firth acting President of Australians for Native Title and Reconciliation.

Although there is some criticism that the movement was driven by privileged Western women and didn't always reflect the concerns of Indigenous or less privileged women around the world, there can be no denying the substantial benefits gained for all women as a result of their effort.

In comparison, some Indigenous groups received recognition of their rights when treaties were made by the conquering country, for the Indigenous people of New Zealand it was as early as 1840. However, as mentioned earlier, despite the internationally legally binding nature of the treaty, Indigenous people the world over still suffered massive human rights violations. Whilst treaties were made individually between conquering state and the local Indigenous populations, unlike the women's movement, there was no coordinated effort between groups of Indigenous people in different countries to unify under a single cause.

Internationally, the Indigenous rights movement didn't really gain recognition until the late 1950s, when the ILO formally recognised 'indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community.'[41]

Through this convention, the ILO became a pioneer among the international community for taking measures to protect the rights of Indigenous people although its effectiveness was somewhat limited due to deeply held suspicions by both parties.

From the ILO's groundbreaking Convention, it would take another 57 years before a document which specifically protected Indigenous peoples' rights would be adopted by the UN, and that is the Declaration. Even then it wasn't legally binding, unlike the equivalent women's rights protection document, the CEDAW.

One possible explanation for the vast difference in result between the two rights' movement is that women across the world were able to unite over a single issue. They were organised, it began with local groups of women's rights activists which fed into national groups which then organised into international groups to create a powerful rights movement which then had representation at the decision making levels in order to influence change.

For the women rights movement, the pinnacle of their success which created the most significant improvement for women's rights worldwide, was the 1993 World Conference on Human Rights held in Vienna, Austria. Women's human rights became the most prominent item on the agenda due entirely to the strategic campaigning and mobilisation of women rights activists worldwide.

[41] C107 Indigenous and Tribal Populations Convention, 1957, ILO 107.

The 1993 World Conference of Human Rights

In the decade leading up to the Vienna Conference, there was growing momentum behind the issue of violence against women and it was touted as a human rights abuse instead of a gender issue only.

At Vienna, women and other human rights organisations coordinated a forum on the issue of violence against women in the Conference hall, this public display engaged interest from the general public and more importantly the attending governments. Consequently, during the conference nearly every Government felt compelled to acknowledge the issue of violence against women and as a result, the official document of the Conference the 'Vienna Declaration and Program of Action' included an extensive section on women's human rights. 'In short, a critical mass of women had become change agents who influenced international policy.'[42]

Therefore, if the Indigenous rights movement use this formula of success that the women's rights movement at Vienna used, then it would be highly likely that they too would achieve a significant boost to their momentum.

Women's rights activists reframed the issue of violence against women to become an issue which transcended gender and was therefore a human rights issue in order to engage both men and women across the world in action. Consequently, if the Indigenous rights activists were to reframe their issue of self-determination into a unifying issue to transcend race and becomes a human rights issue in order to engage both Indigenous and non-Indigenous people all across the world, then the collective bargaining power would be substantially increased and States could be compelled to take positive action. By placing the human rights issue of self-determination on the agenda of a World Human Rights Conference, then States are automatically engaged at least in the conversation, but as demonstrated with the women's movement, it takes strategic campaigning and international co-operation to position for the best advantage.

The UN and the international womens' and Indigenous peoples' rights movement

The establishment of the UN provided an opportunity for the international women's rights movement to firmly place itself in the international arena alongside other human rights agendas. 'The equal rights of men and women clause in the UN Charter established a legal basis for the international struggle to affirm women's human rights.'[43]

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[42] Arvonne S. Fraser, 'Seizing the opportunities: USAID, WID and CEDAW' in Fraser and Tinker (eds), *Developing Power, How women transformed international development*' (2004) 175.

[43] Arvonne S. Fraser, 'Becoming Human: The origins and development of women's human

The UN created the Commission on the Status of Women with the primary responsibility to monitor and encourage the implementation of international law on women's rights. More than 20 years later, a second body was created, the Committee formed under CEDAW which would then become the international authority on women's rights.

The women involved in these organisations knew how to organise and strategise to promote women's rights, and their hard work and skillful use of the UN systems paid off. For example, in 1963 the UN General Assembly adopted a resolution on women in development, 'the resolution called on all UN member states, specialised agencies, and non-governmental organisations to appoint women to bodies responsible for the preparation of national development plans'[44] — a very significant achievement.

Conversely, Indigenous people did not experience the same level of success with the UN as the women's rights movement did. In fact, it was in the ILO when the issue of rights of Indigenous people was first given international attention. The ILO Convention of 1957 'was the first contemporary international human rights document that recognised Indigenous people as having distinct issues of international concern.'[45]

In an effort to engage Indigenous peoples human rights standards without the full acknowledgement they deserved, the UN as part of their new order put a focus on the right of self-determination. The first article of the ICCPR and the ICESCR refer to self-determination, yet without the intimate knowledge of the UN systems that the women's activists at the time had, this again became a missed opportunity for Indigenous rights activists to demand and thus receive systematic recognition of their rights.

At national levels, women were also creating change for other women across the world and a great illustration of the power of organised rights activists is the Percy Amendment.

In 1973, women's rights activists in America coordinated politically to exert pressure for an amendment to be made to the national foreign aid policy. The Percy amendment (as it would become known) included a paragraph which recognised women's rights in donor countries and not just men's as it had previously. This inclusion had a significant impact on America's future foreign aid policies which from 1973 onwards acknowledged women's rights in decision making and therefore foreign aid policies were designed with this in mind.

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rights'(1999) 21 *Human Rights Quarterly* 4, 886.

[44] Ibid 890.

[45] See above n 30, 301.

Post 1970s: the international women's rights movement thrives while the Indigenous people's rights movement survives

The 1970s was a big decade for the advancement of women's rights as the UN was well and truly engaged in the international women's rights movement by then. The 70s was declared by the UN General Assembly as the decade for women; 1975 was designated as International Women's Year and the UN's 'First World Conference for Women' was held in 1975; and it was also the decade that that the GA adopted the CEDAW.

Again, women locally and internationally were organising and coordinating their efforts. In America a prominent women's rights activist explains 'the impact of the seminar was immediate. Background papers and workshop reports were distributed at both the official UN conference and the NGO Tribune.'[46]

Furthermore, a woman's rights activist from India, shares this sentiment of success: 'the Mexico conference of 1975 was a defining moment for many of us. It linked us to many friends and networks and gave us visibility within the international community, including the UN.'[47] Within ten years, the number of participants at the World Conferences tripled. The First World Conference in 1975 attracted five thousand attendees, while the Third Women's Conference in 1985 attracted fifteen thousand.

In comparison, the momentum behind the international Indigenous rights movement was rather sluggish. Twenty years after the decade of women was declared, in 1994 the UN announced the International Decade of the World's Indigenous Peoples (1995-2004), then a year later, announced a second Decade (2005-2015). During that time, gains and progress had been made, yet clearly there is still resistance for direct engagement with Indigenous rights activists and for equal representation at the decision making levels as the women's rights activists now experience.

The UN Working Groups on Indigenous Populations (UNWGIP)

The UN took the step to create a specific group to address the specific issues facing Indigenous peoples. The UN working group on Indigenous populations held its first session in 1982 and their 'methods of work have brought about a reasonably wide representation of Indigenous peoples and thorough presentation of substantive issues.'[48] The most significant achievement from

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[46] Tinker, 'Challenging wisdom, changing policies: the women in development movement' in Fraser and Tinker (eds), *Developing Power, How women transformed international development* (2004) 73.
[47] Devaki Jain, 'A view from the South: A story of intersections' in Fraser and Tinker (eds), *Developing Power, How women transformed international development* (2004) 134.
[48] LexisNexis Butterworths (Publisher) *The Laws of Australia* (1997) Chapter 6 [52]-[62].

the WGIP was the Declaration which was adopted by the UNGA in 2007. Although as mentioned, it lacks the enforceability that the CEDAW holds.

In 2000, the Permanent Forum was established to provide expert advice and recommendations on Indigenous issues to the ECOSOC council. The Forum is also responsible for raising awareness of Indigenous issues in addition to preparing and disseminating information.

In addition to the status as an authority on Indigenous issues, the Forum is also extremely beneficial in the networks it creates as well as increasing the international presence of Indigenous activists.

Given the missed opportunities of the past, it is essential that the activists capitalise on the opportunities that the Permanent Forum provides and based on the recent gains made, it looks like they will.

CONCLUSION

Where to now for the international Indigenous people's rights movement?

In 1997, the Committee of the CERD reported that: 'in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms.'[49]

The international Indigenous people's rights movement has gained a lot of ground, especially in the last decade, however, it still has much to do in order to influence international law, government policies and engage the general public in support.

The key messages from the success of the international women's rights movement is to organise and prioritise over a single unifying issue. The Indigenous rights movement would benefit immensely from the lessons learnt from the success of the women's activist experiences. With the ultimate aim to be legitimate representation at the decision making level, then a co-ordinated and well organised international approach is needed.

The reluctance of the UN in the past to become involved in or advocate directly for the rights of Indigenous people has had a lot to do with the competing interests of States, yet, this is shifting, albeit slowly, and thus creating opportunities for dialogue and cooperation which didn't exist in the past. It is essential for the Indigenous rights movement to capitalise on these opportunities and engage the international community to the fact that this

[49] Committee on the Elimination of Racial Discrimination, General Recommendation XXIII concerning Indigenous Peoples (1997).

movement is not only about Indigenous people, but rather justice, human beings and acknowledging what existed before it was ruthlessly destroyed by colonisers.

The issue of self-determination has the capacity to become to the Indigenous movement what violence against women was to the women's movement, because it was the issue of violence against women 'that finally drew wide international attention to the idea that women's rights are human rights. The issue transcended race, class and culture and united women worldwide in a common cause.'[50]

[50] Arvonne S. Fraser, 'Becoming Human: The origins and development of women's human rights' (1999) 21 *Human Rights Quarterly* 4, 903.