Determining sovereignty: Through law? Or a political option?

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The European doctrine of discovery was reasonably rejected as a legal basis for the acquisition of territory.[1] Australia's highest domestic court has reasonably held that examining issues of state are outside the jurisdiction of a municipal court.[2] Further, the Australian Government has not proposed an alternative basis for the acquisition of territory or successfully claimed sovereignty in a transparent, lawful and fair manner, and this maintains the status quo ante (the status quo of land custodianship before colonisation) which is uti possidetis.[3] According to Judge Sebutinde, 'the Court has never suggested that uti possidetis may be a peremptory norm of international law'[4] but it is clearly customary. This article considers this as the correct legal basis at law but also takes into account the significant facts on the ground built in over the last two centuries of colonisation. That is, as things stand, neither the British nor their successors have a theoretical legal basis for their territorial claims over the continent under international law. The current legal position effectively exhausts domestic legal remedies on this important question of law. Exhausting domestic remedies is an important hurdle in seeking to move the dispute for resolution into the international plane, particularly on matters affecting human rights.[5]

Part I: Sovereignty and *Coe v Commonwealth*[6]

At present, a claim of sovereignty *not* adverse to the Crown has *not* been pursued in Australian courts. Part I of this article argues that such a claim is justiciable and outlines the issues. Part I(A) deals with constitutional change to protect Aboriginal rights.

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1 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo [No 2]*'); Mick Dodson, Asmi Wood and Peter Bailey, 'Australia and the International Protection of Indigenous Rights' in Donald R Rothwell and Emily Crawford (eds), *International Law in Australia* (Lawbook, 3rd ed, 2017).

2 *New South Wales v Commonwealth* (1975) 135 CLR 337 ('*Seas and Submerged Lands Case*'); *Mabo [No 2]* (n 1) 88; Dodson, Wood and Bailey (n 1).

3 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 25 February 2019) 287–8 [36] (Judge Sebutinde) ('*Chagos AO*').

4 Ibid.

5 International Justice Resource Centre, 'Exhaustion of Domestic Remedies in the United Nations System' (Paper, August 2017) <https://ijrcenter.org/wp-content/uploads/2018/04/8.-Exhaustion-of-Domestic-Remedies-UN-Treaty-Bodies.pdf>.

6 *Coe v Commonwealth* (1979) 53 ALJR 403 ('*Coe* (1979)'); *Coe v Commonwealth* (1993) 68 ALJR 110 ('*Coe* (1993)').

In 1979, Paul Coe, on behalf of the Wiradjuri People,[7] sought to plead the issue of sovereignty. The High Court stated that if the claim to sovereignty

> intends to suggest either that the legal foundation of the Commonwealth is insecure, or that the powers of the Parliament are more limited than is provided in the Constitution, or that there is an aboriginal nation which has sovereignty over Australia, it cannot be supported.[8]

In other words, it is a sovereignty claim adverse to the Crown.

The High Court then went on to state that this pleading 'sought to treat the aboriginal people of Australia as a domestic dependant nation, to use the expression which Marshall C.J. applied to the Cherokee Nation of Indians'.[9]

This resulted in a finding that Australia was different to the United States in its 'relationships between the white settlers and the [A]boriginal peoples', and it was 'not possible to say ... [A]boriginal people of Australia' were 'organized as a "distinct political society separated from others"'.[10] This finding should be subject to further argument. The common law should recognise the retained sovereignty of any Aboriginal people or group who can particularise such laws and customs. This is so whether described as domestic dependent nations or some other description palatable to the courts.

In 1993, Isabel Coe, on behalf of the Wiradjuri people, sought to plead that 'the Wiradjuri are a sovereign nation of people'.[11] In *Coe v Commonwealth*,[12] Mason CJ declared '[*Mabo v Commonwealth [No 2]* ('*Mabo [No 2]*')[13]] is entirely at odds with the notion that sovereignty *adverse* to the Crown resides in the Aboriginal people of Australia'. This finding was based on the pleadings before the High Court. This position was maintained in argument before the High Court and the subject of discussion as to whether *Coe v Commonwealth* would concede that the Wiradjuri people were subject to the *Australian Constitution* and the laws of the Commonwealth and states. This concession was not made. This was clearly a claim of sovereignty adverse to the Crown and not justiciable according to the High Court: '"The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state."'[14]

Municipal 'courts have jurisdiction to determine the consequences of an acquisition under municipal law'.[15] Nettle J in *Love v Commonwealth* ('*Love*') elaborated upon this and said:

> But, by contrast, the consequences of the acquisition of sovereignty in and for municipal law *are* justiciable, and are to be determined by common law doctrines earlier grounded in the law of nature and now developed in step with customary international law.[16]

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7 *Coe* (1979) (n 6).
8 Ibid 408 (Gibbs J).
9 Ibid; *Cherokee Nation*.
10 *Coe* (1979) (n 6) 408.
11 *Coe* (1993) (n 6) 112.
12 Ibid 115.
13 *Mabo [No 2]* (n 1) (emphasis added).
14 Ibid 31, quoting *Seas and Submerged Lands Case* (n 2) 388 (Gibbs J).
15 *Mabo [No 2]* (n 1) 32.
16 *Love v Commonwealth* (2020) 375 ALR 597, 660–1 [264] ('*Love*') (citations omitted).

This article seeks to demonstrate that a common law claim of sovereignty, not adverse to Crown, is arguable and justiciable.

The consequences of the acquisition of sovereignty under Australian municipal law in relation to distinct Aboriginal peoples has not been properly pleaded or argued.

Underpinning any such causes of action are fundamental principles such as '[a] common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration'.[17] In *Mabo [No 2]*,[18] Brennan J endorsed Deane J's criticism of the racist doctrine of terra nullius citing Marshall CJ in *Johnson v McIntosh*.[19] A common law doctrine which recognises sovereignty, not adverse to the Crown, and confirms the right to self-determine, would be just.

It was stated in *Commonwealth v Yarmirr* that

> [i]t is neither necessary nor appropriate to attempt some comprehensive description, or definition, of the powers, rights and interests which Australia claims, or the Imperial authorities claimed, in respect of the territorial sea. Inquiries about those powers, rights and interests are usually expressed in terms of "sovereignty" but, as long has been recognised, that is a notoriously difficult concept which is applied in many, very different contexts. In the present context it is necessary to distinguish between external or international sovereignty and internal sovereignty. As Jacobs J said in the *Seas and Submerged Lands Case*:[20]
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> > [S]overeignty under the law of nations is a power and right, recognised or effectively asserted in respect of a defined part of the globe, to govern in respect of that part to the exclusion of nations or states or *peoples* occupying other parts of the globe. External sovereignty, so called, is not mere recognition by other powers but is a reflection, a response to, the sovereignty exercised within the part of the globe. Looked at from the outside, the sovereignty within that part of the globe, assuming it to be full sovereignty and not the limited sovereignty which may exist in the case of protectorates and the like, is indivisible because foreign sovereigns are not concerned with the manner in which a sovereign state may under the laws of that sovereign state be required to exercise its powers or with the fact that the right to exercise those powers which constitute sovereignty may be divided vertically or horizontally in constitutional structure within the State. Therefore, although a sovereignty among nations may thus be indivisible, the internal sovereignty may be divided under the form of government which exists. However, that does not mean that external sovereignty and internal sovereignty are in kind different. Sovereignty in each case has the same content, the right and power to govern that part of the globe.[21]

A recent example of this is the description used of 'Imperial sovereignty'.[22]

The arguments of the plaintiffs in *Love*[23] stated, among other things, that '[t]he body politic of the Commonwealth of Australia is uniquely responsible

17 *Mabo [No 2]* (n 1) 42.
18 Ibid 42–3.
19 21 US 543, 574 (1823).
20 *Seas and Submerged Lands Case* (n 2) 479–80.
21 *Commonwealth v Yarmirr* (2001) 208 CLR 1, 52–3 [52] (emphasis added; citations omitted).
22 *Love* (n 16) 628 [122] (Gageler J).
23 Ibid 626–9 [114]–[126] (Gageler J).

for'[24] the consequence of dispossession outlined in *Mabo [No 2]*.[25] This, it was stated, '[came] perilously close to' an adverse sovereignty argument.[26]

Nettle J in *Love*[27] made telling remarks about native title being held *of* the Crown and cited the High Court's judgment in *Members of the Yorta Yorta Aboriginal Community v Victoria*[28] regarding, among other matters, laws and customs not existing in a vacuum: '"*all laws are laws of a society* or group"' and arise out of land and define particular societies.[29] His Honour went on to find that membership of an Aboriginal society required, according to the traditional laws and customs of the society, such matters as acceptance, descent and self-identification.[30] This is 'a status recognised at the "intersection of traditional laws and customs with the common law"'.[31] Nettle J went on to state, among other things, that this 'status is necessarily inconsistent with alienage' and to classify a member of that society as an alien would have the 'power to tear the organic whole of the society asunder' and was 'the very antithesis of the common law's recognition of that society's laws and customs'.[32]

Relevant to the structure of an argument of sovereignty not adverse to the Crown, Gordon J stated:

> The connection recognised by Australian law between Aboriginal Australians and the land and waters of this country therefore cannot be dismissed as irrelevant to membership of the present polity of the Commonwealth of Australia, a polity established on the same land and waters.[33]

The argument for the recognition of some form of sovereignty, including the recognition of rights of self-determination, would not '"fracture a skeletal principle of our legal system"'.[34]

The arguments or pleadings could be drafted for the Aboriginal peoples' (the subject of native title determinations or the like) taking into account the following matters:

(a) No provision of the *Australian Constitution* has affected the retained sovereignty of the Aboriginal people.[35]
(b) The retained sovereignty of an Aboriginal people is part of a primeval sovereignty and has never been taken away from them, either explicitly or impliedly.[36]

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24 Ibid 628 [121] (Gageler J).
25 *Mabo [No 2]* (n 1) 69.
26 *Love* (n 16) 628 [125] (Gageler J).
27 Ibid 663 [269].
28 (2002) 214 CLR 422, 445 [49] ('*Yorta Yorta*').
29 *Love* (n 16) 663 [269] (Nettle J), quoting ibid (emphasis added; citations omitted).
30 *Love* (n 16) 663–4 [271] (Nettle J), citing *Commonwealth v Tasmania* (1983) 158 CLR 1, 274 (Deane J); *Mabo [No 2]* (n 1) 61, 70; *Yorta Yorta* (n 28) 442 [40], 445 [49].
31 *Love* (n 16) 664 [271] (Nettle J), quoting *Fejo v Northern Territory* (1998) 195 CLR 96, 128 [46]; *Yorta Yorta* (n 28) 439 [31].
32 *Love* (n 16) 664 [272].
33 Ibid 681 [349] (Gordon J).
34 Ibid 682 [340] quoting *Mabo [No 2]* (n 1) 43.
35 *United States v Wheeler*, 435 US 313, 328 (1978) ('*Wheeler*').
36 Ibid.

(c) *United States v Wheeler*[37] is authority for the proposition that the *United States Constitution* has no effect on the retained, or primeval sovereignty, of the Navajo Tribe.

(d) A comparison of the *United States Constitution* and the *Australian Constitution* reveals art 3 § 2 of the *United States Constitution* gives the United States Supreme Court, subject to the 11th Amendment, jurisdiction over similar maters outlined in ss 75 and 76 of the *Australian Constitution*.

(e) Article 1 § 8 of the *United States Constitution* gives Congress the power to regulate commerce with foreign nations, among several states and with Indian tribes. This is the only express provision in the *United States Constitution* which identifies Indian tribes as being separate from others within the United States.[38]

(f) Prior to the 1967 amendments to the *Australian Constitution*, s 51(xxvi) provided that the Commonwealth had no power to make laws with respect to Aboriginal people. Section 127 of the *Australian Constitution* expressly provided, prior to the amendment, that in relation to the census, Aboriginal people should not be counted. By expressly excluding any power of the Commonwealth to regulate Aboriginal people, the framers of the *Australian Constitution* did not impinge upon the retained or primeval sovereignty of Aboriginal people.

(g) The 1967 amendments to the *Australian Constitution* in no way effected the retained or primeval sovereignty of Aboriginal people as art 1 § 8 of the *United States Constitution* did not effect the retained or primeval sovereignty of the Navajo Tribe.[39]

(h) A finding that Aboriginal people remain a 'separate people, with power to regulate their internal and social relations'[40] would not '"fracture a skeletal principle of our legal system"'.[41]

(i) The word 'nation' means a people distinct from others.[42] It is clear that Aboriginal people are distinct from other Australians as '"*all laws are laws of a society* or group"' and arise out of land and define particular societies.[43]

(j) This could also be described as a 'subtle and elaborate system highly adapted to the country in which people led their lives';[44] a system which was characterised as a government of laws and not of men.[45] Provided that a people continue to maintain some degree of organisation of their

37 *Wheeler* (n 35).
38 *Cherokee Nation* (n 9) 211, 219–21.
39 *Wheeler* (n 35) 328; ibid.
40 *United States v Kagama*, 118 US 375, 381–2 (1886).
41 *Love* (n 16) 682 [349] (Gordon J).
42 *Worcester v Georgia*, 31 US 515, 559 (1832).
43 *Love* (n 16) 663 [269] (Nettle J) (emphasis added; citations omitted). See also *Deeral v Charlie (Deed of Agreement in relation to an Application for a Determination of Native Title QC96/15)* (QCD1997/001, 17 November 1997) cls 6–7 ('*Hopevale Deed of Agreement*').
44 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267.
45 Ibid.

internal affairs, they may still be considered to have retained their identity as a nation (albeit dependent and not adverse to the Crown). Part I(B) particularises, among other things, the degree of organisation of internal affairs.

(k) It is within the jurisdiction of the High Court of Australia to determine whether a group of people who form part of the Commonwealth are entitled to self-determination. This is because the right to self-determination has attained the status of a peremptory norm of general international customary law as a result of the inclusion of the right of self-determination in human rights covenants.

(l) Prior to the passing of the *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*'),[46] the *right to self-determination* was found in the *International Covenant on Civil and Political Rights*[47] and the *International Covenant on Economic, Social and Cultural Rights*.[48]

(m) In 2007, the *UNDRIP* was adopted by the General Assembly on Thursday, 13 September 2007, by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). Years later, the four countries that voted against have reversed their position and now support the *UNDRIP*. Today the *UNDRIP* is the most comprehensive international instrument on the rights of Indigenous peoples. It establishes a universal framework of minimum standards for the survival, dignity and wellbeing of the Indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of Indigenous peoples.

(n) In particular, art 3 states: '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.'[49] Part I(B) particularises, among other things, the rights of the Hopevale native title holders to determine certain defined matters.

(o) The right to self-determination, being a peremptory norm of general international customary law, forms part of the domestic law of Australia without any specific 'act' by the Commonwealth. The High Court of Australia has jurisdiction to enforce international norms, which form part of the common law, without any act on the part of the Commonwealth.[50] This would include 'common law doctrines earlier

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46 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('*UNDRIP*').

47 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976).

48 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

49 *UNDRIP* (n 46) art 3. See also arts 4, 9.

50 *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 565–6 (Brennan J), 661–3 (Toohey J).

> ground in the law of nature and now developed in step with customary international law'.[51]

Other pleadings in *Coe v Commonwealth*[52] are arguable. A properly pleaded genocide claim and breach of fiduciary relationship were left open by the High Court.

Coe submitted, in relation to the genocide claim, that the 'municipal courts could have jurisdiction to try crimes against international law on the footing that the common law recognises international law as part of the common law'.[53] The High Court was willing to accept this as an arguable proposition but struck the claim out as Coe could not show how the acts pleaded generated an entitlement against the State of New South Wales.[54] Mason CJ stated:

> I am inclined to the view that, if it be assumed that the Wiradjuri have a claim against [the State of New South Wales] for reparations cognisable in Australian municipal courts for wrongs done to them in breach of customary international law, that claim does not extend to wrongs done to which [the State of New South Wales] was not a party. However, in the absence of more comprehensive argument than was advanced before me, it would be wrong to act on that view in an application to strike out.[55]

The argument for reparations of genocide and other crimes against humanity is premised on the prohibition of genocide being a peremptory norm of customary international law from which no derogation is permitted.[56] The acts of genocide that need to be established on a factual basis, and particularised, are the killing of the group[57] ('Coniston massacre') and the forcibly transferring from a group to another group ('Stolen Generation').[58]

In relation to the claim of a breach of fiduciary relationship, Mason CJ accepted that 'in some circumstances a fiduciary relationship may arise out of a representation, just as it may arise out of an undertaking'[59] and the statements of Toohey J in *Mabo [No 2]*[60] 'could ... establish that some fiduciary obligation arose in the past.[61]

The Commonwealth, states and territories stand as constructive trustees to Aboriginal people who have their native title rights recognised under

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51 *Love* (n 16) 661 [264] (Nettle J) (citations omitted).
52 *Coe* (1993) (n 6) 116.
53 Ibid.
54 Ibid.
55 Ibid.
56 *Polyukhovich v Commonwealth* (n 50) 661–3 (Toohey J).
57 *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art 2(a).
58 Neil Lofgren and Peter Kilduff, 'Genocide and Australian Law' (1994) 3(70) *Aboriginal Law Bulletin* 6, 6–8. See also *Kruger v Commonwealth* (1997) 190 CLR 1; *Cubillo v Commonwealth [No 2]* (2000) 103 FCR 1.
59 *Coe* (1993) (n 6) 117.
60 *Mabo [No 2]* (n 1) 203.
61 *Coe* (1993) (n 6) 117.

Australian law.[62] The fiduciary duty owed to Aboriginal people was breached by unlawful dispossession and alienation of Aboriginal land and waters.[63]

A Possible amendments to the *Australian Constitution*

Gageler J in *Love*[64] discussed the guarantees of Aboriginal rights as provided for in s 35 of the *Canadian Constitution*.[65] This is the most rational and reasonable proposition for the protection of the rights and interests of Aboriginal people.

Constitutional change in Australia could include but not be limited to:

(a) positive mention of Indigenous peoples and culture in a new preamble (largely symbolic);
(b) delete s 25: race voting disqualification power and s 51(26): make laws (special) with respect to people of any race; and
(c) insert new sections:
    (i) grant power to make laws with respect to Indigenous peoples;
    (ii) prohibit laws that discriminate on the basis of race unless redressing disadvantage;
    (iii) permit the making of legally binding agreements between Aboriginal and Torres Strait Islander Peoples and Australian governments (which once ratified by the relevant Parliament shall have the force of law); and
    (iv) the inclusion of specific recognition of language rights.

The insertion of a clause that recognises and protects Indigenous peoples' rights and title to land similar to pt 11 of the *Constitution Act 1982* (C).

Section 35[66] states 'the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed'; s 35(3) includes land agreements as treaty rights in order to achieve greater certainty. A new section of the *Australian Constitution* could read: 'The existing Indigenous rights and treaty rights of the Indigenous peoples of Australia are hereby recognised and affirmed.'[67]

Australian constitutional power over Indigenous peoples' lands can be found in s 51(xxvi) and was used for the passing of the *Native Title Act 1993* (Cth) ('*NTA*'). This provides for flexible agreement-making processes including:

(a) *NTA* pt 2 div 3 sub-divs B–E s 24BA deal with Indigenous Land Use Agreements ('ILUAs'); and
(b) ILUA examples include, among a multitude of ILUAs, the Noongar

62 *Mabo [No 2]* (n 1) 60 (Brennan J), 113 (Deane and Gaudron JJ), 199–203 (Toohey J); *Guerin v The Queen* [1984] 2 SCR 335.
63 *Mabo [No 2]* (n 1) 205 (Toohey J).
64 *Love* (n 16) 631 [135] (Gageler J).
65 *Canada Act 1982* (UK) c 11 sch B ('*Constitution Act 1982* (C)') s 35.
66 *Constitution Act 1982* (C) (n 65).
67 Margaret Stephenson, 'Indigenous Lands and Constitutional Reform in Australia: A Canadian Comparison' (2011) 15(2) *Australian Indigenous Law Review* 87, 96.

> Settlement ILUA.[68] See also the discussions of 'Canada's experience is of central importance' and reflections upon the *Nisga'a Final Agreement* in Canada.[69]

Significantly for Aboriginal peoples, the treaties in Canada confirm that, the treaties [in Canada] confirm that, as polities, power ... resides in the First Nations themselves: 'we have negotiated our way into Canada, to be full and equal participants in Canadian society'.[70] This is not any different to what Marshall CJ said in *Worcester v Georgia* when he affirmed that the 'Indian nations had always been considered as distinct, independent political communities'.[71]

Agreements under the *NTA* bear similarities to treaty negotiations.[72] It is said by some that these agreements do not recognise a right to self-government.[73] This may require further clarification by the High Court as to what is meant by self-regulation or governance of laws and customs in consent determinations (which also could be categorised as treaties).

Part I has sought to demonstrate that matters pertaining to sovereignty, self-determination and constitutional change are interrelated. Sovereignty, self-determination, genocide and any fiduciary relationship require a firm foundation based on fact to be litigated. Constitutional change requires negotiation and consent.

B *Hopevale Deed of Agreement*

The Hopevale *Deed of Agreement in relation to an Application for a Determination of Native Title QC96/15* cls 6 and 7 state:

> 6. The native title holders are entitled to the exclusive possession, occupation, use and enjoyment of the native title land ('the native title rights and interests') in accordance with valid State and Commonwealth laws.
>
> 7. The native title rights and interests of importance are rights and interests in accordance with custom and tradition to:
>
> 7.1 Have access to and use of the natural resources of the native title land[74] including the right to:
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> 7.1.1. maintain and use the native title land;
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> 7.1.2. conserve the natural resources of the native title land;
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> 7.1.3. safeguard the natural resources of the native title land for the benefit of the native title holders;
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> 7.1.4. manage the native title land for the benefit of the native title holders;

68 See *McGlade v South West Aboriginal Land and Sea Aboriginal Corporation [No 2]* (2019) 374 ALR 329.

69 Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1, 7, 21.

70 Ibid 21–2.

71 *Worcester v Georgia* (n 42).

72 Hobbs and Williams (n 69) 25.

73 Ibid 27.

74 See *Willis v Western Australia* [2014] FCA 714 (right to take and use resources for any purpose); *Akiba v Commonwealth* (2013) 250 CLR 209.

7.1.5. use the natural resources of the native title land for social, cultural, economic, religious, spiritual, customary and traditional purposes.

7.2 *Determine* access rights in relation to entry to the native title land by others including the right to grant, deny, or impose conditions in relation to, entry of the native title land.
7.3 *Determine* use rights in relation to activities which may be carried out by others on the native title land including the right to grant, deny, or impose conditions in relation to, activities which may be carried out on the native title land.
7.4 Exercise and carry out economic life (including by way of barter) on native title lands including to hunt, fish and carry out activities on the native title land, including the creation, growing, production or harvesting of natural resources.
7.5 *Discharge* cultural, spiritual, traditional and customary rights, duties, obligations and responsibilities on, in relation to, and concerning the native title land including to:

7.5.1. *preserve* sites of significance to the native title holders and other Aboriginal people on the native title land;

7.5.2. *determine*, give effect to, pass on, and expand the knowledge and appreciation of the culture and tradition;

7.5.3 regard the native title land as part of the inalienable affiliation of the native title holder to the native title land and ensure that the use of the native land is consistent with that affiliation;

7.5.4. maintain the cosmological relationship beliefs, practices and institutions through ceremony and proper and appropriate custodianship of the native title land and special and sacred sites, to ensure the continued vitality of culture and the well-being of the native title holders;

7.5.5. inherit, dispose of or confer native title rights and interests in relation to the native title land on others in accordance with custom and tradition;

7.5.6. *determine* who are native holders; and

7.5.7. resolve disputes in relation to native title land.

7.6 Establish residences on the native title land.[75]

Part II

Part I of this article argues for the common law recognition of Indigenous sovereignty not adverse to the Crown's claim of sovereignty; thus, it is a claim in a 'form' acceptable to Anglo-Australian law. Part II of this article examines a political accommodation of the claims of the many peoples who now share this continent, but for convenience collectively are referred to here as 'two-peoples', the British (and their successors) and Indigenous peoples.[76]

75 *Hopevale Deed of Agreement* (n 43) (emphasis added).

76 'Aboriginal and Torres Strait Islander' peoples is the commonly and currently most used term to describe Indigenous peoples of the Australian continent. These are all clearly colonial terms (ie, terminology variously used by settler states collectively to refer to a range of tribes and peoples, often who each identifies separately). The use of these terms is not uncontentious. This article generally, but not exclusively, employs the phrase 'Indigenous people/s' for this purpose, as this is the term preferred in international instruments, including by consensus in the *UNDRIP* (n 46).

The High Court in *Love* clearly accepted the notion that these two-peoples formed distinct bodies-politic.[77] As an alternative to the line of argument presented in Part I, Indigenous peoples could also seek international support to effect decolonisation through a political process supervised by the international community.[78] Part II examines the options and the legal basis for such a solution.

A 'Settlement', sovereignty, self-determination and treaty issues in Australia

Sovereignty

Indigenous peoples never ceded sovereignty in Australia. Arguably, an enduring myth is that the British arrived and immediately laid claim to sovereignty from when they first landed at Botany Bay. The emerging truth is that the British did not feel secure for about half a century,[79] and they asserted exclusive claims only after their military superiority was largely achieved. Even Sir William Blackstone had misgivings about 'seising on countries already peopled, and driving out or massacring the innocent'.[80] Further, it was not until the late 1870s, a century after the arrival of the First Fleet, that the Privy Council gave legal effect to the notion of terra nullius,[81] a legal fiction of settlement and resulting sovereignty, British claims that lasted for a further century.[82]

Late last century the High Court finally recognised the existence of Indigenous peoples as prior inhabitants (at the time when the British first laid claim to the continent). With this recognition, the High Court reasonably, and necessarily, also rejected the European 'doctrine of discovery' as the legal basis for the acquisition of territory on the continent.[83] According to the doctrine of discovery, a substantially empty tract of land ('terra nullius'), may be settled, a consequence in Australia of which is the reception of English law brought over by the settlers.[84] With the denial of the doctrine, surely legal notions such as the assertions of sovereignty which presumed the validity of the doctrine must also come into question. These notions should be primed for re-examination in the domestic plane, as will be examined in a political and social context because domestic courts do not have jurisdiction over matters of state.[85]

Further, Parliament has subsequently recognised prior occupation in

77 *Love* (n 16).
78 *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514(XV), UN Doc A/RES/1514(XV) (14 December 1960) ('*Resolution 1514(XV)*').
79 Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1st ed, 1995) 6.
80 *Mabo [No 2]* (n 1) 33 (Brennan J), quoting Sir William Blackstone, *Commentaries on the Laws of England* (Richard Taylor for Thomas Tegg, 17th ed, 1830) 7.
81 *Cooper v Stuart* (1889) 14 App Cas 286.
82 *Mabo [No 2]* (n 1).
83 Ibid.
84 Ibid 35.
85 Ibid 32; *Seas and Submerged Lands Case* (n 2) 388.

statute.[86] The High Court and Parliament's acceptance of the fact that the legal fiction of terra nullius was false clearly creates a gap in the common law as to how territory was first lawfully acquired by the British and thus the legality of its (and its successors') consequent claims of sovereignty. Nettle J describes this gap as the '"incongruity between legal characterisation and historical reality", or between "theory [and] our present knowledge and appreciation of the facts"'.[87]

The admission by the High Court of such a 'gap', generally, and arguably, would fracture the fabric of Anglo–Australian law. However, as Jacobs J observed, sovereignty of a federal state 'may be divided vertically or horizontally in a constitutional structure';[88] this is a notion that can underlie treaty arrangements based on a recognition of Indigenous sovereignty, arguably accommodating the competing claims of the two-peoples.

As a question of fact, the Australian continent was clearly occupied when the British first arrived, and this appears to have been evident to everyone except for Anglo–Australian law. As a question of law, however, the unresolved Anglo–Australian claims over land and waters still remain an outstanding matter for resolution between the parties, through negotiation, inter alia, the outcomes of which, as suggested here, can be formalised in treaty.[89]

From an international law perspective on 'discovery' and its analogous application in Australia, Delia Opekokew noted that the United Nations General Assembly ('UNGA')

> [h]as asserted that the 'doctrine of discovery' is an obsolete concept employed by colonial powers to justify the theft and occupation of certain territories. The principle of self-determination takes precedence over this doctrine because the era of colonialism has come to an end. ... The governments who deny self-determination to indigenous peoples have manipulated the international formulae for decolonisation so that indigenous peoples have been excluded from the principles setting out the obligations for those governments to decolonise their territories. ... Principle IV [of *Resolution 1514(XV)*] indicates the importance of geographical separateness [ie the salt-water theory of separateness].[90]

The 'doctrine of discovery', therefore, is no longer good law. While it is quite unlikely that at present any nation state would pursue this matter on behalf of Indigenous peoples in Australia, as a matter of law, this has clear implications for Australia in the international plane.[91]

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86 *Native Title Act 1993* (Cth); *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth).

87 *Love* (n 16) 661 [265] (Nettle J) (citations omitted).

88 *Seas and Submerged Lands Case* (n 2) 479–80.

89 A useful working, but non-exhaustive, definition of sovereignty is self-determined jurisdictions 'that are juridically independent: and can enter into treaties that will promote their interests as they themselves define them': Stephen D Krasner, 'Problematic Sovereignty' in Stephen D Krasner (ed), *Problematic Sovereignty: Contested Rules and Political Possibilities* (Columbia University Press, 2001) 1, 1.

90 Delia Opekokew, 'International Law, International Institutions, and Indigenous Issues' in Ruth Thompson (ed), *The Rights of Indigenous Peoples in International Law: Selected Essays on Self-Determination* (University of Saskatchewan, Native Law Centre, 1987) 1, 3.

91 Blacker and Rice use the terms 'the highest degree of political autonomy up to and including de jure independence (or *international legal sovereignty*)': Coit Blacker and

Territorial integrity of states and international law

In the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* ('*Chagos AO*'),[92] Judge Abraham addressed some reservations regarding the principle of 'territorial integrity' under colonial administration, a notion, which he highlighted, was dictated and applied solely by the interests of the colonial Power at that time.[93] As a case in point, he used the example of the unchallenged detachment of the Seychelles from Mauritius in 1903 by the British.[94] In this context he noted that

> [the principle of territorial integrity] cannot, in my view, preclude taking into account, when the particular circumstances so warrant, the freely expressed will of the different components of the population of that territory, even if it leads to partition as a solution.[95]

Indigenous peoples in Australia are not seeking partition as a solution, but the principle that it is an option available under international law is clear. Further, the *Charter of the United Nations* ('*UN Charter*') provides that international obligations on decolonisation 'apply no less in the metropolitan areas'[96] of states, here including and clearly applicable to Australia. In the indigenous context, early in the history of the World Council of Indigenous Peoples, Asbjørn Eide noted that

> [i]t was widely held that it would be more practical to examine different current and possible self-government arrangements rather than to clarify the meaning and application of 'self-determination'. No doubt this is an area in which the Working Group will have to be both dynamic and cautious. Friction between governments and indigenous populations taking part in these discussions can become insurmountable if the concern with self-determination is pushed too far; on the other hand the question of some degree of control by indigenous populations over their own fate, their use of resources and their social organisation has to be responded in a positive and constructive way.[97]

Metropolitan[98] colonial states such as Canada, Australia, New Zealand/Aotearoa and the United States (collectively called the 'CANZUS states')[99] have been involved closely with Indigenous developments in the international plane. CANZUS states have often been closely associated with

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Condoleezza Rice, 'Belarus and the Flight from Sovereignty' in Stephen D Krasner (ed), *Problematic Sovereignty: Contested Rules and Political Possibilities* (Columbia University Press, 2001) 224, 224.

92 *Chagos AO* (n 3).

93 Ibid 153–4.

94 Ibid.

95 Ibid.

96 *Charter of the United Nations* art 74 ('*UN Charter*'). See also discussions accompanying below nn 102, 142–3.

97 Asbjørn Eide, 'United Nations Action on the Rights of Indigenous Populations' in Ruth Thompson (ed), *The Rights of Indigenous Peoples in International Law: Selected Essays on Self-Determination* (University of Saskatchewan, Native Law Centre, 1987) 11, 24–5. This type of self-determination is referred to in this article as 'internal self-determination'.

98 See discussions accompanying below nn 138, 140.

99 These states have a similar, but not identical, colonial history. The notion of treaty in Australian negotiations examined in this chapter considers several stakeholders including

the drafting of instruments such as the *UNDRIP*[100] but then (and raising the level of commitment to good faith behaviour by these states) at the very end voted against its adoption at the UNGA.

The International Labour Organization ('ILO') *Convention concerning Indigenous and Tribal Peoples in Independent Countries* ('*ILO Convention 169*')[101] attempted to allay fears related to creating international legal personality for Indigenous peoples. However, the ILO does not possess the legal right to deprive Indigenous persons of their collective personhood, particularly without their consent.[102] In any event, this will not benefit Australia as it is not a party to the *ILO Convention 169*.

CANZUS states, which are directly and significantly affected by the development of self-determination for Indigenous peoples in these jurisdictions, have opposed the development of the law and norms for Aboriginal peoples, as indicated by their vote against the adoption of the *UNDRIP*. Time has however passed them by. On the other hand, the significant demographic changes in CANZUS states favour immigrants, who would now largely support the colonial state, arguably only making internal self-determination practical, thus preventing the creation of a whole new cycle of injustices that would be caused by any notion of the repatriation of immigrants and their descendants. This is a compromise of moral necessity imposed on Indigenous peoples, but in recognition of this potentially huge concession, colonial states must also be forced to compromise significantly. The scope of self-determination, including internal self-determination, is now considered.

B Self-determination: A substantive right?

The right to self-determination is rooted in the *UN Charter*. Article 55 of the *UN Charter* holds that the UN is '[w]ith a view to the creation of conditions of stability and well-being ... based on respect for the principle of equal rights and self-determination of peoples'.[103]

Self-determination is now, and since at least the time of the *Declaration on the Granting of Independence to Colonial Countries and Peoples*

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the various Indigenous peoples of the continent, each as a separate 'people', and the Crown in its various rights, in Australia, the UK and other places, and other stakeholders, as might emerge as negotiations proceed. All CANZUS states (arguably with the exception of Quebec) have had, and still follow, a similar form of Westminster-based legal and political 'body politic', which makes this comparison reasonable.

100 *UNDRIP* (n 46).

101 *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991) ('*ILO Convention 169*'). This *Convention* was originally proposed as a Convention regarding indigenous and tribal peoples in independent countries at the International Labour Conference 76th session: 'International Labour Standards on Indigenous and Tribal Peoples', *International Labour Organization* (Web Page) <https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/indigenous-and-tribal-peoples/lang--en/index.htm>.

102 *ILO Convention 169* (n 101) art 1(3) states that '[t]he use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law'.

103 *UN Charter* (n 96).

('*Resolution 1514(XV)*'),[104] a general rule of customary international law. In its written submissions in the *Chagos AO*, the UK said that nine colonial states (not including Australia) abstained in the vote on the *Resolution 1514(XV)*.[105] The UK noted that '[*Resolution 1514(XV)*] did not reflect States' acceptance of a customary obligation at that time'.[106] On the other hand, the UK clearly did not deny that self-determination was a customary rule at present. Judge Salam stated that the UN Security Council endorsed *Resolution 1514(XV)* and that the UN did so in several resolutions.[107] The majority of the International Court of Justice ('ICJ') has confirmed that 'the right to self-determination is now erga omnes'.[108] As a rule of customary international law, the principle of self-determination universally is binding on all states, including on Australia as member of the UN and as part of a rules-based international order.

It is now convenient to examine some of the elements of *Resolution 1514(XV)* which define self-determination. In its title, the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, the UNGA uses the term 'Independence' as a synonym for self-determination in the form of external self-determination for colonised countries and arguably as internal self-determination for other 'peoples' generally.[109]

Linda Tuhiwai Smith notes that 'by any reasonable definition Indigenous Peoples [in Australia] are unambiguously "peoples"'.[110] The definition of Indigenous peoples in the US is as a distinct people,[111] a characterisation also

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104 *Resolution 1514(XV)* (n 78).

105 In its submissions to the *Chagos AO* (n 3), the UK noted in its written submissions to the International Court of Justice ('ICJ') (citations omitted) that

> [t]he negotiating records and explanations of vote reveal that there were divided views to its meaning that were not resolved by the time of its adoption ... Nine States abstained, including colonial powers (Belgium, France, Portugal, Spain, United Kingdom, and United States). ... When it came to negotiating the *Friendly Relations Declaration* in 1970, [*Resolution 1514(XV)*] was considered and then deliberately omitted. [*Resolution 1514(XV)*] marked an important 'stage' in the development of international law on self-determination, but it did not reflect States' acceptance of a customary obligation at that time.

United Kingdom, 'Written Reply of the United Kingdom to the Question Put by Judge Cançado Trindade at the End of the Hearing Held on 5 September 2018' (10 September 2018) <https://www.icj-cij.org/public/files/case-related/169/169-20180910-OTH-02-00-EN.pdf>.

106 Ibid.

107 *Chagos AO* (n 3) 338–9. Australia along with the UK and some other Anglophonic states such as the US and yet other states, including some yet fully to decolonise, voted against the UNGA seeking this advisory opinion from the ICJ. Colonial states, including countries such as Aotearoa/New Zealand and Canada abstained from the vote: 'Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965: Resolution/Adopted by the General Assembly', *United Nations Digital Library* (Web Page) < https://digitallibrary.un.org/record/3807805>.

108 *East Timor* (*Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 102 [29].

109 See the ICJ's exposition of the principles in below n 126.

110 Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, 2nd rev ed, 2012) 119.

111 *Worcester v Georgia* (n 42).

confirmed by the High Court in Australia.[112] However, as Indigenous peoples in Australia are numerically small but culturally distinct minorities, external self-determination may not immediately be practical.[113] Consequently, some other form of self-determination, which is acceptable to all parties, might be more apt at present.

Resolution 1514(XV)'s preamble refers to ''the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples'. It goes on to recognise the 'the [ardent] desire [of the UNGA to] end ... colonialism in all its manifestations' and to reiterate 'the necessity [to bring] to a speedy and unconditional end colonialism in all its manifestations'. The ICJ, however, explicitly does not distinguish between internal and external self-determination. It simply notes that UNGA resolutions have required decolonisation.[114]

Inter alia, to these ends, *Resolution 1514(XV)* art 2 declares that '"[a]ll 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 this is a form of words adopted in the *UNDRIP*.[115]

None of the Indigenous peoples/countries within Australia are self-governing at present, and therefore, until self-determination has been given effect in Australia, as argued in Part I above, Australia may have a fiduciary obligation to protect the Indigenous peoples of this continent.[116]

Meaning of self-determination

Orfeas Chasapis Tassinis and Sarah Nouwen commented on the then-upcoming *Chagos AO*, that the '[ICJ] will for the first time in two decades pronounce on the law of self-determination. In the *Kosovo Advisory Opinion*, the ICJ managed to sail around this spiky fundamental concept of international law'.[117]

In the *Chagos AO*, the ICJ explicitly considered the issue of self-determination. The ICJ noted that the UNGA 'had affirmed on several occasions the right to self-determination'[118] and concluded that the adoption of *Resolution 1514(XV)*[119] 'represents a defining moment in the consolidation of [s]tate practice' on the decolonisation aspect of self-determination.[120]

Resolution 1514(XV)'s title also refers to 'Peoples' and for this article, the

112 *Love* (n 16).

113 Asmi Wood and Christie M Gardiner, 'Identifying a Legal Framework for a Treaty between Australia's First Peoples and Others' (Paper, Australian Institute for Common Roots, Common Futures International Indigenous Governance, Australian Indigenous Governance Institute, February 2018).

114 *Chagos AO* (n 3).

115 *UNDRIP* (n 46) art 3.

116 *Coe* (1993) (n 6); *Mabo [No 2]* (n 1).

117 Orfeas Chasapis Tassinis and Sarah Nouwen, 'Anticipating the Chagos Advisory Opinion: The Forgotten History of the UK's Invocation of the Right to Self-Determination for the Sudan in the 1940s', *EJIL: Talk!* (Blog Post, 19 February 2019) <https://www.ejiltalk.org/anticipating-the-chagos-advisory-opinion-the-forgotten-history-of-the-uks-invocation-of-the-right-to-self-determination-for-the-sudan-in-the-1940s/>.

118 *Chagos AO* (n 3) 132 [150].

119 *Resolution 1514(XV)* (n 78).

120 *Chagos AO* (n 3) 132 [150].

focus is on this element. In its reference to one of the aims of *Resolution 1514(XV)*, with respect to peoples, the UNGA states that

> [c]onscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of *equal rights and self-determination of all peoples*, and of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion ...[121]

The *Australian Constitution* explicitly and effectively denies 'aboriginal natives' equality.[122] The explicit refusal of the founders and drafters of the Australian Constitution to include an equality clause supports this claim.[123] The absence of self-determination under law in Australia is an issue of fact.

According to the ICJ's interpretation of *Resolution 1514(XV)*:

> A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:
> (a) Emergence as a sovereign independent [s]tate
> (b) Free association with an independent state; or
> (c) Integration with an independent [s]tate.[124]

The ICJ goes on to confirm that the achievement of one of these options 'must be [through] the free and genuine will of the people concerned'.[125] On how this may be achieved, the ICJ said that '"[t]he right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized"'.[126]

While self-determination has largely been used in the international context to give peoples a right to independence and self-government (option (a) above), this is not the only or arguably even the most important meaning of self-determination. For colonised states where Indigenous peoples make up a relatively small minority of the demographic, changes following colonisation options (b) and (c) above are arguably more feasible.[127] The shorthand term used here for option (b), and generally for this type of self-determination, where self-determination operates within the borders of a recognised international entity, is 'internal self-determination'.[128]

Opekokew goes on to add, however, since newly independent nations joined the UN, that they have been a force in transforming the laws on self-determination and that new categories of colonial situations are being advanced, including with the particular right of Indigenous peoples to

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121 *Resolution 1514(XV)* (n 78) (emphasis added).

122 *Australian Constitution* s 51(xxvi); *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ('*Hindmarsh Island Bridge Case*').

123 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901).

124 *Chagos AO* (n 3) 133 [156] as set out in Principle VI of *Resolution 1514(XV)*.

125 Ibid 134 [157].

126 Ibid, quoting *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 36 [71] ('*Western Sahara*').

127 Gudmundur Alfredsson, 'The Right to Self-Determination and Its Many Manifestations' in Ruth Thompson (ed), *The Rights of Indigenous Peoples in International Law: Selected Essays on Self-Determination* (University of Saskatchewan, Native Law Centre, 1987) 53, 54; Wood and Gardiner (n 113).

128 Alfredsson (n 127); Wood and Gardiner (n 113).

self-determination being identified as an issue.[129] On the other hand, Irene Watson notes that the Working Group on Indigenous Populations ('WGIP') had the 'lowest status within the UN'[130] and that Indigenous peoples' right to 'self-determination was viewed as the most controversial question'[131] in drafting the *UNDRIP*. The underlying fear of colonial states is territorial integrity, an issue considered above but is, in any event, *not* a significant issue with respect to internal self-determination.[132] On the other hand, clearly self-determination is a right to be exercised as seen fit by each people.

The *Statute of the International Court of Justice* still uses the language of 'law recognised by civilised nations',[133] and arguably reflects the Eurocentric nature of the UN at the time of its inception. Decolonisation has arguably changed the nature of the UNGA (but perhaps less so with the UN Security Council). The ICJ has also arguably moved with the changing membership of the UNGA to reconsider its view in the *Legal Status of Eastern Greenland (Norway v Denmark)*[134] regarding the status of tribal peoples and terra nullius. Additionally, with the development of the law, the ICJ has arrived at a more balanced decision with respect to the rights of the Indigenous peoples of the Western Sahara.[135] It is now the time for Indigenous peoples everywhere to gain equality and reassert their rightful place among the peoples of the world.

Self-determination is a legal right that has necessarily evolved under international law.

Opekokew notes that (in the not-so-distant past) self-determination traditionally was narrowly defined by the salt-water theory as overseas territorial and political entities under foreign domination.[136] There is no contention that Australia is a colonial state. Australia, however, belongs to a group of colonised states including the other CANZUS states, one that does not neatly fit into the salt-water category of a colonial relationship between the colony and 'mother country'.

As a result of the salt-water categorisation, colonies such as Australia 'have largely averted the international gaze, [and] the integrity of the metropolitan territory of colonial powers has not been affected by the decolonisation process'.[137] Salt-water colonies now are largely (but not completely) a thing of the past. Less powerful and more strongly controlled populations such as the

129 Opekokew (n 90).

130 Irene Watson, 'Indigenous Peoples' Law-Ways: Survival against the Colonial State' (1997) 8(1) *Australian Feminist Law Journal* 39, 54.

131 Ibid 55.

132 Erica-Irene Daes (WGIP Chair as she then was) appears to define self-determination for Indigenous peoples as not extending to cession (ie, external self-determination); she said (Erica-Irene Daes, 'Native People's Rights' (1986) 27(1) *Les Cahiers de Droit* 123, 128): '[t]he land rights of Indigenous populations include surface and subsurface rights, full right to interior and coastal waters and right to adequate and exclusive economic zones within the limits of international law'. While for convenience, this article works within this limitation, for analytical convenience, it does not concede that this limitation is binding on any Indigenous group.

133 *Statute of the International Court of Justice* art 38(1)(c).

134 [1993] PCIJ (ser A/B) No 53 ('*Eastern Greenland Case*').

135 *Western Sahara* (n 126) 12.

136 Opekokew (n 90).

137 Alfredsson (n 127) 55.

Indigenous peoples of Australia are only now beginning to have their voices heard. The ICJ has also recognised the special 'character and ... importance' of self-determination of colonisation in a 'metropolitan' setting (that is, where colonisers and Indigenous populations share and coexist within the same geographical and territorial boundaries).[138]

Traditionally, the UN has not recognised Indigenous peoples as national groups with a right to self-determination.[139] This view is confirmed in several past cases in the international plane.[140] This, however, was the situation in the mid-20th century, when the UN was still dominated by colonial powers. External self-determination leading to independence of several nation-states, followed by membership of the UN, has changed the nature of the UNGA in particular. Asbjørn Eide, the first Rapporteur of the WGIP, observes from the very outset that Indigenous peoples began interacting with the UN system in their own right and acknowledged that there are many intermediate solutions between full integration and secession.[141] Internal self-determination followed by a form of self-government ('internal self-determination') is explored in the article as a possible, perhaps even the most practical, legal and political option in Australia.

Eide further notes that '[the ILO experience was that] individuals belonging to Indigenous populations were subject to gross exploitation on the labour market'.[142] Consequently, the ILO created the *Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*[143] as 'an international instrument adopted to protect Indigenous and tribal populations from oppression and discrimination'.[144] It arguably was a far-sighted legal instrument for 1957. This *Convention* was still an instrument of its time.[145]

Indigenous peoples were also beginning to mobilise internationally and domestically. According to Robert J Miller, Jacinta Ruru, Larissa Behrendt and Tracey Lindberg, the 1967 Referendum in Australia was also a rare opportunity for what 'would be a ... moment of inclusive nation building'[146] but it is evident in 2021 that in Australia that (for Indigenous peoples) both equality and inclusiveness are still elusive, as confirmed by the High Court in

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138 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Advisory Opinion*) [2004] ICJ Rep 136, 172 [88], 184 [29].

139 Opekokew (n 90) 2. See also *Chagos AO* (n 3) 133 [156] (options (b) and (c)).

140 Native chiefs were not considered competent to enter into 'international' contracts: *Island of Palmas (Netherlands v USA) (Award)* (1928) 2 RIAA 829. Territory occupied by non-western 'backward' peoples can be considered terra nullius: *Eastern Greenland Case* (n 134) 71.

141 Eide (n 97) 25.

142 Ibid 26.

143 *Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, signed 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959).

144 Erin Hanson, 'ILO Convention 107', *Indigenous Foundations* (Web Page, 2009) <https://indigenousfoundations.arts.ubc.ca/ilo_convention_107/>.

145 RL Brash, 'Revision of ILO Convention No 107' (1987) 81(3) *American Journal of International Law* 756.

146 Robert J Miller et al, 'Asserting the Doctrine of Discovery in Australia' in Robert J Miller et al (eds), *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2010) 187, 189 (citations omitted).

Kartinyeri v Commonwealth.[147] However, issues of human rights and equality have continued to develop in the international plane and will inevitably have an impact in Australia, albeit from experience, much more gradually.

Indigenous peoples whose lands were colonised by the British were colonised (as mentioned above) in a 'metropolitan' sense (that is, they lived in the same geographical proximity) but with very significant autonomy.[148] The salt-water theory of colonisation generally does not apply to CANZUS states, where although they have now almost severed legal and political ties with their mother states, the 'settlers' have faithfully replicated the customs and laws of their motherlands almost in their entirety.[149] These states were recognised as 'independent', while no formal control is necessary for them to synchronise positions on important global issues. In this sense they operate almost as a federation or political union with minor squabbles between them but generally unified on important global issues as indicated by the voting patterns at the UN. Indigenous peoples on the other hand have become culturally, legally, socially and economically marginalised in their own lands. Eide notes that the tension between the interests of Indigenous peoples and those of the colonial states permeated the early work of the UN's WGIP from the very start.[150]

'Internal self-determination' is a term used here as broadly synonymous with 'free association' in the meaning in *Resolution 1514(XV)* and its associated Principles[151] ('Principles') as approved by the ICJ, including in the *Chagos AO*.[152] As referred to here, 'free association'/internal self-determination is with/within the Australian federation. The terms of the free-association, including a form of vertically divided sovereignty[153] which is mutually compatible, including with a notion of sovereignty not adverse to the Crown as discussed in Part I, and compatible with Indigenous peoples' right to self-determination, are the preferred model for this article.

Precisely what constitutes 'free association' in this context is a matter for negotiation by the parties, within the leeway provided for by *Resolution 1514(XV)* and its Principles. The precise degree of free association to be entered into, should, however, be chosen by the various Indigenous peoples as self-determined entities. The modalities of what constitutes and how self-determination is expressed in practice are not prescribed by the *UN Charter*, the UNGA or the ICJ.[154] The ICJ noted, however, that 'the right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which the right is to be realised'.[155] Arguably, this 'measure of discretion' will only be applied by the UNGA if the

147 *Hindmarsh Island Bridge Case* (n 122).
148 *Colonial Laws Validity Act 1865* (Imp), 28 & 29 Vict, c 63.
149 Eide (n 97) 14.
150 Ibid.
151 *Resolution 1514(XV)* (n 78): principles which should guide members in determining whether or not an obligation exists to transmit the information called for under art 73e of the *UN Charter* (n 96).
152 *Chagos AO* (n 3) 133 [156].
153 *Seas and Submerged Lands Case* (n 2) (Jacobs J).
154 *Chagos AO* (n 3) 267, 269 (Judge Gaja).
155 *Western Sahara* (n 126) 36 [71].

parties cannot agree on a free and fair form of giving expression to self-determination, including through negotiations.

Giving effect to Indigenous self-determination in Australia

Part I proposes a reasonable legal course of action to resolve the differences between the two-peoples. Part II, in the alternative, proposes a political solution based on both the federal model accepted in Australia and international law. Broadly speaking, the *Australian Constitution* permits the admission of new entities into the federation.[156] Excision of territory from a state, including for the creation of new (self-determined Indigenous) entities, requires the consent of the legislature of the relevant state/s.[157] Current treaties being negotiated between Indigenous peoples and the states and territories in Australia, which are acknowledged and permitted by the federation, will in the future provide the legal basis and evidence of the development of *opinio juris* of a legal need to coexist as self-determined peoples, including the need to resolve outstanding claims of matters related to lands and waters of the continent. Michael Mansell argues for the creation of a new Indigenous state within the federation and within the four corners of the present *Australian Constitution*.[158] What is suggested here are free association agreements not necessarily confined to the creation of a single, contiguous Indigenous state but still within the broad constitutional framework.

Indigenous peoples should *not*, however, accept self-government based on the *Australian Constitution*'s power over territories, as it is a plenary power[159] whose scope is 'as large and universal ... as can be granted'[160] and unless significantly circumscribed through the treaty process, this power could be used again to crush self-determined Indigenous communities. Admissions as states, either collectively as suggested by Mansell, or some variation of this approach, might prove to be acceptable to all sides. The rights of states, too, are subordinate to the Parliament,[161] and the limits of this power might be an issue for negotiation between the parties.

C Development of self-determination for Indigenous peoples treaty models

In Australia, treaty under international supervision will allow the codification of a preferred form of self-determination under positive law, one that is freely chosen by Indigenous peoples, but arguably, necessarily, limited (in this article for analytical purposes) to say free association, self-government or integration (that is, options (b) or (c) above[162]) as chosen by the communities through a

156 *Australian Constitution* (n 122) ch VI.

157 Ibid s 124. The issue of Indigenous territories that extend beyond state boundaries is not examined here but is a matter that can be negotiated with the relevant parties under the current constitutional arrangements.

158 Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016); *Australian Constitution* (n 122) ch VI.

159 *A-G (Cth) v The Queen* [1957] AC 288, 320.

160 *Kruger v Commonwealth* (n 58) 41 (Brennan CJ), quoting *Spratt v Hermes* (1965) 114 CLR 226, 242 (Barwick CJ).

161 *Australian Constitution* (n 122) s 109.

162 See the discussion accompanying above n 124.

process giving the fullest free reign to free, prior and informed consent of the people concerned. These processes should not be rushed or corrupted through coercive mechanisms or bad faith behaviour which must be checked by using the good offices, including those of the UNGA and the Expert Mechanism on the Rights of Indigenous Peoples, and should ensure the true, free choice of the peoples.

Treaty should recognise and reward Indigenous peoples' compromise over issues such as a vertical form of sharing sovereignty[163] and provide quid pro quo as ongoing economic benefits that allow for the sharing of resources under the terms of the *UNDRIP*. This includes support from the federation in the medium term to help communities achieve economic, educational and social parity between the treaty parties, at a level that is comparable to the rest of the nation.

Treaty provisions for the longer term will promote bilingual education, cultural security and assistance in the development of local institutions, including a self-determined form of democratic governance, law[164] and executive control within the jurisdiction of the people, while clearly avoiding issues such as the Balkanisation by the judicious location of self-determined territories. Aligning current local government boundaries, for example, to broadly coincide with traditional Indigenous boundaries, with special measures[165] to allow the development of local Indigenous cultures appropriately adapted for economic viability, is perhaps one such possible model.

Treaty in Australia would require a positive statement on the character of the nature of self-determination. Notwithstanding that this is a minority view in the *Chagos AO*,[166] Indigenous peoples should assert the *jus cogens* nature of self-determination, a peremptory norm from which no derogation is permitted and requires all treaty parties to accept this, including for the consequences of breach, as a baseline human rights issue. Clearly, the consequences of the breach of a *jus cogens* norm in a treaty is the invalidity of the offending parts of a treaty,[167] and if a new peremptory rule should emerge in time in this context, and in the future, then any treaty provision in conflict with this emergent rule also becomes void.[168]

Conclusion

Part I of this article argues that a claim of sovereignty *not* adverse to the Crown should be pursued in Australian courts. The claim of sovereignty not adverse to the Crown is arguable and contestable as a justiciable issue. The second part dealing with constitutional change to protect Aboriginal rights

163 See the discussion accompanying above n 88.

164 Examining perhaps the systems including in Quebec, Malaysia or India as a possible model of legal pluralism under the common law.

165 *Racial Discrimination Act 1975* (Cth) s 8.

166 *Chagos AO* (n 3) 260 [8] (Judges Trindade and Robinson), 283 [26] (Judge Sebutinde).

167 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 53.

168 Ibid art 64.

outlines various suggestions that could be taken into account in the constitutional debates.

Part II of this article provides a possible political solution as an alternative to the legal solution of Part I. This part examines a political solution based and framed within the confines of international law related to self-determination but limited to free association as internal self-determination. It proposes a possible framework and model for treaty based on self-determined choices while (for this article) navigating within the limits of the territorial integrity of the current Australian state.