THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AND SELF-DETERMINATION IN AUSTRALIA: USING A HUMAN RIGHTS APPROACH TO PROMOTE ACCOUNTABILITY

Amy Maguire*

I. Introduction

In September 2007, the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples (UNDRIP), with 143 votes in favour, four against and 11 abstentions.[1] It was the first UN resolution drafted by the rights-holders themselves and sought to establish a range of human rights as standards of achievement for the world's Indigenous peoples. Australia, along with Aotearoa/New Zealand, Canada and the United States, voted against the adoption of the UNDRIP. Australia was particularly opposed to the protection of the right of Indigenous peoples to self-determination under art 3. Then Minister for Indigenous Affairs, Liberal Party (conservative) MP Mal Brough, argued: "What it does is it provides rights to one group of Australians over all else."[2] A similar sentiment was more recently expressed by conservative commentator Andrew Bolt, who argued that the current campaign in favour of constitutional recognition of Indigenous peoples as Australia's First Peoples is "racist" and a token movement which seeks to divide Australians based on race.[3]

In April 2009, the Labor government gave its support to the UNDRIP. Then Minister for Indigenous Affairs, Jenny Macklin, welcomed the move as evidence that Australia now shows "faith in a new era of relations between states and Indigenous peoples grounded in good faith, goodwill and mutual respect".[4] Minister Macklin framed the UNDRIP's protection of the right of self-determination in the following terms:[5]

* Dr Amy Maguire is a senior lecturer in international law at the University of Newcastle Law School, Australia. My sincere thanks to Kerryn Brent, Lisa Brew and Shelby Houghton for their invaluable research assistance and feedback. An earlier version of this article was presented at the 2013 Australian and New Zealand Society of International Law conference, which took as its theme "Accountability and International Law" and I am indebted to colleagues at that conference and in my Law School for feedback on earlier drafts. Any errors remaining are my own.

1 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/RES/61/295 (2007) [UNDRIP].

2 Karen Barlow "Indigenous Australians treated as equals, says Brough" (15 September 2007) ABC Local Radio: AM <www.abc.net.au>.

3 NITV News "Bolt at odds with Brandis over 'racist' Qantas campaign" *SBS* (online ed, Australia, 20 August 2014).

4 Jenny Macklin "Statement on the United Nations Declaration on the Rights of Indigenous Peoples" (press release, 3 April 2009).

5 Above n 4.

> [T]he Declaration recognises the entitlement of Indigenous peoples to have control over their destiny and to be treated respectfully. Article 46 makes it clear that the Declaration cannot be used to impair Australia's territorial integrity or political unity. We want indigenous peoples to participate fully in Australia's democracy.

In 2013, the Australian government and Human Rights Commission made a joint statement to the UN Permanent Forum on Indigenous Issues, asserting that the Australian government and Indigenous peoples in Australia see "Australia's support for the Declaration as another opportunity to rebuild our relationship".[6] Australia's commitment to UNDRIP raises the question of whether governments can be held to account against the rights standards it enshrines, in particular the foundational right to self-determination.

This article explores the right of Indigenous peoples to self-determination in the context of accountability, both in terms of Australia's accountability to its Indigenous peoples and its accountability under international law. Lawyers often tend to focus on what the law says and what status it has (particularly in international law, where "soft" law is subject to marginalisation in many accounts).[7] I am more interested in what the law does, whether it is translated into state and non-state actor behaviour and whether the law is used in ways which attend to the needs of those subject to it. For these reasons, this article draws on data from a qualitative empirical study involving self-determination claimants. I put forward an argument based in international legal norms that seeks to hold the state accountable not only to the international community but to its own citizens. Accountability is a useful concept for tying the law – as an instrument of the state – to the state's obligations to its people.

Following the work of John Dryzek, I interpret accountability as a feature of a deliberative democratic system. Accountability in this context has an important function in promoting adherence to, and effectiveness of, international legal instruments such as the UNDRIP. It is also distinct from accountability as the term may be more commonly understood in international legal commentary; that is, in terms of state responsibility to the international community.

Dryzek has argued that deliberation is "central to democracy" and that political systems can be identified as more or less democratic depending on how "authentic, inclusive, and consequential political deliberation is".[8] Australia undoubtedly regards itself as a high-functioning democracy and yet

6 Mandy Doherty and Jenny Bedford "Implementation of the Declaration of the Rights of Indigenous Peoples" (Speech on behalf of the Australian Government and Australian Human Rights Commission to the Permanent Forum on Indigenous Issues, New York, 22 May 2013).

7 Megan Davis critiques the "orthodox" position that the Declaration is "soft" law which does not create domestic obligations: Megan Davis "To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On" (2012) 19 Australian International Law Journal 17 at 36.

8 John S Dryzek "Democratization as Deliberative Capacity Building" (2009) 42 Comparative Political Studies 1379 at 1380. Laureate Professor Dryzek, of the University of Canberra, is a political theorist whose work focuses particularly on democratic theory and practice and environmental politics.

it has shown itself unwilling to properly deliberate on its obligations under the UNDRIP, particularly the obligation to respect the right of Indigenous peoples to self-determination. A key means of achieving what Dryzek terms "deliberative democracy" is to privilege the concept of accountability. Accountability requires a means by which "empowered space" (a deliberative space such as a parliament or committee in which actors reach collective decisions) is accountable to the "public space" (a deliberative space like a public forum or the internet that imposes few restrictions on who can join or what participants can say).[9] I follow Dryzek's argument that this type of accountability "is key to the generation of broad deliberative legitimacy for collective outcomes".[10] In its future operations within empowered spaces like parliament and cabinet, officials of the Australian state ought to hold themselves accountable to the public space. Within that public space, both within Australia and globally, Indigenous peoples consistently assert their right to self-determination and these assertions must be attended to.

In this article, I argue that accountability can be promoted through a "human rights approach" to the right of self-determination for Indigenous peoples in Australia. A human rights approach would cast self-determination as a process rather than a single event, require focus on substantive equality and bring to the fore matters of "unfinished business",[11] including land rights, treaty, constitutional recognition, sovereignty and Indigenous representative governance. Such an approach would necessitate the adoption of self-determination as a guiding principle in Australian government policy-making and legislation. Through these means, a human rights approach to self-determination provides tools by which to measure Australia's accountability to the right under international law.

In Part II, I locate the right of self-determination within international law and the UNDRIP. I then reflect on the status of the UNDRIP as "soft law" and consider what this ought to mean in terms of holding states to account under the UNDRIP's provisions. In Part III, I consider the features of a "human rights approach" to self-determination. Finally, in Part IV, I explore means by which a human rights approach to self-determination may be implemented in Australia.[12] In this part I incorporate a focus on data gathered through qualitative research interviews with Indigenous participants.

I have provided a more detailed explanation of my methodology elsewhere.[13] This article draws on a combination of doctrinal legal research and qualitative socio-legal research. Qualitative data was gathered through in-depth research interviews with 14 Indigenous participants in Australia.

9 At 1385-1386.

10 At 1385.

11 Patrick Dodson "Until the Chains are Broken: Aboriginal Unfinished Business" (2000) 45 Arena 29.

12 Robert McCorquodale "Self-determination: A Human Rights Approach" (1994) 43 International and Comparative Law Quarterly 857.

13 Amy Maguire "Contemporary Anti-colonial Self-determination Claims and the Decolonisation of International Law" (2013) 22 Griffith Law Review 238 at 242-246.

Analyses of self-determination have typically been highly doctrinal and have not followed a bottom-up approach to exploring the justifications or claims advanced by individual members of claimant groups. In my research, I seek to privilege the experiences and aspirations of rights claimants. This is a means of "talking back" to international law. In this way, I critique the colonial origins and biases of the international legal system.

Research participants in this study were targeted due to their experiences and expertise in self-determination, ensuring that all participants approached the research project from an informed position and delivered "information-rich" data through the interviews.[14] In the first footnote referring to each participant, I include a brief statement of their relevant background and/or professional role in relation to the research. Qualitative research does not seek to make claims of generality,[15] but rather to show valid and reliable connections between data and analysis.[16] In the empirical research on which this article draws, I grounded my findings in the meanings expressed by interview participants, by using the constant comparison method, coding frequently raised concepts and using direct quotations from transcripts. In Part IV, I focus on interview data reflecting on the potential of a human rights approach to self-determination for Indigenous peoples in Australia. This key theme emerged frequently throughout the data and became more detailed through constant comparison.[17] Interview data reflecting on the human rights approach emphasises several means by which Australia may be held accountable for promoting and protecting Indigenous peoples' right to self-determination.

II. The Declaration on the Rights of Indigenous Peoples

Adopted in 2007, the UNDRIP is still a relatively new document. It is, however, the product of a lengthy drafting process, commencing in 1985.[18] It involved discussion, debate and consultation between UN member states and Indigenous communities, nations and representatives.[19] All four states which initially voted against the UNDRIP – Australia, Canada, New Zealand and the United States – have now offered their support.

The UNDRIP confirms that: "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."[20]

14 Jamie Baxter and John Eyles "Evaluating Qualitative Research in Social Geography: Establishing 'Rigour' in Interview Analysis" (1997) 22 Transactions of the Institute of British Geographers 505 at 513.

15 Ann Chih Lin "Bridging Positivist and Interpretivist Approaches to Qualitative Methods" (1998) 26 Policy Studies Journal 162 at 163.

16 Baxter and Eyles, above n 14, at 512.

17 Michelle Byrne "Grounded theory as a qualitative research methodology" (2001) 73 Association of Operating Room Nurses Journal 1155 at 1155.

18 Sarah Pritchard "The United Nations and the making of a declaration on indigenous rights" (1997) 89(3) Aboriginal Law Bulletin 4.

19 Dave Sweeney "Drip Filtered" Habitat Magazine (Australia, July 2013) at 28.

20 UNDRIP, art 3.

The right of self-determination was first confirmed as an element of binding international law in common art 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[21] Self-determination is essential to the human rights framework, as demonstrated by its centrality in these two key documents of international human rights law. The phrase "all peoples" demonstrates that the right is universal in application.[22]

Self-determination entails the right of a "people" to choose their own form of political organisation and relationship to other groups.[23] However, self-determination goes beyond this "essence" of political control, to extend "full rights in the cultural, economic and political spheres".[24] The right represents the means for a people "to preserve its cultural, ethnic, historical, or territorial identity …"[25] and the economic, social, cultural and political dimensions of self-determination are inter-linked.[26] Therefore, self-determination has significance far beyond the issues of state territory and sovereignty and assertions of the right may or may not include claims to independent statehood.

Self-determination is a process, rather than any single outcome of that process.[27] Indeed, self-determination may be described as a right with many "faces", several of which have been identified by Kirgis. These include freedom from colonialism, secession, reunification of formerly divided states, limited autonomy within the state, protection as a minority group and choice of form of government.[28] Each claimant group exercising self-determination must shape the manifestation of the right in their particular circumstances. All peoples may continue to aspire to a greater degree of self-determination in the future, whether through changes to borders, changes to governments, or changes to social and economic circumstances.

21 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 18 December 1979, entered into force 3 September 1981).

22 For example, see: *Importance of the Universal Realisation of the Right of Peoples to Self-Determination and of the Speedy Granting of Independence to Colonial Countries and Peoples for the Effective Guarantee and Observance of Human Rights* GA Res 3382, XXX (1975).

23 Ian Brownlie *Principles of Public International Law* (6th ed, Oxford University Press, Oxford, 2003) at 553.

24 Patrick Thornberry "Self-determination, Minorities, Human Rights: A Review of International Instruments" (1989) International and Comparative Law Quarterly 867 at 880.

25 Erica-Irene A Daes "Some Considerations on the Right of Indigenous Peoples to Self-determination" (1993) 3 Transnational Law and Contemporary Problems 1 at 4-5.

26 Martin Dixon and Robert McCorquodale *Cases and Materials on International Law* (4th ed, Oxford University Press, Oxford, 2003) at 226.

27 Michla Pomerance *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (1982) as cited in Garth Nettheim "'Peoples' and 'Populations': Indigenous Peoples and the Rights of Peoples" in James Crawford (ed) *The Rights of Peoples* (Oxford University Press, Oxford, 1988) 107 at 119.

28 Frederic L Kirgis "The Degrees of Self-determination in the United Nations Era" (1994) 88 American Journal of International Law 304 at 307.

In the UNDRIP, self-determination is stated to include a right to self-government or autonomy in matters relating to internal or local affairs[29] and co-exists with the right of Indigenous peoples to "maintain and strengthen their distinct political, legal, economic, social and cultural institutions ..."[30] while participating in the institutions of the state if they so choose.[31] Davis has conducted a comprehensive exploration of commentary on the UNDRIP's content and concludes that it reaffirms self-determination as it stands in international law; that is, art 3 and subsequent provisions should not be taken to further delimit self-determination for Indigenous peoples.[32] Consequently, self-determination should be interpreted in the context of the entire text of the UNDRIP and international law as a whole and thus "includes, but is not limited to, the right to autonomy or self-government, as well as a means for financing these functions."[33] In this article, I focus on self-determination because its realisation is fundamental to the realisation of other human rights.

The UNDRIP has been described as a significant indicator of the progression of Indigenous peoples from being regarded as "victims" to taking on the status of "actors" under international law.[34] In support of this claim stands the UN Permanent Forum on Indigenous Issues, which brings state representatives to the table with Indigenous representatives from around the world. The UNDRIP has also been cited by courts in various jurisdictions, including the Queensland Court of Appeal, which commented that the UNDRIP ought to influence domestic interpretations of the human rights obligations held by the Australian state towards Indigenous peoples.[35]

The UNDRIP and "Soft Law"

Resolutions of the General Assembly are not however binding or enforceable statements of international law. When Australia eventually gave its support to the UNDRIP, then Indigenous Affairs Minister Jenny Macklin emphasised this point: "While it is non-binding and does not affect existing Australian law, it sets important international principles for nations to aspire to."[36] The federal government has not since expressed any intention to bring the provisions of the UNDRIP into effect through legislation.

29 UNDRIP, art 4.
30 UNDRIP, art 5.
31 Heidi Bruce and Din Gilio-Whitaker "Implementing the UN Declaration on the Rights of Indigenous Peoples, Nation-by-Nation and State-by-State" (2014) 13 Fourth World Journal 83 at 84.
32 Megan Davis "To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On" (2012) 19 Australian International Law Journal 17 at 33.
33 Brenda L Gunn "Self-determination as the Basis for Reconciliation: Implementing the UN Declaration on the Rights of Indigenous Peoples" (2012) 7 Indigenous Law Bulletin 22 at 23.
34 Jeremie Gilbert *Indigenous Peoples' Land Rights Under International Law: From Victims to Actors* (Transnational Publishers, Ardsley, 2006).
35 *Aurukun Shire Council & Anor v CEO Office of Liquor and Gaming and Racing in the Department of Treasury* [2010] QCA 37 at [33].
36 Jenny Macklin "Statement on the United Nations Declaration on the Rights of Indigenous Peoples" (press release, 3 April 2009).

Australia's position in relation to the UNDRIP raises the question of accountability under international law. Does Australia's decision to offer its support to the UNDRIP signify anything, if the UNDRIP is regarded as purely aspirational? To reference Dryzek's theory, to depict the UNDRIP as aspirational undermines the capacity of the Australian government to engage in authentic and consultative decision-making with Aboriginal and Torres Strait Islander rights holders. Further, key proponents of the UNDRIP's development certainly saw it as having greater than aspirational value.[37] Furthermore, it is arguable that soft law instruments have taken on a significant role in the development of international law, particularly in human rights, such that they should not be dismissed as merely aspirational statements.[38]

While soft law instruments like the UNDRIP may not create binding obligations on state parties, they may "nevertheless create expectations about future action" and demonstrate the inadequacy of the traditional hierarchy of international legal sources in providing for the evolution of principles.[39] Over time, declarations can contribute to the emergence of consistent state practice and *opinio juris* in favour of the establishment of customary international law.[40] Indeed, UN General Assembly (UNGA) resolutions are essential in developing a "normative culture" in international law.[41] Further, their non-binding nature has not prevented international and national courts and tribunals from citing UNGA declarations in judgments. This is the case with the UNDRIP, with the right of Indigenous peoples to self-determination emphasised by the UN Human Rights Commission and CERD.[42]

The African Commission on Human and People's Rights has also endorsed the content and use of the UNDRIP. In its *Communiqué on the UN Declaration on the Rights of Indigenous Peoples*, the Commission stated:[43]

37 Megan Davis "Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples" (2008) 9 Melbourne Journal of International Law 439.

38 Dinah Shelton "Introduction: Law, Non-Law and the Problem of 'Soft Law'' in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, Oxford, 2003) 1 at 12-13.

39 Hilary Charlesworth and Christine Chinkin *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, Manchester, 2000) at 66-67.

40 Donald R Rothwell, Stuart Kaye, Afshin Akhtarkhavari and Ruth Davis *International Law: Cases and Materials with International Perspectives* (Cambridge University Press, Cambridge, 2011) at 79; *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226.

41 Rothwell and others, above n 40, at 94.

42 Mauro Barelli "The Role of Soft Law in the International Legal System: The case of the United Nations Declaration on the Rights of Indigenous Peoples" (2009) 58 International and Comparative Law Quarterly 957 at 975.

43 *Communique on the UN Declaration on the Rights of Indigenous Peoples* (28 November 2007) as cited in Abraham Korir Sing'Oei and Jared Shepherd "'In Land We Trust': The Endorois' Communication and the Quest for Indigenous Peoples' Rights in African" (2010) 16 Buffalo Human Rights Law Review 57 at 94.

> The UN Declaration on the Rights of Indigenous Peoples is in line with the position and work of the African Commission on indigenous peoples' rights as expressed in the various reports, resolutions and legal opinions on the subject matter. The African Commission is confident that the Declaration will become a very valuable tool and a point of reference for the African Commission's efforts to ensure the promotion and protection of indigenous peoples' rights on the African continent.

Unfortunately, the Commission did not take up the opportunity to integrate the UNDRIP into its decision-making framework in the decision of *Communication 276/2003, Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya*,[44] a land rights claim in Kenya. In one of the first Indigenous rights claims to have been decided since the adoption of the UNDRIP, the Commission could have done more to utilise the UNDRIP as an interpretation tool in relation to the African Charter of Human and Peoples Rights.[45]

James Crawford cites the UNDRIP as an important "law-making" resolution, as it provides "a basis for the progressive development of the law" and has capacity to act as a catalyst for "the speedy consolidation of customary rules".[46] The UNDRIP clearly fits into a "treaty-like" category of soft law instruments, in the sense that it was carefully negotiated and drafted, it encompasses "an element of good faith commitment …, a desire to influence state practice and an element of law-making intention and progressive development".[47]

In practical terms, what matters more may not be whether a rule is hard or soft law, "but whether it is going to be more or less effective in changing behaviour in a particular context and issue area".[48] As Sir Robert Jennings once noted: "Recommendations may not make laws, but you would hesitate to advise a government that it may, therefore, ignore them, even in a legal argument".[49] The widespread acceptance of the UNDRIP, as indicated by its near-universal adoption in the General Assembly and subsequent agreement by Australia and the other initially-opposed states, makes "the legality of opposing positions harder to sustain".[50]

Indeed, there is some evidence that Australia is beginning to move away from its earlier insistence on the non-binding nature of the UNDRIP, towards a more nuanced engagement with its terms. For example, the

44 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2010) African Commission on Human and Peoples' Rights, Case 279/2003.

45 Above n 43, at 57.

46 James Crawford *Brownlie's Principles of International Law* (8th ed, Oxford University Press, 2012) at 42. Crawford notes that each provision must be analysed in line with state intentions at the time of adoption.

47 A E Boyle "Some Reflections on the Relationship of Treaties and Soft Law" (1999) 48 International and Comparative Law Quarterly 901.

48 Rothwell and others, above n 40, at 101.

49 Robert Jennings *Cambridge-Tilburg Law Lectures* (3rd series, Kluwer Law International, Boston, 1983) at 3-32.

50 Alan Boyle "Soft Law in International Law-Making" in Malcolm D Evans (ed) *International Law* (3rd ed, Oxford University Press, Oxford, 2010) at 122-140.

Australian government has noted that it is working with the Australian Human Rights Commission and the National Congress of Australia's First Peoples:[51]

> to increase awareness of, and encourage dialogue about, the Declaration in policy development, program implementation and service delivery as a way to embed the Declaration in how business is done.

If the Australian government makes good on this commitment, the question of the non-binding nature of the Declaration will become less significant. Of greater value will be the status of the UNDRIP as an authoritative interpretation of obligations Australia already bears under international law and the internalisation of these obligations in government action and policy-making. This type of progress could also contribute to the development of binding customary international law in the future.

This more nuanced approach was recently advocated by the Parliamentary Joint Committee on Human Rights, a committee established by the Australian government in 2011 to examine legislation and proposed legislation for human rights compatibility and to report to Parliament on human rights matters. In 2013, the Joint Committee was tasked with reporting on the human rights compliance of the "Stronger Futures" legislative package, through which the federal government regulates several aspects of social life in Aboriginal communities in the Northern Territory. The Joint Committee found itself compelled to comment on the significance of the UNDRIP, despite its status as soft law.

In its report, the Joint Committee noted that the UNDRIP is not one of the seven human rights treaties which are listed by the Australian government as containing obligations binding on the state.[52] However, the Joint Committee acknowledged that the UNDRIP expresses many of those binding obligations in terms specific to Indigenous peoples and that parts of the UNDRIP restate customary international legal obligations.[53] Therefore, the UNDRIP should be regarded as "an influential and authoritative source of guidance that should be drawn on in policymaking and the development of legislation".[54] The Joint Committee concludes that it will draw on the UNDRIP when interpreting Australia's treaty obligations and expect the government to consider the UNDRIP where necessary in statements of compatibility with human rights.[55] The Australian government has since noted that "Commonwealth agencies are starting to include reference to the Declaration" in statements of compliance for proposed legislation.[56]

51 Doherty and Bedford, above n 6.

52 Parliamentary Joint Committee on Human Rights *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and related legislation* (Canberra, Eleventh report of 2013) at 15.

53 At 15.

54 At 16.

55 At 16.

56 Doherty and Bedford, above n 6.

III. The Human Rights Approach to Self-determination

Despite the evidence that "soft law" instruments like the UNDRIP have greater than aspirational significance, and the encouraging position recently taken by the Parliamentary Joint Committee on Human Rights, it is apparent that Australia has not committed itself to the implementation of the UNDRIP in fact or in law. Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda notes that the government lists support for the UNDRIP in its Human Rights Framework, holds itself up as having an ongoing commitment to the promotion of human rights and "asserts that its policies and legislation are in compliance with the Declaration".[57] However, "a national assessment on compliance with the Declaration has not been conducted" and Australia's recent appearances before several UN treaty bodies "have raised concern about the protection and realisation of the rights of Aboriginal and Torres Strait Islander peoples in Australia".[58] Further, there has been a definite shift away from the use of "self-determination" language and policy in Indigenous affairs in Australia over recent decades.

In this context, I support the development of a "human rights approach" to self-determination and will argue that this approach can provide the necessary tools to promote Australia's accountability to the right for its Indigenous peoples. In 1994, Robert McCorquodale presented a persuasive case for the implementation of a new approach to self-determination claims, one which would evaluate such claims within the broader framework of international human rights law. McCorquodale argued that a "coherent legal framework" was required to deal with self-determination claims, as the approaches which had held sway until that time were not equipped to address the potential conflicts between rights which may emerge when self-determination is asserted.[59] The international law of human rights is capable of providing the "coherent legal framework" through which self-determination solutions may be negotiated.

The human rights approach to self-determination requires contextualising a self-determination claim in relation to the other rights with which it will interact. As yet, McCorquodale's proposal has not been generally adopted in international legal dialogue. Instead, self-determination has received progressively less attention within the international arena. Contemporary "hard cases" of self-determination remain marginalised.[60] However, in practical terms, the human rights approach has already assisted in clarifying the meaning and scope of self-determination where it interacts with other human rights, notably through McCorquodale's own advisory work in South

57 Mick Gooda "Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda, Australian Human Rights Commission, to the Expert Mechanism on the Rights of Indigenous Peoples" (Geneva, 9-13 July 2012).

58 Above n 57.

59 McCorquodale, above n 12, at 857.

60 Maguire, above n 13.

Africa and Malawi.[61] In light of this, McCorquodale's proposal deserves renewed evaluation and I sought to achieve this, in part, by interviewing him as part of my broader empirical study.[62]

In proposing a human rights-centred approach to self-determination, McCorquodale asserts the need for a framework capable of application in a variety of situations, which balances the rights of all people against a concern for preventing threats to peace and security.[63] This distances the human rights approach from the traditional "territories" or "peoples" approaches to self-determination, which favoured the interests of states over the rights of claimant peoples.

Of these two approaches, the territories approach requires only brief treatment here, as it lacks contemporary currency. The territories approach focused on historical boundaries and permitted the exercise of self-determination by salt-water colonies[64] within the confines of *uti possidetis juris*.[65] This meant that the peoples entitled to self-determination were defined territorially, rather than ethnically.[66] Elements of this approach were evident in the manipulation of the maps of Europe and the colonial territories, following the First World War. The territories approach was capable of adaptation only to the self-determination claims of colonial peoples whose homeland could be clearly defined in geographical terms and who wished to separate from an imperial power.

This approach failed to meet Judge Dillard's famous characterisation of the nature of self-determination, namely, that "it is for the people to determine the destiny of the territory and not the territory the destiny of the people".[67] The territories approach served the interests of the dominant powers within the international order, as it guaranteed the stability of borders and limited the number of self-determination claims by minority peoples within states. However, it has fallen from favour in recent decades and it does not reflect the values inherent in the international human rights framework. The territories

61 Interview with Professor Robert McCorquodale, Dean, University of Nottingham Law School (the author, Nottingham, 27 March 2006). Robert McCorquodale was interviewed on the basis of his expertise in self-determination as a Professor of international law, with particular focus on Britain's engagement with the right.

62 Robert McCorquodale was interviewed in the other portion of my empirical study, not discussed in this article, concerning self-determination for Irish nationalists in Northern Ireland. For further details of this aspect of the study, see: Amy Maguire "Contemporary Anti-Colonial Self-Determination Claims and the Decolonisation of International Law" (2013) 22 Griffith Law Review 238 and Amy Maguire "Self-determination, Justice, and a 'Peace Process': Irish Nationalism, the Contemporary Colonial Experience and the Good Friday Agreement" (2014) 13 Seattle Journal for Social Justice 537.

63 McCorquodale, above n 12, at 857-858.

64 That is, colonies administered by a distant metropolitan power.

65 The doctrine of *uti possidetis juris* fixed the boundaries of newly formed states based on those which existed at the moment independence was asserted. Thus, in effect, the boundaries of the new state became those imposed by the colonial power.

66 David Raič *Statehood and the Law on Self-Determination* (Kluwer Law International, The Hague, 2002) at 209.

67 *Western Sahara Opinion (Separate Opinion of Judge Dillard)* [1975] ICJ Rep 1975 12 at 122.

approach is not suited to the variety of self-determination claims advanced by peoples in the twenty-first century, who typically share territories and rights entitlements with other peoples, as is the case for Indigenous peoples in Australia.

The traditional approach which retains significant power within contemporary analyses of self-determination is the "peoples" approach. This strategy requires the identification of the "self" claiming self-determination. Guidelines for this process have been discussed in a range of legal commentaries[68] but never been set down as part of a clear legal framework. In this approach, "peoplehood" becomes a threshold question; if a claimant group cannot meet the criteria for peoplehood, their self-determination claim will not gain a full hearing. Because one criterion for defining the 'self' is self-identification as a people,[69] a set of fixed criteria is impossible to develop.

The process by which a particular people is recognised is "an effect of a particular form of discursive reconstruction".[70] There is certainly a risk that legitimate self-determination claims will be dismissed because a claimant people cannot meet a set of rigid criteria, even if they are bound by oppressive government or unjust borders,[71] or able to demonstrate a cohesive group identity. For these reasons, the meaning of "peoples" itself is contested and has been variously argued to identify the whole people of a State,[72] all colonised peoples,[73] all peoples of the world[74] and even communities which claim membership of a larger "people".[75] Political considerations invariably dominate when states are faced with a decision whether or not to recognise a group as a people for the purposes of self-determination.

68 For example, see Ian Brownlie "The Rights of Peoples in Modern International Law" in James Crawford (ed) *The Rights of Peoples* (Oxford University Press, Oxford, 1988) 1 at 5; *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter* GA Res 154, XV (1960); *Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Right of People for UNESCO* SNS-89/CONF. 602/7 (1990). This UNESCO report cited common features of peoples such as racial or ethnic identity, language, territorial connection and cultural homogeneity.

69 Eric Kolodner "The Future of the Right of Self-determination" (1994-1995) 10 Connecticut Journal of International Law 153 at 161.

70 Nathaniel Berman "Sovereignty in Abeyance: Self-Determination and International Law" (1988-1989) 7 Wisconsin International Law Journal 51 at 103.

71 McCorquodale, above n 12, at 868.

72 Rosalyn Higgins *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, Oxford, 1963) at 104.

73 *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter* GA Res 154, XV (1960).

74 International Covenant on Civil and Political Rights GA Res 2200A, XXI (1966); International Covenant on Economic, Social and Cultural Rights GA Res 2200 A, XXI (1966).

75 As has occasionally been claimed in relation to British unionists living on the island of Ireland and regarding themselves as members of a British "people".

In 1993, Professor Erica-Irene Daes, a leader of the global movement to develop and bring into effect a Declaration on the Rights of Indigenous Peoples, demonstrated that Indigenous peoples conform to the criteria set down for the determination of "peoplehood". Daes identified Indigenous peoples as distinct in society, language, law, culture and their relationships to their traditional lands and concluded that the "United Nations should not pretend, for the sake of a convenient legal fiction, that those differences do not exist".[76] Yet around the world, and notably in Australia, states continue to deny Indigenous communities the status of peoples. Earlier rhetorical and legislative commitments to the notion of Indigenous self-determination have been scaled back in recent years in Australia. The freedom with which the Australian state has denied the status of Indigenous Australians as peoples demonstrates that the "peoples" approach to self-determination is subordinate to political convenience. It also proves that the empowered space of government in Australia does not make itself accountable to the public space in which Indigenous peoples assert self-determination. Therefore, a "peoples" approach to self-determination is inadequate as a means of promoting state accountability to the right under international law.

McCorquodale has identified a range of further problems with the "peoples" approach, notably that it fails to recognise how peoples may change throughout time, that it may be possible to engineer peoples in order to attain certain political ends, that few individuals can happily state that they are members of one single people and – perhaps most importantly – that no single definition of peoplehood exists.[77] Furthermore, an individual's sense of group belonging is an intangible notion, which cannot be easily quantified.[78] The imposition of externally-determined criteria fails to honour an individual's freedom to choose their community affiliation. The peoples approach also suffers from a degree of hypocrisy, with states proclaiming in international law that peoples ought to decide on their future, even though the question of "who is a people?" continues to be decided by states.[79] Whilst states retain dominance in relation to this test, the question of which peoples are entitled to assert self-determination becomes a political rather than a legal one, dependent on the whims of states rather than the circumstances and desires of peoples.[80]

76 Erica-Irene A Daes "Some Considerations on the Right of Indigenous Peoples to Self-determination" (1993) 3 Transnational Law and Contemporary Problems 1 at 6.

77 McCorquodale, above n 12, at 867.

78 Interview with Bríd Rodgers, Social Democratic and Labour Party (The author, Lurgan, 9 March 2006). Rodgers was one of the first Ministers in the devolved Northern Ireland Executive, elected for the Social Democratic and Labor Party, a centrist Irish nationalist party.

79 Alexandra Xanthaki "The Right to Self-Determination: Meaning and Scope" in Nazila Ghanea and Alexandra Xanthaki (eds) *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry* (Martinus Nijhoff Publishers, Leiden, 2005) at 15.

80 Martin Dixon and Robert McCorquodale *Cases and Materials on International Law* (4th ed, Oxford University Press, Oxford, 2003) at 218.

Attempts to impose rigid criteria upon peoples asserting self-determination ignore "the multiple patterns of human association" and the impossibility of defining all peoples according to "existing or perceived sovereign boundaries".[81] For this reason, the peoples approach to self-determination is circular and unproductive, especially in the contemporary environment of more fluid sovereignty, multi-national states and multiple identities.[82] There is a need for a new way. In contrast to the peoples and territories approaches, the human rights approach is sufficiently sensitive to balance the competing interests brought into play by self-determination claims.[83] The peoples approach to self-determination has facilitated the marginalisation of contemporary self-determination claims, enabling the international legal system to avoid evaluating "hard cases". The human rights approach is capable of facilitating the just evaluation of all self-determination claims, because the guiding framework of international human rights law sets out principles which aim to balance human rights in light of developments in international society.[84] Further, the broader human rights framework enshrines standards of practice against which states may be held to account.

McCorquodale explains that the specific right of self-determination is well-adapted to evaluation within the broader human rights framework because the two doctrines share fundamentally similar purposes; self-determination protects and empowers communities, and the international law of human rights protects both the rights of individuals and the rights of the communities which those individuals come together to form.[85] Indeed, the central positioning of self-determination in common art 1 of the ICCPR and ICESCR emphasises the symbiotic relationship between self-determination and the more individual-focused human rights. Similarly, self-determination is given primacy within the UNDRIP, as demonstrated by the combined force of arts 3 to 5.[86] Full realisation of the right of self-determination is essential for the adequate protection of all human rights.

In order to explore how the human rights approach to self-determination would work in practice, McCorquodale acknowledges that most human rights are not absolute values,[87] but rather that limitations may sometimes be imposed to enable rights to interact in the real conditions of social life.

81 S J Anaya *Indigenous Peoples in International Law* (Oxford University Press, Oxford, 1996) at 79.

82 At 79.

83 McCorquodale, above n 12, at 870.

84 At 871.

85 At 872.

86 UNDRIP, arts 3-5.

87 Some rights under the international legal framework are absolute, for example the prohibition against genocide (Convention on the Prevention and Punishment of the Crime of Genocide 1021 UNTS 78 (opened for signature 9 December 1948, entered into force 12 January 1951)) and the right to freedom from torture (International Covenant on Civil and Political Rights, above n 21, art 7).

This is the case with self-determination. It is a general legal rule that any limitations imposed on the exercise of human rights are only imposed to protect other rights and the interests of society and any limitations imposed are to be interpreted narrowly.[88] While self-determination applies wherever a people is subject to oppression, it is subject to the presumption that exercises of self-determination cannot be permitted to destroy or impair the other human rights also enshrined in the international legal framework.[89] The human rights approach makes possible self-determination solutions which enable the concurrent protection of the whole range of human rights to their fullest extent.[90] This is significant in the context of accountability, as too often Indigenous rights are evaluated publicly in terms of how they may impinge on the established rights of the majority (as was clear in the statement from former Indigenous Affairs Minister Mal Brough referred to in the introduction to this article). The evaluation of Indigenous self-determination claims should not be represented as an "either/or" equation, but as an opportunity to refine and improve the balance of rights enjoyed by all members of Australian society. Such an analysis would more appropriately enable deliberative democracy.

Self-determination claims not only bring into question the rights of non-claimants, but also the interests of states. A balancing act is required between the realisation of self-determination and respect for state sovereignty. In this context, self-determination may be subject to limitations imposed to protect the general interests of international society, specifically through the doctrines of territorial integrity and *uti possidetis juris*.[91] However, it is well established that the right of a state to territorial integrity only remains absolute so long as the self-determination of peoples within that territory is fully realised.[92] In any case, given that most self-determination claims asserted by Aboriginal and Torres Strait Islander peoples are framed within the context of the existing Australian state,[93] objections asserting Australia's right to territorial integrity are largely redundant.

88 McCorquodale, above n 12, at 873 citing as an example the European Court of Human Rights decision in *Sunday Times v United Kingdom (Judgment)* (1978) No 6538/74 (ECHR).

89 At 876.

90 Interview with Robert McCorquodale, above n 61.

91 McCorquodale, above n 12, at 879-881.

92 *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* GA Res A/Res/25/2625 (1970); G J Simpson "The Diffusion of Sovereignty: Self-determination in the Post-Colonial Age" (1996) 32 Stanford Journal of International Law 255 at 283.

93 Noel Pearson "Reconciliation: To Be or Not To Be- Separate Aboriginal Nationhood or Aboriginal Self-determination and Self-government within the Australian Nation" (1993) 3 Aboriginal Law Bulletin 15 cited in Sam Muir "The New Representative Body For Aboriginal and Torres Strait Islander People: Just One Step" (2010) 14 Australian Indigenous Law Review 86 at 86. However, there are those such as Mansell who advocated for a more separate form of self-government including Indigenous passports, diplomats and an Olympic team: M Mansell *Tomorrow: The Big Picture' in The Future of Australia's Dreaming* (Australian Museum, Sydney, 1992) at 17.

A key benefit of the human rights approach is that it seeks to empower a people to assert self-determination and then be acknowledged as a party to a process of international legal dialogue. This approach would give subject communities a voice in the public space, and promote the accountability of states to their claims by encouraging deliberative democracy and local and global levels. The human rights approach does not impose rigid criteria, but rather enables the contextual evaluation of all self-determination claims. Whereas some of the contemporary "hard cases" of self-determination have been marginalised from international legal discourse, a human rights approach promotes the full and fair evaluation of all self-determination claims. When analysed within the context of the human rights framework, their claims can be balanced against the competing rights and interests of other individuals and groups sharing contested territory.[94] Focus shifts from which groups are entitled to self-determination, to how the right is to be exercised. This balancing process is better suited to developing more nuanced and flexible self-determination solutions, particularly in settler colonial societies like Australia, where an insistence on state sovereignty has dominated the conversation.

IV. Implementing a Human Rights Approach to Indigenous Self-determination in Australia

In practical terms, a human rights approach can assist in identifying the types of "unfinished business"[95] (or rights issues) that ought to be addressed, in order for Australia to make itself accountable to self-determination under the UNDRIP. In this section, I consider a number of factors which could contribute to the development of a human rights approach to Indigenous self-determination in Australia. I integrate the information-rich data provided by Indigenous participants in research interviews conducted in Australia. This qualitative data provides a means by which self-determination claimants can speak to the accountability gap between international legal standards and domestic implementation of human rights.

A. Self-determination as a Process, Not an Event

In order to make itself accountable to the right of Indigenous peoples to self-determination, Australia must abandon its fear of self-determination discourse as threatening to its sovereignty. Indigenous self-determination assertions in Australia are almost always set within the framework of the state, that is, it is rare for Indigenous advocates to demand self-determination in the form of secession and independent statehood. Focus on self-determination in its secessionist form limits our capacity to depict the right as a process and militates against efforts in deliberative democracy. Self-determination is a process which requires negotiation, the development of a human rights culture and a social and political commitment to substantive equality.

94 McCorquodale, above n 12, at 870.

95 Patrick Dodson "Until the Chains are Broken: Aboriginal Unfinished Business" (2000) 45 Arena 29.

Participants in my qualitative research were drawn to this conception of self-determination as requiring an ongoing process of realisation, rather than a single event (for example, secession and the formation of an independent state). Irabinna Rigney perceived the right as an ongoing process, "linked to the cultural wellbeing of Indigenous peoples" and related to "land, language, culture, education" and other values.[96] Larissa Behrendt regards process as central to the realisation of self-determination, in the sense of active involvement in decision-making and the development of institutions, ensuring that visions of self-determination may evolve over time.[97] Irene Watson notes that, "especially considering the diversity of Aboriginal Australia, one act can never bring self-determination to all".[98] Future generations should not be bound to exercise self-determination under terms set by their forebears.[99] Rather, within the process of self-determination, claimants should have choice "in relation to issues like culture, language and lifestyle".[100] Noel Pearson notes the significance of "moments" when settlements are reached or laws are changed, but believes that self-determination is not realised at any single moment because legal change is only an aspect of the whole.[101]

To paraphrase comments made by von Doussa and Calma in the context of reconciliation in Australia, a human rights approach to self-determination requires "acknowledgment of the impact of historically-derived disadvantage on Indigenous peoples", culturally responsive measures to address inequality and a sustained commitment to the full and equal realisation of all human rights by Indigenous peoples in Australia.[102] This mandates the further development of a human rights culture in Australia. The international legal

96 Interview with Irabinna Rigney (the author, Adelaide, 29 August 2006). Professor Irabinna Rigney is an Aboriginal educationalist and a member of the Narungga, Ngarrindjeri, Andyamathanha and Kaurna language groups.

97 Interview with Larissa Behrendt (the author, University of Technology, Sydney, 8 September 2006). Professor Larissa Behrendt is a Eualeyai and Kamillaroi woman and a legal academic.

98 Interview with Irene Watson (the author, Adelaide, 30 August 2006). Professor Irene Watson is a member of the Tanganekald and Meintangk peoples, a legal practitioner and academic and former member of the UN Working Group on Indigenous Populations.

99 Interview with Mick Dodson, Australian National University (the author, Canberra, 22 September 2006). Professor Mick Dodson is a Yawuru man, legal academic and former member of the UN Permanent Forum on Indigenous Issues.

100 Interview with Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC (the author, Sydney, 11 December 2006). Tom Calma is a Kungarakan elder and a member of the Iwaidja tribal group, a long-time public servant and, at the time of our interview, Commissioner of the Human Rights and Equal Opportunity Commission.

101 Interview with Noel Pearson, Director, Cape York Institute for Policy and Leadership (Cairns, 6 December 2006). Noel Pearson is a member of the Bagaarrmugu and Guggu Yalanji peoples, a lawyer and community representative of Cape York Indigenous communities.

102 John von Doussa and Tom Calma "Human rights and reconciliation in Australia (1991-2006)" in Elliott Johnston, Martin Hinton and Daryle Rigney (eds) *Indigenous Australians and the Law* (2nd ed, Routledge, London, 2008) 179 at 181.

system could play an oversight role in this context, especially as the Australian state has recently demonstrated its unwillingness to entrench human rights protection in legislation.[103]

Interview participants asserted that a human rights approach to self-determination should also be promoted through the recognition that Indigenous peoples seek substantive, rather than formal, equality. Irabinna Rigney notes government resistance to differential treatment of different groups, but argues that treating all people in the same way "means assimilation for Indigenous peoples".[104] Aden Ridgeway notes that:[105]

> one [aspect of self-determination] is the achievement of formal equality, in the sense of having a government talking about their policy of self-determination ... But you've also got to have substantive equality at the other end, which means you have to work away at all the small building blocks that define and give expression to real equality being achieved – otherwise you end up with situations where the letter of the law says something, and it's warm and feels good, but life within a community stays exactly the same. You're still disadvantaged, there's poor health, there's people unemployed, your culture's not being supported or recognised ...

B. Land Rights

One of the reasons for the persistent refusal by the Australian state to recognise the connection between Indigenous rights to land and self-determination is the paranoia that self-determination claims threaten Australia's sovereignty and territorial integrity.[106] However, Indigenous peoples around the world have consistently asserted that land rights are fundamentally intertwined with self-determination. In his interview for this research project, Noel Pearson noted:[107]

> ... the ancestral connection with land for Indigenous peoples is not just a question of multicultural coexistence. The relationship with home land is something that is distinct to those people for whom a particular land is their native land.

103 In 2009, the government-appointed National Human Rights Consultation reported to the government and proposed the adoption of a Human Rights Act, along with a wide range of complementary measures: National Human Rights Consultation "Report" (2009) at 364. In April 2010, the federal government announced that it would focus on human rights education, and introduce new measures for human rights oversight of legislation, however, it would not propose a Human Rights Bill before parliament: Susanna Dunkerley "Govt rejects formal human rights charter" *The Sydney Morning Herald* (online ed, Sydney, 21 April 2010).

104 Interview with Irabinna Rigney, above n 96.

105 Interview with Aden Ridgeway, Tourism Australia (the author, Sydney, 28 November 2006). Aden Ridgeway is a Gumbayyngirr man, a former federal politician and public servant and is active in a wide range of public policy areas.

106 See, for example, the Australian government's comment that it "does not support an interpretation of self-determination that has the potential to undermine Australia's territorial integrity or political sovereignty": Commonwealth of Australia "Common Core Document forming part of the Reports of States Parties - Australia - incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights" (2006) at 55.

107 Interview with Noel Pearson, above n 101.

Some urban Indigenous communities also regard connection to land as essential to self-determination. For example, although interview participants Mick Mundine and Peter Valilis describe the Aboriginal community in Sydney's Redfern as "like the United Nations", they identify the community's land as having great political, historic and cultural significance.[108] Yet, the Australian state has, since *Mabo*, established a highly complex, expensive, time-consuming and difficult body of law to regulate claims to native title. It remains extraordinarily difficult for Indigenous peoples in Australia to assert self-determination through claims to land rights.[109]

Of course, it appears "almost inconceivable that [isolated instances of] Indigenous separatism would translate into the creation of a 'black state'".[110] Instead, the Australian state is obliged to engage constructively with the range of distinctive Indigenous perceptions of land and its relationship to self-determination. The importance of this is realised in the UNDRIP through the operation of arts 8, 10, 25 and 26, which draw explicit links between the principle of self-determination and the importance of relationships with the land. The international legal system could support this by becoming more inclusive of the voices of non-state actors, thus reducing the emphasis placed on territory in international legal discourse. Greater international legal pressure is warranted to require Australia's adherence to the UNDRIP standards for recognition of land rights, and in this way, to promote accountability to the right of Indigenous peoples to self-determination. The accountability of empowered spaces to public spaces is important in the international legal system, as in domestic systems. Indeed, this is particularly so, considering the frequent challenges made to the effectiveness of international law.

C. Indigenous Conceptions of Sovereignty

Holding Australia to account in relation to Indigenous self-determination poses a challenge to national and international understandings of sovereignty. Statist understandings of sovereignty tend to emphasise geographical and

108 Interview with Mick Mundine and Peter Valilis, Aboriginal Housing Company (the author, Redfern, 8 August). Mick Mundine is a community leader in Australia's most prominent urban Aboriginal community, Redfern in Sydney. Mundine and Peter Valilis were office-holders in the Aboriginal Housing Company at the time of our interview.

109 Nick Duff "Reforming the Native Title Act: Baby steps or dancing the running man?" (2014) 17 Australian Indigenous Law Review 56; Deirdre Howard-Wagner and Amy Maguire "The Holy Grail' or 'The Good, The Bad and The Ugly'?: A Qualitative Exploration of the ILUAs Agreement-making Process and the Relationship Between ILUAs and Native Title" (2010) 14 Australian Indigenous Law Review 71; Glenn Kelly and Stuart Bradfield "Winning Native Title, or Winning Out of Native Title?: The Noongar native title settlement" (2012) 8 Indigenous Law Bulletin 14; Noel Pearson "The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta" (2003) 7 Newcastle Law Review 1.

110 Stuart Bradfield "Separatism or Status-Quo?: Indigenous Affairs from the Birth of Land Rights to the Death of ATSIC" (2006) 52 Australian Journal of Politics and History 80 at 81 citing the "bogey" of the "black state" as raised by opponents to Indigenous autonomy, for example: Keith Windschuttle "Why there should be no Aboriginal Treaty' (2001) 45 Quadrant 15 at 24.

political boundaries. Respondents in this research contended that Indigenous sovereignty continues in Australia and that the state is obliged to broaden its understanding of what sovereignty entails.[111] In this context, Australia may look to the example of the international legal system. State sovereignty within the international forum is becoming increasingly limited by the existence of global and regional governance bodies such as the United Nations and European Community, the increasingly powerful human rights framework and the establishment of international courts such as the International Criminal Court. Indeed:[112]

> the idea of nation states as islands of sovereignty no longer holds sway in a globalised and interdependent world. With some flexibility and imagination, Indigenous peoples' prior sovereignty could be recognised in a manner which enhances rather than fractures Australia's democratic system of governance.

A new understanding of Indigenous sovereignty ought to acknowledge, as Irabinna Rigney put to me, that "no Indigenous nation in what is now called Australia has ever ceded sovereignty".[113] Recognition of continued Indigenous sovereignty is regarded by some Indigenous self-determination claimants as conferring status, thus enhancing the capacity of claimants to achieve external acknowledgment of their distinctiveness. The key is not to regard Indigenous sovereignty as translatable to a hard, statist understanding of the concept. Instead, contemporary approaches to self-determination ought to encompass the perspectives of Indigenous claimants on sovereignty as a corollary of self-determination. Indigenous sovereignty may be exercised within the Australian nation state. As Peter Yu stated in our interview for this research, "the context is that of nations within a nation".[114] Indigenous self-determination and sovereignty may both be expressed, in part, through the concepts discussed in the following three sections on representative governance, constitutional recognition and treaty.

D. Representative Governance

Interview participants in this research identified governance as an essential factor in holding Australia accountable to the rights set out in the UNDRIP, particularly the right of Indigenous peoples to self-determination. However, it is apparent that Australian governments elected through a majoritarian process will never reflect an Indigenous agenda.[115] Irabinna Rigney regards representative governance, "put in place by, for and in the interests of

111 Interview with Mick Dodson, above n 99; Interview with Irabinna Rigney, above n 96; Interview with Irene Watson, above n 98; Interview with Peter Yu (the author, Sydney, 29 September 2006). Peter Yu is a Yawuru man and prominent Indigenous community activist, particularly in the area of land rights.

112 Larissa Behrendt, Chris Cunneen and Terri Libesman *Indigenous Legal Relations in Australia* (Oxford University Press, South Melbourne, 2009) at 19.

113 Interview with Irabinna Rigney, above n 96.

114 Interview with Peter Yu, above n 111.

115 Interview with Noel Pearson, above n 101.

Indigenous peoples", as central to achieving improvement in socio-economic outcomes for Indigenous people and enabling Indigenous communities to negotiate with the state to resolve conflicts.[116] As Tom Calma recognises, Indigenous Australia is incredibly diverse, and an effective representative structure must be capable of taking into account the needs of "women, youth, older people",[117] as well as geographically and culturally distinct communities.

Re-establishing representative governance, and making it effective, is also important as a means of enabling Indigenous communities to communicate, strategise and work together towards self-determination within the Australian nation state.[118] Linda Burney, in our interview, argued that any model should have the capacity to:[119]

> … influence Cabinet decisions, function as an advocacy body for Aboriginal aspirations, have a political focus, have a policy focus, and probably be responsible for some programs.

Noel Pearson similarly advocates for a "power equalisation mechanism", capable of requiring government to negotiate with Indigenous people on equal terms.[120]

In this context, I note the establishment of the National Congress of Australia's First Peoples in 2010. The Congress is a private company, owned by its Indigenous members and independent from government. The Congress describes itself as a "unifying voice for Aboriginal and Torres Strait Islander Peoples in Australia."[121] Since its establishment in 2010, over 7,500 Aboriginal and Torres Strait Islanders have signed up as members.[122] It has been applauded as being both "efficient and effective" in its short time of existence and is set to play a role in driving constitutional recognition for Indigenous peoples.[123] As Jody Broun, former co-Chair of the Congress, has noted:[124]

> It is likely that the Congress will be called upon to play a role in determining the level of support in the Aboriginal and Torres Strait Islander community for the proposal put forward by Government.

The Congress is currently seeking to establish itself as the peak advocacy body for Indigenous peoples in Australia and has centralised the UNDRIP in its operations. In 2012, the Congress raised concerns regarding the

116 Interview with Irabinna Rigney, above n 96.
117 Interview with Tom Calma, above n 100.
118 Interview with Irabinna Rigney, above n 96.
119 Interview with Linda Burney, Member of the Legislative Assembly, NSW Parliament (the author, 15 November 2006). Linda Burney is a Wiradjuri woman and Labor politician.
120 Interview with Noel Pearson, above n 101.
121 National Congress of Australia's First Peoples "About Us" (2015) <nationalcongress.com.au>.
122 Michael Coggan "Indigenous Affairs Minister reviewing future of National Congress of Australia's First Peoples" *ABC News* (online ed, 5 December 2013).
123 P Cranko, A Redman and E Ferrer "Organisation Evaluation Report: National Congress of Australia's First Peoples" (National Congress of Australia's Fist Peoples, August 2012).
124 Jody Broun "Shaping change: The National Congress of Australia's First Peoples explores the path towards constitutional reform" (2011) 7 Indigenous Law Bulletin 37 at 41.

operation of the *Stronger Futures* legislation, triggering a Parliamentary Committee Inquiry.[125] The Congress' submissions were clearly significant to the Committee. The Committee accepted that, as a general rule, any "special measure" in relation to indigenous people should "as far as possible be developed in consultation with the group whose members are to be the beneficiaries of the measure."[126] Importantly, it was also agreed that the UNDRIP:[127]

> while not enshrined in domestic law, is an important and relevant instrument for [the committee's] work, and provides specific guidance as to the content of the rights in the human rights treaties which fall within the committee's mandate.

Despite early achievements, it is not yet possible to gauge whether the National Congress will become an effective body for the advancement of Indigenous self-determination. Its independence, energy and grounding in an Indigenous membership base are positive features, however, its distance from government and lack of ownership of program delivery could limit its reach. The Congress has attracted some criticism over its effectiveness and financial stability. Some critique has come from Indigenous commentators, who have questioned the Congress' structure and capacity to adequately represent remote Indigenous communities.[128] Despite having over 7,000 members, only 800 people voted in the 2013 Congress election, which raises serious questions about the Congress' ability to function as a "national voice" for Indigenous peoples.[129]

In 2013, Indigenous Affairs Minister Nigel Scullion asked whether the $29 million in Government grants the Congress had been allocated had translated to widespread engagement with its members.[130] The 2014-2015 Commonwealth budget cut funding previously allocated to the Congress, which has put its leadership under pressure to appeal for public funding.[131] These budget fears have plagued Congress since its inception, with concerns expressed shortly after its establishment that:[132]

> one of its benchmarks for success – financial autonomy – has already become untenable. This not only puts Congress on shaky ground but calls into question the nature of the Government's commitment to 'building partnerships' with Indigenous people.

125 *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and related legislation*, above n 52, at 1.
126 At 23.
127 At 16.
128 Murray Silby "Criticism of First Peoples' Congress" *SBS* (online ed, 26 August 2013).
129 "Indigenous Affairs Minister reviewing future of National Congress of Australia's First Peoples", above n 122.
130 Michael Coggan "Future Uncertain for Indigenous National Congress" *ABC News* (online ed, 5 December 2013).
131 Myles Morgan "National Congress Hopes Funding Will Come From Public" *SBS NITV News* (online ed, 28 May 2014).
132 Thalia Anthony "New National Indigenous Representative Body ... Again" (2010) 7 Indigenous Law Bulletin 5 at 7.

It therefore remains to be seen how effective the Congress will be in meeting the representative governance needs of Indigenous peoples in Australia, in their context of their right to self-determination. Considering that a former Australian government disbanded the previous national representative governance structure, as will be discussed below, the effectiveness of any governance body for Indigenous peoples is one means by which to measure Australia's accountability to the rights protected by UNDRIP. It is clear that the majoritarian democratic model in Australia fails to adequately account for the rights and aspirations for Indigenous peoples. A deliberative democratic model, more accountable to self-determination, ought to integrate alternative pathways for Indigenous peoples to put their rights claims to government.

E. Constitutional Recognition

Indigenous peoples in Australia have sought recognition of a form of unique identity and status, which brings together elements of Australian citizenship alongside "a measure of political independence".[133] One means of acknowledging the distinct status of Indigenous peoples is constitutional recognition.[134] The Australian Constitution has both marginalised and discriminated against Indigenous peoples since federation. The constitutional "race power" has been employed to authorise laws detrimental to the rights of Indigenous peoples.[135] Domestic constitutional reform may therefore be a positive step in promoting Australian accountability to international human rights standards, particularly those set out in the UNDRIP. A human rights approach to self-determination calls for the balancing of rights and it is unrealistic to expect this to occur while the Constitution actively discriminates against Indigenous peoples.

This is one area of "unfinished business" that has seen some, albeit complicated, progress in recent years. The federal government and parliament are tasked with responding to the 2012 recommendations from the Expert Panel on recognising Aboriginal and Torres Strait Islander people in the Constitution. The Expert Panel recommended that a referendum be put to the Australian people, to authorise the following constitutional amendments:

- Remove s 25, which permits the Australian States to ban people from voting based on their race;
- Remove s 51(xxvi), otherwise known as the "race power", which the federal government may currently rely on to authorise laws that discriminate against people based on their race;
- Insert a new s 51A, to recognise Aboriginal and Torres Strait Islander peoples as First Peoples and to preserve the federal government's capacity to pass laws for the benefit of Aboriginal and Torres Strait Islander peoples;

133 Bradfield, above n 110, 83.

134 Behrendt, Cunneen and Libesman, above n 113, at 272-273.

135 Mark Harris "The Narrative of Law in the Hindmarsh Island Royal Commission" in Martin Chanock and Cheryl Simpson (eds) *Law and Cultural Heritage* (La Trobe University Press, Melbourne, 1996) at 115.

- Insert a new s 116A, banning racial discrimination by government; and
- Insert a new s 127A, recognising that Aboriginal and Torres Strait Islander languages were this country's first languages, while confirming that English is Australia's national language.[136]

On 20 September 2012, following advice from Reconciliation Australia that only 39 per cent of non-Indigenous Australians were aware of the proposed referendum and due to fears that the upcoming election could compromise bipartisan support, the Government announced its intention to defer the process toward a referendum.[137] This decision to delay was largely met with support from the Indigenous community, agreeing that the process should be delayed until there is sufficient community awareness and support is attained.[138] The organisation "Recognise" continues its activities to promote the case for constitutional recognition through community and media engagement around Australia.[139]

In November 2012, following the decision to delay the referendum, the Parliament established a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. This Committee was tasked with further consultation on the proposed model for change and helping to ensure strong cross-party support for a referendum proposal. The Government then enacted the Aboriginal And Torres Strait Islander Peoples Recognition Act 2013 (Cth), which commenced on 28 March 2013, to state its commitment to put constitutional recognition of Indigenous peoples to a referendum. Section 4 of that Act requires the government to review the public readiness for the referendum and the recommendations of the expert panel within 12 months of the commencement of the Act. According to the then Minister for Families, Housing, Community Services and Indigenous Affairs, Jenny Macklin, this Act symbolised a "clear step forward to holding a successful referendum to change the Australian Constitution to recognise Aboriginal and Torres Strait Islander people."[140]

On 25 June 2015, the Joint Select Committee issued its final report and gave its full support to constitutional change:

136 Expert Panel on Recognising Aboriginal and Torres Strait Islander People in the Constitution, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012) at xviii.

137 Darren Coyne "Government defers Constitution vote" *The Koori Mail* (Australia, 3 October 2012) at 7.

138 See comments from Pat Dodson, National Congress of Australia's First Peoples co-Chair Jody Broun and Social Justice Commissioner Mick Gooda in Darren Coyne, above n 137, at 7. However, there were some who argued that more should have been done to engage the community and should have taken the opportunity under the coverage of the apology to the Stolen Generations to do so: see comments from Sean Gordon in Darren Coyne, above n 137, at 7 and comments of Les Malezer in Kirstie Parker "Malezer has doubt over vote" *The Koori Mail* (Australia, 3 October 2012) at 8.

139 Recognise <www.recognise.org.au>.

140 Commonwealth of Australia (28 November 2012) House of Representatives (Debates) 13653 (Jenny Macklin) at 13653.

> The committee has heard that it is time to remedy the injustice of exclusion and recognise in our founding document the significant contribution of Aboriginal and Torres Strait Islander peoples to a modern Australia.[141]

The Committee recommended that:

1. Both Houses of Parliament to hold full sitting days of debate on the recommendations, with a view to building momentum for a referendum.
2. A referendum be held "when it has the highest chance of success".
3. Section 25 of the Constitution be repealed.
4. Section 51(xxvi) be repealed, with the Commonwealth retaining a 'persons power' to legislate for Aboriginal and Torres Strait Islander persons.
5. Parliament determine which of three options for a 'persons power' (detailed in the Committee's report) to put to a referendum.
6. The Declaration on the Rights of Indigenous Peoples be included in the legislative list of international instruments to which legislators must refer under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).
7. The government hold Constitutional Conventions in the lead-up to a referendum, involving broad community representation.
8. Constitutional Conventions comprised only of Aboriginal and Torres Strait Islander delegates also be held.
9. A referendum be held to determine if Aboriginal and Torres Strait Islander people should be recognised in the Constitution.
10. A parliamentary process oversee progress towards a referendum.[142]

Parliament has yet to hold the joint full sitting days proposed by the Joint Select Committee, nor has the government (now headed by Prime Minister Malcolm Turnbull) made a commitment to a referendum date or timeline.

As this debate plays out, some Indigenous commentators have raised concerns about the capacity of constitutional recognition to promote self-determination.[143] Celeste Liddle believes that a focus on constitutional recognition sets back the long-standing campaign for recognition of Aboriginal sovereignty through treaty.[144] Liddle has also questioned the legitimacy of government funding to the Recognise campaign, which she regards as "a government-sponsored ad campaign removed from Indigenous grassroots opinion."[145] These challenges to the value of constitutional recognition ought

141 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report* (2015) at v.

142 At xiii-xvi.

143 Kerry Blackman "Rejecting Constitutional Recognition – Reconciliation begins with the truth of history" (13 August 2014) *Sovereign Union – First Nations Asserting Sovereignty* <nationalunitygovernment.org>; Celeste Liddle "Indigenous recognition: We have more diverse views than the official campaign" *The Guardian* (online ed, 22 September 2014).

144 Cited in Rachael Hocking and Simon Leo Brown "Indigenous campaign builds against constitutional recognition" *ABC News* (online ed, 10 July 2014).

145 Celeste Liddle "I don't want your Recognise campaign – it's nothing but a sham" *The Guardian* (online ed, 18 August 2014).

to direct attention to the long-standing demands from Indigenous peoples in Australia for a treaty or treaties with the Australian state. It is important that constitutional recognition not be presented as a more mainstream or palatable option which can eliminate any need for a treaty to address the unfinished business of self-determination for Indigenous peoples in Australia.

F. Treaty[146]

Treaties between colonisers and colonised peoples in other settler states, such as Aotearoa/New Zealand and Canada, have been credited with enhancing the degree of self-determination available to contemporary Indigenous claimants in those territories.[147] Indigenous peoples in Australia have long advocated for a treaty or treaties with the state, as a means of establishing a new framework for relations.[148] Indeed, the absence of a treaty, and the injustice of the "settlement" of Australia based on the incorrect application of *terra nullius* at the time of European colonisation, have acted as major stumbling blocks to the realisation of Indigenous self-determination in Australia. The nature and impacts of colonisation in Australia have established a legal legacy at odds with contemporary international law on the rights of Indigenous peoples, making it exceptionally difficult to hold Australia to account in relation to the UNDRIP and other human rights standards. However, governments have opposed, ignored or deflected calls for treaty, on the basis that a treaty can only properly be formed between two sovereign entities.[149] At present, a treaty or treaties is not on the mainstream Australian policy agenda.

146 In this article, I use the term 'treaty' in place of 'a treaty'. Both terms have been used in commentary on agreement-making between Indigenous peoples and states, but in Australia 'treaty' has been a central concept in Indigenous political agendas for decades. Its use signifies the impossibility of a single treaty addressing the experiences and aspirations of the hundreds of distinct Aboriginal nations in Australia. It also acts as a rallying cry to a concept of Treaty which can encompass sovereignty, self-determination and unfinished business claims. See, for context: Australian Institute of Aboriginal and Torres Strait Islander Studies and Australia, Aboriginal and Torres Strait Islander Commission (eds) *Treaty: Let's Get it Right!* (Aboriginal Studies Press, Canberra, 2003).

147 Nin Tomas "*Te Reo Maori - Te Reo Rangatira o Aotearoa – Te Okeoke Roa* – The Maori Language – The Chiefly Language of Aotearoa – The Long Struggle" in Greta Bird, Gary Martin and Jennifer Nielsen (eds) *Majah: Indigenous Peoples and the Law* (The Federation Press, Leichhardt, 1996) 152 at 155.

148 Barbara A Hocking "Commenced Constitutional Business? Reflections on the Contribution of the Saami Parliaments to Indigenous Self-Determination" in Barbara A Hocking (ed) *Unfinished Constitutional Business? Rethinking Indigenous Self-Determination* (Aboriginal Studies Press, Canberra, 2005) 248 at 267-268; Marcia Langton et al (eds) *Settling With Indigenous People* (The Federation Press, Sydney, 2006); Aileen Moreton-Robinson "Patriarchal Whiteness, Self-Determination and Indigenous Women: The Invisibility of Structural Privilege and the Visibility of Oppression" in Barbara A Hocking (ed) *Unfinished Constitutional Business? Rethinking Indigenous Self-Determination* (Aboriginal Studies Press, Canberra, 2005) 61 at 70.

149 See for example a statement of former Prime Minister John Howard: "A nation, an undivided united nation does not make a treaty with itself. I mean, to talk about one part of Australia making a treaty with another part is to accept that we are in effect two nations." See Tony Wright and Kerry Taylor "PM Rules Out Divisive Treaty" *The Age* (Melbourne, 30 May 2000) cited in Bradfield, above n 110, at 94.

Nevertheless, participants in my research raised treaty as highly significant for the realisation of self-determination, noting that the absence of such an agreement has diminished the status of Indigenous peoples since colonisation.[150] These perspectives echo the many demands expressed by Indigenous people throughout Australia's history as a settler state, particularly prominent since peaks in Indigenous activism surrounding the 1988 Bicentennial events and Corroboree 2000. For example, Michael Mansell highlighted the absurdity of the Howard government's position that because "Aborigines are also Australians, people cannot make a treaty with themselves."[151] Hannah McGlade wrote that "our claims to sovereignty, self-determination and treaty" are central to a spirit of justice that "will never be relinquished."[152] Commentators have continued to promote the treaty case in more recent years, despite the absence of institutional support. Constitutional lawyer George Williams notes that Australia is exceptional among other settler colonial societies in having failed to enter negotiations with Indigenous peoples "about the taking of their lands or their place in this nation."[153] He argues that a treaty is necessary for reconciliation between Indigenous peoples and the Australian state and that it must include acknowledgment, a process of negotiation and "outcomes in the form of rights, obligations and opportunities."[154] Neither the constitutional recognition campaign nor the 2008 National Apology to the Stolen Generations has absolved Australia of responsibility to attend to the demands for treaty,[155] or explore the significance of treaty to Indigenous self-determination.

For a treaty or treaties to be entertained, the Australian state would have to drastically shift its policy approach to Indigenous affairs. Indeed, a productive engagement with the treaty debate would be a signal step to indicate Australia's willingness to be held accountable to the obligations contained in the UNDRIP. To return to the element of Dryzek's theory raised in the introduction to this article, a commitment to treaty would be a powerful step in making Australia accountable to Indigenous self-determination under the UNDRIP. This is because treaty is consistently and strongly demanded in the "public space" by Indigenous advocates, but has been either ignored or refused by those who occupied the "empowered space" of government.

150 Interview with Tom Calma, above n 100; Interview with Mick Dodson, above n 99; Interview with Irene Watson, above n 98.

151 Michael Mansell "Citizenship, Assimilation and a Treaty" in *Treaty: Let's Get it Right!*, above n 146, 5 at 6.

152 Hannah McGlade "Native Title, 'Tides of History' and Our Continuing Claims for Justice – Sovereignty, Self Determination and Treaty" in *Treaty: Let's Get it Right!*, above n 146, 118 at 136.

153 George Williams "Treaty with Australia's indigenous people long overdue" *Sydney Morning Herald* (online ed, Sydney, 12 November 2013).

154 George Williams "Does True Reconciliation Require a Treaty" (2014) 8 Indigenous Law Bulletin 3 at 4.

155 Isabelle Auguste "Rethinking the nation: Apology, treaty and reconciliation in Australia" (2010) 12 National Identities 425 at 436.

V. Conclusion

I have not sought to propose a single self-determination solution for Indigenous peoples in Australia. This would be futile, considering that the right must manifest differently according to the diverse circumstances of Indigenous peoples. It would also be presumptuous, as the claimants themselves must determine how to exercise the right. Bradfield has recognised that, between the extremes of secession and assimilation, the right of self-determination contains "a multitude of possibilities for realising aspirations to both retain rights as citizens *and* a unique status as Indigenous peoples recognised by the state."[156]

Instead, I have introduced the concept of accountability into the analysis of Australia's commitment to the UNDRIP. Now that Australia has given its support to the UNDRIP, it must be held to that commitment by continued oversight and advocacy. I have focused on the right of self-determination, as central both to the international human rights framework as a whole and to the global and domestic advocacy efforts of Indigenous peoples. A human rights approach to self-determination is called for, if the right is to become a reality for contemporary claimant peoples who continue to struggle for institutional recognition and support. The successful implementation of a human rights approach to Indigenous self-determination could transform Australian understandings of our commitment under the UNDRIP – from an aspiration which may be ignored, to an obligation which the Australian state and its people are capable of meeting.[157] By making itself accountable to the human rights standards set out in the UNDRIP, Australia would gain new capacity to address its "unfinished business" with Indigenous peoples.

156 Bradfield, above n 110, at 81.

157 Brenda Gunn has argued that the right of self-determination, as set out in the Declaration on the Rights of Indigenous Peoples, can transform the relationship between Indigenous peoples and the Canadian state and promote reconciliation: Brenda Gunn "Self-determination as the basis for reconciliation: Implementing the UN Declaration on the Rights of Indigenous Peoples" (2012) 7 Indigenous Law Bulletin 22.