

To what extent does the United Nations facilitate self-determination and Indigenous rights to participate in decision making?

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A thesis submitted in fulfillment of the requirements for the Degree of Doctor of Philosophy.

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**Abstract:**

The United Nations has witnessed an increasing level of recognition of Indigenous rights since the adoption of the Declaration in 2007. This thesis examines the extent to which the United Nations facilitates the recognition of Indigenous rights to self-determination in this emerging area of international law and assesses its impact domestically within settler-states. Specifically, it assesses the capacity for Indigenous advocacy at the United Nations to influence colonial-settler states' recognition of Indigenous rights to self-determination, as asserted in the Declaration on the Rights of Indigenous Peoples and seeks to identify means to increase its efficacy.

The study draws a comparative analysis from four settler-states, Canada, the United States of America, New Zealand and Bolivia, to highlight lessons that may inform the Australian context. The research aims to assess settler Governments' responsiveness and capacity within the United Nations framework to better facilitate the recognition of self-determination and avenues for adjudication, reparation and redress for Indigenous Peoples.

The thesis implements a Transformative Indigenous Rights Theory which privileges Indigenous voices and enacts a decolonizing intent. Methodologically, the thesis draws on interviews with Indigenous leaders involved in UN processes and an action-based praxis approach, which highlighted the correlation between local and global advocacy.

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As supervisor for the candidature upon which this thesis is based, I can confirm that the authorship attribution statements above are correct.

Danielle Celermajer

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# CHAPTER 1

## INTRODUCTION: OUR ANCESTORS COME WITH US

## Proem: Relations with the State

*Being Aboriginal I was born into a fraught politically contested environment. But it wasn't until later in life I became aware of the degree and how early the state had formed its relationship to me. I realised when my mother had sought a copy of her file from the Australian Special Intelligence Organisation (ASIO), through the requested access to non-redacted information available after 20 years (ASIO, E/15/42, n.d.).*

*The 157 pages of volume 1 was hard reading to be frank, because the content was so dull, that was until page 46, where I was surprised to see myself listed as a child, my age confirmed by my address that I was around 9 years of age (ASIO, E/15/42, p.46). At that tender age I'd been listed as requiring ongoing monitoring. I have not sought my own file as yet.*

*My mother's file noted her as an 'Aboriginal personality' (ASIO, E/15/42, p.13), though a mother of six young children and dated before her involvement in the 1972 Aboriginal Tent Embassy, a political action outlined in the proem for chapter six. We grew up under occupation, under a state that perceived even children were worthy of surveillance. Yet to seek justice for Aboriginal and Torres Strait Islander Peoples is not seditious.*

*Both my parents were Aboriginal, both were politically engaged, they carried a drive for justice as their parents and grandparents had. But they differed in personality and their approach tremendously. My mother was able to rouse people with her passionate presentations at rallies or meetings. Both were proponents of non-violent political protest to raise public pressure on governments for change.*

*My father, on the other hand - while an advocate for political action, also considered that on occasion strategic engagement provided opportunity to shift the state through an influence on its operation and decision making. He saw potential to be more effective by turning the structures of the settler-state around back against itself.*

*It reflected a dilemma, both in life and in this thesis, whether to take a solely activist route to strive to influence broader structural change or whether it was more strategic to also draw on those mechanisms that may be available through the broader state and international structures.*

*Significantly, any engagement is not undertaken from a point of assimilation, rather culture is deeply ingrained for Aboriginal and Torres Strait Islander Peoples. It remains enmeshed within the core of our being, even when removed from our country. Though dispossession is profoundly damaging, it doesn't break who we are. Our forebearers continue to reside in us. Our values and ways of thinking continue to be transmitted across the generations. Whether raised on country or in urban environments, our worldview remains inherently different to that of settlers and migrants.*

*It is these differing values, obligations to our communities, to all living things, to country and to our future generations that drives and informs this research. This thesis is a direct response to the needs of our communities, not driven by an academic motivation. It is my cultural obligations that inform and direct this research. It is snippets of these values, personal groundings and histories that are reflected on in the proems at the commencement of each chapter.*

## 1.1 Context of Indigenous Rights Research

The United Nations has witnessed an increasing level of recognition of Indigenous rights since the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007. This thesis critically examines the extent to which the United Nations facilitates the recognition of Indigenous rights to self-determination in this emerging area of international law and assesses its impact domestically within settler-states. The thesis investigates the capacity for Indigenous advocacy at the United Nations to influence colonial-settler states' recognition of Indigenous rights to self-determination as asserted in UNDRIP and seeks to identify means to increase its efficacy.

This research contributes to a growing Indigenous approach which ties its theory and methodologies to the assertion of Indigenous rights to self-determination. The thesis implements a '*Transformative Indigenous Rights Theory*' which I developed in response to the research objectives of this study, privileging Indigenous voices to enact its decolonizing intent. This analysis of Indigenous participation at the United Nations seeks to assess the usefulness of international law as a means to address the power disparities between Indigenous Peoples and settler-states in the assertion of our sovereign rights to self-determination.

The thesis required the development of a specific theoretical approach which I term Transformative Indigenous Rights Theory (TIRT), which is a theoretical approach that strives to achieve transformational change in the relationship between Indigenous Peoples and the state, to one of recognising the sovereign rights of Indigenous Peoples. Given the degree of transmutation required, it is not anticipated that this transformation will occur within a study, rather TIRT research proactively seeks to contribute momentum to the radical change required to address the legacy of colonialism and its ongoing oppression of Indigenous Peoples. TIRT is outlined more fully in Chapter three.

Though the Universal Declaration on Human Rights (UDHR) and its core treaties, initially didn't recognise the circumstances of Indigenous Peoples, James Anaya argues the broad adoption of UNDRIP 'may be understood to embody or reflect, to some extent, customary international law' (Anaya, 2009, p.80). Article 3 of the Declaration, the right to self-determination, is according to Anaya, 'a foundational right, without which Indigenous Peoples' other human rights, both collective and individual, cannot be fully enjoyed', (Anaya, 2010, p.15). 'Self-determination' as applied in UNDRIP is a process of decolonization that does not require secession, but rather provides a strategy to assert Indigenous rights, against state and corporate economic and political interests.

UNDRIP affirms obligations on settler-states to recognise the pre-existing and inherent rights of Indigenous Peoples and confirms settler-states as duty bearers, as a result of their history of colonization and ongoing occupation. However, the challenge remains how to translate those obligations in international law into state approaches that facilitate Indigenous decision making on issues that impact upon them. This study examines international legal frameworks and their impacts on settler-states to inform the struggle for self-determination by Aboriginal and Torres Strait Islander Peoples in Australia. The contention is to move beyond tokenistic acknowledgement of 'aspirational' rights to honouring those international standards, cementing the communal rights of Indigenous Peoples as self-determining peoples with capacity to express that autonomy, both locally and globally.

Indigenous Peoples face increasing global pressures, as neoliberal market forces seek to assert economic interests over Indigenous Peoples' rights and lands. Friedrich Hayek, an early proponent of neoliberalism, defined neoliberalism as the deregulation and fostering of markets, deregulation of labour, reduction of social welfare, privatisation of services, and rejection of collective unionism (Hayek, 1944). The promulgation of neoliberalism by states and corporate actors over the last

40 years has seen the promotion of globalisation and a reenergised colonial assault against Indigenous Peoples in an attempt to erase Indigenous claims to their ancestral lands and undertake renewed processes of dispossession (Alfred & Corntassel, 2005, p.603).

International law has been sought by Indigenous People to leverage settler-state compliance with their obligations to recognise Indigenous rights. Since the adoption of UNDRIP, the United Nations and its treaty bodies have sought to strengthen their responses related to Indigenous Peoples' rights. This study examines the effectiveness of Indigenous mechanisms in supporting the implementation of UNDRIP. I also evaluate the strategies implemented within the United Nations to promote Indigenous engagement following the United Nations World Conference on Indigenous Peoples (WCIP) to assess its impact on settler-states.

The study has found that though there has been some isolated and limited progress, an overall resistance persists among settler-states to meet these obligations within their domestic jurisdictions, where states have historically operated with impunity. This examination of international law's capacity to respond to the needs of Indigenous Peoples and remediate settler-state breaches of Indigenous human rights has found the capacity for mediation, arbitration and reparation wanting. However, United Nations mechanisms remain the main international body that may, despite clear deficiencies, assist in exposing state violations.

As we approach the twentieth anniversary of UNDRIP, it is timely to assess the degree of UNDRIP's implementation domestically and consider the effectiveness of current United Nations mechanisms. Importantly, this research also seeks to identify what further initiatives may be required to move beyond an aspirational promise, to fulfill UNDRIP's commitment to Indigenous self-determination.

## 1.2 Overarching Objectives and Approach

This research is grounded on a theoretical approach I call '*Transformative Indigenous Rights Theory*' (TIRT). TIRT provides an Indigenous driven theoretical approach that seeks transformational change through a decolonising framework. According to Danermark et al 'theories are used as a guiding framework for interpretation, this is a mode of abductive inference that is an indispensable feature of much of social science research' (2019, p.162). This theoretical approach provides a conceptual interpretative framework that relates motives to actions to provide an explanation of the proposition and objectives (Danermark, 2019, p.139), which I outline in Chapter Three.

This theory then informs the methodological approach. In striving to empower Indigenous Peoples, this study promotes the voices of the Indigenous contributors, drawing on participatory observational analysis and incorporating praxis strategies in response to Indigenous political aspirations. Additionally, this research also integrates more personal subjective reflections of experiences and family histories, outlined in the proems at the start of each chapter. Although not directly related to the research topic, they provide a more subtle overarching framework to the study, which may contribute lessons that indirectly inform this research.

In undertaking this examination, it was crucial to also engage with critiques of rights frameworks, Indigenous resurgent and rejection approaches and criticisms of the United Nations. I address each of these in Chapter Two, before outlining my own response, while also drawing on the Indigenous experts engaged in advocating within the United Nations, whom I interviewed for this thesis.

In examining the extent that the United Nations facilitates self-determination and Indigenous rights to participate in decision-making, my first objective is to evaluate the operation of UNDRIP and

investigate the Indigenous specific mechanisms within the United Nations to identify how to further enhance Indigenous participation and the assertion of our rights. The thesis interrogates the extent that these processes facilitate self-determination for Indigenous Peoples and identifies key strategy to respond to the entrenched conflict between Indigenous Peoples and settler-states.

A second objective is to scrutinise and assess strategies implemented since the World Conference on Indigenous Peoples (WCIP) in 2014 to evaluate their effectiveness and whether those measures are sufficient to advance Indigenous self-determination. Additionally, the thesis seeks to appraise and evaluate settler-state strategies implemented domestically to reflect Indigenous rights to self-determination. Both these objectives are addressed in chapter six, which considers initiatives implemented within the United Nations and canvases the relative effectiveness of domestic strategies sought by those settler-states under investigation.

These objectives inform the overall aim of the thesis which, after identifying potential gaps, seeks to identify opportunities within the United Nations to further support Indigenous assertions of their sovereign rights to self-determination. These opportunities are outlined in the findings in chapter seven. The research affirms that Indigenous People strive to leverage international mechanisms and emerging norms in international law, as an extension of domestic political strategies to assert Indigenous rights to self-determination.

The research aims to assess settler-state responsiveness and capacity within United Nations frameworks to better facilitate the recognition of Indigenous self-determination. In doing so, I draw on examples from four settler-states, Canada, the United States of America, New Zealand and Bolivia, to highlight lessons that may inform Aboriginal and Torres Strait Islander Peoples' struggle for self-determination in Australia. This research seeks to contribute to debates on whether it is

useful for Indigenous Peoples to leverage the United Nations to move beyond that of a forced occupation to a position of shared sovereignty.

The methodology implementing the TIRT approach, is grounded in an analysis of in-depth interviews with Indigenous experts. This data is then triangulated with observational analysis and an action-based praxis approach. These varied methods are used to strengthen the validity of the qualitative data, analysis and research findings. Incorporating praxis throughout the study provides an additional level of analysis on the usefulness for Indigenous Peoples of utilising United Nations mechanisms in asserting Indigenous rights, justice, and political and social change objectives. Significantly, the praxes undertaken also highlight the correlation between local and global Indigenous activism.

A series of in-depth semi-structured interviews were undertaken with ten Indigenous experts and community leaders representing the targeted regions. These interviews were completed during United Nations sessions of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) in Geneva, Switzerland, and in a number of cases at interview subjects' workplaces in their home territories, between 2017 and 2019. Interviewees included: Grand Chief Wilton Littlechild, former Member of United Nations Permanent Forum on Indigenous Issues (UNPFII) and former EMRIP Chair, Grand Chief Ed John, former UNPFII Chair, Kenneth Atsenhainton Deer, of the Bear Clan from the Mohawk community of Kahnawà:ke who has been active at the United Nations for more than 30 years, Professor Kristen Carpender former EMRIP Chair, Professor Claire Charters expert on Indigenous Peoples in international law and former advisor to the President of the UN General Assembly on enhancing Indigenous Peoples' participation at the United Nations and Professor Margaret Mutu, chair of the Te Rūnanga-ā-Iwi o Ngāti Kahu and Professor at the University of Auckland Faculty of Law, specialising in Indigenous peoples' rights in international law, among others. A more detailed summary of each interviewee is provided in Appendix A. All interviewees

agreed to be publicly identified and forego confidentiality given the public positions they held and their interest in contributing to processes that seek to promote Indigenous advocacy at the United Nations.

Though the overall scope of this research is broad, confining the study to Indigenous related mechanisms at the United Nations and drawing on a few specific examples from the selected settler-states to address central themes raised in the data provided the necessary limitations. At the same time, this approach responds to the intent of the study to provide a broad overview of relevant issues and to canvas further untapped opportunities to augment the assertion of Indigenous rights.

Within this study I address issues impacting Indigenous Peoples globally, with a primary focus on Aboriginal People from Australia. While I acknowledge that Indigenous Peoples vary widely in their cultures and histories, they also share aspirations for their self-determination, as confirmed by long standing discussions of the International Work Group for Indigenous Affairs (IWGIA), which has coordinated international Indigenous efforts since 1968 (Dahl, 2009). Given my focus on First Nations Peoples in Australia, I use the term 'Aboriginal' in relation to Aboriginal and Torres Strait Islander peoples of Australia. However, I am also aware that other Indigenous peoples also use the term 'Aboriginal'. To avoid confusion, I use the internationally accepted term 'Indigenous' when referring to Indigenous Peoples globally or from another region, to distinguish the First Nations peoples being referred to.

### 1.3 Recurrent Themes

A number of central themes were raised throughout the data and are reflected across the chapters, commencing with the basis of Indigenous sovereignty and its emanating rights to self-determination.

Accordingly, the impact of the recognition of Indigenous rights in international law on Indigenous expressions of self-determination is investigated across the chapters. Additionally, the use of treaties and their capacity to form constructive agreements with sovereign Indigenous Peoples to facilitate self-determination and decolonization processes are also examined.

The implications of UNDRIP on the United Nations are examined and whether those developments adopted in response are sufficient in meeting the needs of Indigenous Peoples. The United Nations World Conference of Indigenous People (WCIP) is reviewed and provides a comparison to the Alta Outcome Document, which was developed by Indigenous Peoples to inform the WCIP recommendations. An examination of WCIP assesses which recommendations were adopted and evaluates the effectiveness of those initiatives that were implemented. Significantly, I also identify those recommendations from the Alta Outcome Document that were not implemented. Additionally, the study assesses if United Nations mechanisms meet Indigenous Peoples' need for global avenues for adjudication, reparation and redress.

Further, strategies that settler-states have implemented in response to UNDRIP are also canvassed, considering constitutional and legislative responses, as well as a referendum to incorporate Indigenous rights to self-determination within the domestic jurisdictions of settler-states. The challenges that electoral cycles and opposing political parties bring in securing longer term outcomes are also explored. Bolivia provides a counterpoint to other settler-states in having previously recognized UNDRIP in its constitution. It provides an example of the impact of domestic recognition on the judiciary and on the implementation of Indigenous autonomy.

Significantly, the study also emphasizes the relationship between locally driven Indigenous political advocacy and how international mechanisms can amplify and augment indigenous Peoples'

assertions of their rights. Advocacy at the United Nations holds states up to global scrutiny but also links the 476 million Indigenous Peoples of the world to an international Indigenous network. It is a political strategy that seeks to overcome the isolation and repression experienced by Indigenous Peoples domestically, where they face powerful economic and political interests.

## 1.4 Drivers Behind the Research

My interest in international law and its capacity to hold settler-states accountable was first sparked through my involvement with the Committee to Defend Black Rights (CDBR), which campaigned for a Royal Commission into Aboriginal Deaths in Custody in the late 1980's. The Royal Commission was subsequently called following CDBR's Chairperson, Helen Corbett nee Boyle, raising the matter at the United Nations Working Group on Indigenous Populations (WGIP) in 1987. The WGIP subsequently developed the first draft of the Declaration on the Rights of Indigenous Peoples in 1994, which was eventually adopted by the General Assembly in 2007. These experiences highlighted a capacity to influence settler-states in the recognition of Indigenous rights through international advocacy.

Additionally, the political climate in Australia since the election of the LNP Howard government in 1996, has witnessed a more oppressive approach towards Indigenous Peoples with governments enacting an emboldened neoliberal agenda. Additionally, the Howard Government sought to use Aboriginal issues in a bid to influence political campaigns, claiming remote Aboriginal communities were sexually abusing children and then announcing the Northern Territory Emergency Response' (NTER) or NT Intervention in June 2007, prior to the November federal election in Australia.

It was the punitive nature of government policies and specifically the NT Intervention that gave impetus to my establishing an Aboriginal rights body, the Aboriginal Rights Coalition. The Intervention sent 600 army troops into 73 remote Aboriginal communities, stripping community decision-making and enforcing the leasing of their communal lands to the Federal Government, in an attempt to impose individual title over communal land title. Significantly, this abrogation of the rights of Indigenous Peoples was imposed the same year UNDRIP was adopted in 2007 (A/RES/61/295), endorsed by 143 nations, with only four initially against and eleven abstaining. Though those four states that voted against, including Australia, have since endorsed in 2009/10.

The Howard government claimed the Intervention had been established in response to the 'Ampe Akelyernemane Meke Mekarle-The Little Children are Sacred Report,' which addressed the issue of child sexual assault in remote Aboriginal communities (AHRC, 2007, p.2). However, the report's recommendations of significant investment in services and facilities in remote Aboriginal communities were ignored in favour of politically motivated legislation (AHRC, 2007, p.5). The racially targeted legislation included compulsory 'Income Management', which quarantined 50%-70% of social welfare payments, with those funds then provided through a Basics-Card that controlled the stores people could purchase from and the goods people could buy (AHRC, 2007, p.8). The legislation also imposed government appointed Community Business Managers, winding back previous approaches centred on self-determination (AHRC, 2007, p.6). Financial support for smaller 'Homeland' communities, considered not economically viable, was also cut and communities were pressured to move to larger 'Hub Towns' for services, housing and claimed employment opportunities (APONT, 2011, pp.1-2). The racialized focus of this legislation required the suspension of the Racial Discrimination Act [1975] (RDA). Although the suspended provision was

reinstated in July 2010, its implementation continued to disproportionately impact Aboriginal People (FAHCSIA, 2011, pp.1-2).

These policy approaches were traumatising for remote Aboriginal communities, where intruding army troops were perceived as a contemporary invasion and occupation, imposing a sense of powerlessness that was the antithesis of the Indigenous rights now recognised in international law. The pathologising of Indigenous Peoples deflected the historical and structural causes of Indigenous deprivation to lay responsibility for their impoverishment on individuals, while the ramifications of dispossession and decades of neglect were ignored. Aileen Morton-Robinson argues that Aboriginal communities are conceived as dysfunctional and are pathologized as a means to subjugate Aboriginal People (Morton-Robinson, 2009, p.63). She contends the denial of the impact of colonization in producing economic dependency serves to make the ongoing race war against Indigenous Peoples invisible (Moreton-Robinson 2009, p.70). These policy approaches continued despite changes of government, with both major political parties asserting a repressive and disempowering managerial agenda at the expense of Aboriginal Peoples.

It was these oppressive legislative approaches that spurred me to apply for funding to attend the United Nations Permanent Forum on Indigenous Issues (UNPFII) in 2011, where I secured sponsorship from the Australian Human Rights Commission (AHRC). However, by 2014 the LNP Abbott Government had cut the funding of small grants for Aboriginal and Torres Strait Islander People to participate at the United Nations. The removal of funding seemed to reflect Australian Government concern with Aboriginal attendance raising issues at the United Nations, because the small size of these grants, at \$5,000 per person, would not alter the Government's budget bottom line. In subsequent years, the United Nations Voluntary Fund provided an invaluable source of funding for Aboriginal and Torres Strait Islander Peoples to attend United Nations mechanisms, along

with Indigenous Peoples from the global south. However, contrary to the Australian Government's intention, rather than preventing Aboriginal and Torres Strait Islander engagement within these international fora, it resulted in a more community driven participation at the United Nations. In 2015, when the cuts took effect, I called a meeting of previous grant recipients which agreed to establish the Indigenous Peoples' Organisation-Australia (IPOA), determining we would not be silenced by a cut in funding, rather we established IPOA as a members driven voluntary body.

It was these experiences that led to the formulation of this thesis, propelled by the need to explore the capacity of the United Nations to influence the domestic realm, as a political action to assert our rights. I raise these policy approaches as key motivators for the research; however, they also shed light on the influence of neoliberalism and the social and political structures of these former British colonies that seek to limit our capacity to express our rights. As a result, strategically, I also explore the capacity of settler-states to reform. The works of James Tully (2002, 2004, 2008 & 2013), Dominic O'Sullivan (2017 & 2022), Duncan Ivison (2000, 2017 & 2020) and Phillip Pettit (2000), among others, inform this section, which is expanded in chapter three.

## 1.5 Significance of the Study

As we move towards the twentieth anniversary of UNDRIP in 2027, this research provides a timely examination of the transformative role of UNDRIP, interrogating both its effectiveness within the United Nations and in its domestic implementation within settler states. Additionally, the study provides evidence-based recommendations to address identified deficiencies and support its further implementation.

This analysis evaluates current Indigenous focused processes within the United Nations to assess if these are adequate to ensure settler-states compliance in meeting established standards of Indigenous rights in international law. This investigation of Indigenous mechanisms identifies continuing gaps and confirms that measures adopted to date are inadequate to defend Indigenous rights and ensure settler-state adherence to globally accepted legal benchmarks.

Importantly, the thesis identifies further opportunities at the United Nations to enhance the abidance of those rights confirmed in UNDRIP. In particular, the thesis emphasises the need for United Nations oversight and intervention in relation to the violation of Indigenous rights. Additionally, the thesis considers domestic factors that hinder settler-states compliance of international standards. This analysis informs the findings and identifies specific initiatives that may address this shortfall.

Undertaking this research required an appropriate theoretical approach and associated methodology. I developed TIRT to respond to the Indigenous directed political agenda and transformational aspirations of the study. This unique theoretical approach informs the research, the development of findings and confirmed that even though the transformation sought cannot occur within the life of this study, the aim of TIRT is to propose a transformative direction forward so the United Nations and settlers-states may better fulfill their obligations in meeting these emerging norms.

In adopting a TIRT approach, the study also incorporates a series of praxes within the methodology to proactively examine opportunities and capacity to enhance the transformational objectives of the research. These praxes vary significantly in their methods, from direct domestic political action to international advocacy at the United Nations. These strategies enact various means to engage with

and analyse the effectiveness of United Nations processes and strategies to engage the international media. Though they vary substantially, each approach reflects the decolonising objective and assertion of Indigenous rights to self-determination which is the foundation of TIRT.

This study's distinctive theoretical approach and methodology provides opportunity for new insights into the operation of the United Nations. TIRT also utilises my participation within the Indigenous rights fora of UNPFII and EMRIP and as an elected Indigenous regional member of the Facilitative Working Group (FWG) of the Local Communities and Indigenous Peoples Platform (LCIPP) of the United Nations Framework Convention on Climate Change UNFCCC).

This analysis and the observations I made informed the findings of the thesis, which provides a range of practical strategies that may address the shortcomings I identify in the earlier chapters. Through the study I outline initiatives that provide further opportunity for remedies within the United Nations to enhance the compliance of Indigenous rights. The findings include recommendations for Indigenous specific monitoring mechanisms, and I outline means to strengthen existing mechanisms through the incorporation of shared decision-making between Indigenous Peoples and states. I also elaborate on a proposal for a mechanism to adjudicate and mediate violations of Indigenous rights and opportunities for enhanced participation at the United Nations. In addition, I recommend structural reform to provide more effective reporting avenues to the United Nations General Assembly.

In taking this practical Indigenous driven transformative approach to progress decolonization, this thesis has compiled new data and contributed to a more detailed understanding of the operation and potential of the United Nations to support the assertion of Indigenous self-determination. In doing so, the thesis has sought also to advance academic knowledge on Indigenous rights.

More importantly, this analysis and its findings have sought, in a very practical way, to contribute to strengthening the participation of Indigenous Peoples and to support the assertion of their rights within United Nations fora. This research recognises that given the vast power disparities between settler-states and Indigenous Peoples, international law and the mechanisms that facilitate those judicial structures may be drawn on and strengthened to better reflect the needs of Indigenous Peoples in the assertion of our rights against powerful political and economic interests.

## 1.6 Contribution to Indigenous Debates

The issues I address in this thesis contribute to fundamental debates on the assertion of Indigenous Peoples' rights. The meaning and applicability of the term sovereignty to Indigenous Peoples is canvassed drawing on Indigenous academics including Taiaiake Alfred (2005, 2009 & 2015), Aileen Morton-Robinson (2009, 2014 & 2015) and Mick Dodson (1994). I argue that though an awkward fit for Indigenous Peoples, given its historical connotation with European sovereign states, the term can be indigenised to reflect the ancestral connections, rights to traditional lands and the inherent rights to self-determination of Indigenous Peoples and is used with this Indigenous framing in this thesis.

This research seeks to contribute to a growing school of scholars focusing on Indigenous Peoples in international law. One of the more prominent is James Anaya (2004, 2008, 2009, 2013), a leading Apache and Purépecha lawyer and academic in Indigenous international law, who has held several key United Nations positions, including as Special Rapporteur on the Rights of Indigenous Peoples, and as advisor to the President of the United Nations General Assembly's processes to enhance the participation of Indigenous Peoples. Anaya contends that a dedicated Indigenous human rights instrument through UNDRIP would not be necessary had the human rights of Indigenous Peoples been respected, with the articles of UNDRIP reflecting existing human rights conventions (2009,

p.63). He also elaborates on UNDRIP raising controversy over its use of the term self-determination, with UNDRIP confirming its applicability to Indigenous Peoples, and that it does not require succession (Anaya, 2009, p60). The significance of the term self-determination is affirmed by Anaya, who clarifies it is the 'configurative principle', the foundational right on which all other rights stem (2004, p.99).

The interdisciplinary nature of this study extends beyond a strict legal analysis to Sheryl Lightfoot's examination of Indigenous international relations (2016). Lightfoot is an Anishinaabe citizen of the Lake Superior Band of Ojibwe Nation. She is a former Chair of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and a scholar on Indigenous international relations. Lightfoot interprets the influence of UNDRIP as transformative in changing the conception of self-determination and decolonisation, and in being unique in engaging Indigenous Peoples in its development. UNDRIP has, according to Lightfoot delegitimised the Doctrine of Discovery and Terra Nulius (2016, p.18). She clarifies, however, that the term self-determination isn't pre-defined, rather it's up to Indigenous Peoples themselves to determine how to implement it (Lightfoot, 2016, p.202). This study draws on developments in international law, such as UNDRIP, to assert the need for more transformative approaches to reflect the sovereign self-determination of Indigenous Peoples.

Alexandra Xanthaki, a United Nations Special Rapporteur in the Field of Cultural Rights, who has also published extensively on the rights of Indigenous Peoples, argues UNDRIP has changed both the scope of the right to self-determination and the beneficiaries of that right (Xanthaki, 2014, p71). Xanthaki contends UNDRIP provides a right to self-determination that extends Indigenous rights beyond domestic assertions to the international jurisdiction (Xanthaki, 2014, p73). The Declaration provides for Indigenous 'rights to control Indigenous directed policy approaches and the right for Indigenous Peoples own political and legal institutions' (Xanthaki, 2014, p73). Significantly, self-

determination also includes the right for Indigenous People to negotiate with states and provides control over the means and operation of the relationships between them (Xanthaki, 2014, p72). The thesis argues that Indigenous inherent sovereignty provides Indigenous Peoples rights to participate and engage in international fora alongside state parties and proposes means to strengthen that Indigenous engagement.

Further, themes canvassed include debates on reconciliation and recognition through the work of Nancy Fraser (1995) and Iris Young (1997), before moving to an Indigenous focused analysis through the works of Glen Coulthard (2014), Taiaiake Alfred (2005, 2009, & 2015) and Jeff Corntassel and Cindy Holder (2008). Additionally, I drew on Corntassel (2005 & 2008), Audra Simpson (2014 & 2017), Makere Stewart Harawira (2018), and Margaret Mutu (2019) Moana Jackson (2020) to interrogate Indigenous political approaches, from resurgent, refusal, resilient and restorative approaches before I consider why these are insufficient in an Aboriginal context within Australia.

This analysis contributed to my determining the need to undertake a TIRT approach, which I outline in chapter 3, with the associated methodological approach set out in chapter four. These debates are reflected on and responded to throughout this thesis and through these deliberations further inform my justifications for this study.

## 1.7 Overview of Chapters

Following from this Introductory chapter, chapter two identifies key scholarly debates, where I canvas Aboriginal conceptions of self-determination and sovereignty. I survey literature on Indigenous rights in international law and examine the impact, influence and critiques of UNDRIP. Additionally, this chapter interrogates debates on the relative value of recognition and reconciliation

processes before applying an Indigenous lens to these conceptual frameworks. Finally, I scrutinise Indigenous resurgence, refusal, resilient and restorative schools of thought, given their relevance to whether Indigenous researchers should engage with state-based processes, whether domestically or internationally. This chapter identifies existing gaps in current research and argues United Nations advocacy may be useful in augmenting Indigenous assertions of our rights, grounded on our ancestral sovereignty.

The third chapter outlines the theoretical basis of the thesis, commencing with a brief definition of Transformative Indigenous Rights Theory (TIRT) the theoretical approach I determined necessary to provide a framework to this study, before documenting how I reached this position. The context and conceptual basis of Indigenous rights is then deliberated. This analysis provides a foundation to review liberalism's capacity to respond to Indigenous assertions of our rights to self-determination. The final part of this chapter returns to explain the transformative objectives of this study the principles underlying TIRT and the decolonial aspirations on which it is grounded.

The fourth chapter outlines the methodological approach I developed to implement TIRT research. The chapter canvasses the imperative driving an Indigenous rights methodology before engaging with Feminist Standpoint and Indigenist Standpoint which have informed the development of my TIRT approach. The methodology references my insider and subjective framing, as an Indigenous researcher striving to implement decolonizing objectives. I explain that data is drawn from a series of in-depth semi-structured interviews with Indigenous experts, while also incorporating participatory observational research. Additionally, I outline how participatory action research is incorporated throughout the thesis through action-based praxes. These three methods are triangulated to provide further levels of analysis to add validity and rigour to the study.

The fifth chapter is the first of three results chapters and sets out key themes that are revisited throughout the thesis. The chapter appraises why Indigenous Peoples seek to advocate at the United Nations to assert our self-determination and sovereign rights as ‘peoples’ in international law. I deliberate on how global Indigenous activism and collaboration strengthens Indigenous assertions of our rights. I then highlight the correlation between local Indigenous advocacy and global networks through the introduction of the first of a series of praxes. This is followed by a section on leveraging international law, UNDRIP and international Indigenous mechanisms, which provides the foundation for a deeper analysis in later chapters. The latter part of the chapter examines the domestic situation across the settler-states under investigation. This includes an overview of Bolivia, as a point of contrast, having adopted UNDRIP in its constitution. Finally, I review the challenges for Indigenous Peoples in advocating at the United Nations.

The sixth chapter builds on this foundation to scrutinise developments over the last decade to further enhance Indigenous participation at the United Nations, such as the World Conference on Indigenous Peoples (WCIP) and its outcomes. I consider the implementation of the System-Wide Action Plan (SWAP) before assessing the expanded mandate of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP). I also investigate a Study on an Optional Protocol to UNDRIP to assess the potential of this proposal to facilitate settler-state compliance with Indigenous rights. The chapter then reviews domestic strategies, including legislative recognition of UNDRIP in Canada, proposals for constitutional recognition in Aotearoa/New Zealand and a referendum on an Indigenous advisory body to Parliament in Australia. Bolivia again provides a distinction, having incorporated UNDRIP in their constitution, I evaluate its impact on the Bolivian Judicial system. Capacity for the United Nations to hold settler-states accountable for breaches of Indigenous rights is also interrogated through a praxis-based study of the Universal Periodic Review (UPR), which

provides valuable insights. Finally, I examine United Nations' judicial processes and assess the capacity for Indigenous Peoples to raise complaints, noting relevant examples.

Chapter seven, as the final results chapter, outlines the findings of the research and recommendations for possible further reform. I first outline strategies to enhance existing United Nations mechanisms where I critique recommendations for an Oversight Body of UNDRIP. I then appraise the Facilitative Working Group, of the Local Communities and Indigenous Peoples Platform, of the United Nations Framework Convention on Climate Change, which sets a precedence of shared decision-making between states and Indigenous Peoples. This section concludes with an analysis of a praxis-based initiative to strengthen Indigenous engagement during COP30. I then address a proposal for an Indigenous adjudication mechanism, before examining how it may also mediate domestic treaty compliance and support the development of contemporary treaties to implement self-determination. The establishment of Indigenous autonomous regions in Bolivia is considered as a further example of domestic strategies to implement self-determination. Finally, the United Nations General Assembly's ability to allocate Observer Status to Indigenous Peoples is interrogated. In summary, I consider the broader United Nations framework and investigate possible structural reforms to locate these Indigenous focused initiatives, while providing reporting lines to the General Assembly, through an expanded mandate of the Decolonisation Committee.

The concluding chapter reviews key debates and pulls together the overall analysis. I outline the overall findings and reflect on the research process. In this chapter I also indicate areas for further study. In summarising the findings, I emphasise that though there are limitations in advocating at the United Nations, this thesis argues for a focus on building effective mechanisms and augmenting Indigenous Peoples' participation as 'peoples' in international law. Indigenous Peoples' sovereignty and rights to self-determination provide clear rights to participate on an equal basis with already

recognised nation states, providing representation for the 476.6 million Indigenous Peoples globally. This chapter confirms that the research conducted provides clear direction on how to enhance the participation of Indigenous Peoples to strengthen our assertion of self-determination, both within the international law framework of the United Nations and nationally. While this study was undertaken principally to inform Aboriginal and Torres Strait Islander Peoples in Australia, this investigation may also be of interest to other Indigenous Peoples. Though UNDRIP marked a significant shift in the global recognition of rights, the promise of that endorsement has yet to be realised. This thesis contributes to identifying further opportunities to strengthening the participation of Indigenous Peoples in defining and asserting our rights to self-determination.

## CHAPTER 2:

# ASSERTING INDIGENOUS RIGHTS

## Proem: Early Experiences of Aboriginality

*It is white people who first told me, though fair, I was different. I was Aboriginal. I was maybe two or three as I recall standing behind my mother's legs as women raised their voices on our suburban porch, in a working-class western suburb of Sydney. I recall her saying afterwards, that they didn't like that we were Aboriginal. From then on, my older brothers and I were banned from the neighbour's front yards where the other kids played. Their houses stood like sacred monoliths, an unknown world beyond.*

*There were two shifts in these neighbourly relations that I recall. One related to the family across the road, where, like weekly clockwork, a women's screams could be heard, punctured by squeals from their children, until they escaped to the front yard, where the public glare brought some safety.*

*It was my mother that could stand it no longer, she marched across the street to the house next door to the ruckus, the one house where I could play and occasionally shared the bright life of their television, with our house limited to radio. Their father was a garbo (garbage collector), considered a dirty job, and the mother, having been an orphan, was her own outcast. My mother, bristling with anger, held onto her broom and directed the hapless mother to arm herself with anything she could find. She didn't take too long to follow, together they pounded on the perpetrator's door.*

*The drunken father tried initially to shoo them away and close the door but I could see from across the street it was jammed open with the broom, he opened it wide, and half stepped out. The entire street could hear their exchange; it was made clear that should they hear screams again he would be the one left feeling the blow. The noise settled that night and over future nights. He likely continued to torment his family, but he did so more quietly. My mother taught me that day, that you stand up when you need to, despite possible ramifications.*

*It was a few years later when my oldest brother Greg, was around ten, I was about seven, and unusually my mother was not home. There were shrieks from the house next door, from where we were forbidden. The boy, my brother's age, came screaming onto his porch, he had aimed at his friend with his older brother's rifle and pulled the trigger, not aware it had been left loaded.*

*Greg, knowing the yard was out of bounds, gingerly went to their porch but dare not follow the boy inside. Greg looked at me, the only other person within the vicinity, overwhelmed with the drama that befell him. The boy was hysterical, so I waved him on in, myself staying a safe distance in my own driveway.*

*He used the phone for the first time that day, following the emergency numbers listed above the phone and called the help required. The child died but help was sought, breaking the parent's strict rules. After the accident they softened, we were allowed on the front yard, but not as far as the rear yard and definitely not inside.*

*In retrospect, it was probably a gift, that rule of exclusion stopped it being my brother the boy aimed at that afternoon. It provided a further lesson, rules and laws are often not just, so we need to listen to our inherent sense of justice. As I grew, I also learnt from my family to foster the agency to challenge and seek to amend such injustices.*

## 2.1 Introduction

In investigating the capacity of the United Nations to facilitate the self-determination of Indigenous Peoples, this chapter reviews the work of Indigenous scholars, and others working on Indigenous studies, on how they address some of the key concepts that are examined in my thesis. These scholars provide insight into Indigenous conceptions of self-determination and sovereignty, and how Indigenous peoples are influencing these definitions in international law. It also explores differing political and philosophical approaches in engaging with settler-states, and how such approaches may inform United Nations advocacy. More significantly, the chapter identifies gaps in research in the assertion of Indigenous rights domestically and in international fora.

In this chapter, I have first sought to examine the basis of self-determination and its correlation with the concept of sovereignty. While there are a number of Indigenous academics who focus on Indigenous rights to self-determination, and others review global mechanisms and instruments established to progress rights advocacy, I have sought to assess whether activism, merging local and global political interactions, may be useful in the assertion of Indigenous rights. While a number of Indigenous academics reflect on and engage in activism, in response to their own contested political environments, this thesis is distinctive in seeking to extend an examination of these contestations to the United Nations to assess if that forum may be useful in leveraging the transformative change that's required.

The United Nations has various mechanisms and instruments that call on states to recognise Indigenous Peoples' rights and self-determination. This chapter provides an overview of key scholars who have reviewed the United Nations' capacity to respond to Indigenous claims concerning their rights to self-determination and outlines progress that has been achieved. It also reviews the work

of Indigenous academics who are critical of the capacity of the United Nations to hold states accountable. These bodies of work highlight state intransigence in responding to Indigenous rights to self-determination and limitations in holding settler-states accountable for violations of Indigenous rights.

Though settler-states have previously undertaken recognition and reconciliation processes domestically to claim they are taking action to recognise Indigenous rights, there are legitimate questions as to whether such processes can be considered rights enacting. As such, this chapter also considers debates on the relative value of recognition versus redistributive approaches to justice. As Nancy Fraser contends, both have the capacity to be affirmative, reinforcing existing power structures, or transformative, helping to undermine and transform those existing structures (1995, p.11). Indigenous scholars, such as Jeff Corntassel, have warned of cultural recognition processes that fail to address the underlying power disparity or assimilationist intents of redistributions that are tied to extractive market forces (Corntassel, 2008, p.111)

Indigenous engagement with settler-states and the United Nations is often questioned by Indigenous scholars. Those aligned with 'resurgent' (Alfred, 2005) and 'refusal' (Simpson, 2014) approaches to Indigenous self-determination warn of co-option and assimilation through state based United Nations mechanisms (Alfred & Corntassel, 2014, p.8). Recognition processes, they argue, further empower states' domination of Indigenous peoples. Resurgent approaches promote traditional cultural values and the revitalisation of Indigenous communities as opposed to seeking recognition from the colonial state (Alfred,2005).

However, this thesis argues that in an Australian context, our rights are so marginalized that resistance demands a more engaged stance, while still maintaining a focus on political actions.

Dispossession and colonial settler-state structures require active resistance. While I acknowledge the critiques of rights, legal frameworks and conceptions of sovereignty, I argue for their redeployment as tools to assert our just claims. I contend that strengthening engagement with the United Nations would be beneficial in support of Aboriginal and Torres Strait Islander Peoples demands that the Australian settler-state recognises our ancestral rights, informed by international norms, to secure justice for Indigenous Peoples.

For Aboriginal and Torres Strait Islander People in Australia, I contend, engagement with the state is necessary to leverage international law and legal standards, to influence the domestic power relations and assert our inherent claims as Indigenous Peoples. In combining Aboriginal activism and the assertion of Indigenous rights, through the leveraging of international mechanisms, this thesis seeks to explore means to overcome violations of the fundamental rights and freedoms of Aboriginal and Torres Strait Islander Peoples.

In reviewing relevant academic works, in section 2.2 I first consider Aboriginal and Torres Strait Islander and broader Indigenous conceptions of sovereignty, whether the term is applicable to Indigenous Peoples and whether it requires a spatial location tied to ancestral lands. This leads to an analysis of developments in international law in section 2.3, where I review the impact of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and its most contentious concept, that of self-determination for Indigenous Peoples. This is followed by section 2.3.1 which addresses limitations of a rights based legal framework. In section 2.4 I move to debates around recognition, redistribution and reconciliation processes. The final section 2.5 provides an appraisal of Indigenous approaches to the colonising settler-state, whether resurgent, refusal, resilient or an ethic of restoration. These debates highlight the multidisciplinary nature of these debates, it also identified an existing gap in academia and why I take a differing and distinctive approach in this work.

## 2.2 Aboriginal Conceptions of Self -Determination and Sovereignty

Self-determination is a core article of the United Nations Declaration of Human Rights (UNGA Res 217 A), where it was historically tied to the rights of nation-states. Article 1 of its two key covenants, the International Covenant on Civil and Political Rights and the International Covenant on Social Economic and Political Rights, both affirm the self determination of all peoples. As a right attributed to 'peoples', it is fundamental to the assertion of Indigenous Peoples' rights and so is a central theme of this thesis and the literature review.

In reviewing the capacity of international law to facilitate the realization of Indigenous rights I investigate developing definitions of Indigenous self-determination. For Aboriginal People the term self-determination refers to the right to make decisions as a people. Mick Dodson asserts that 'self-determination is to peoples what freedom is to individuals...the very basis of their existence' (1994, p.68). The demand for self-determination is a central underpinning right outlined in UNDRIP. Self-determination is, according to Dodson, 'the most fundamental of our rights as peoples; the pillar on which all other rights rest; a right of such profound nature that the integrity of all other rights depends on its observance' (1994, p.68).

For Aboriginal and Torres Strait Islander Peoples in Australia there is a correlation between self-determination and an Indigenous conception of sovereignty. The term sovereignty has been adopted from Western political thought, where work on social contract theory asserted a relationship between European dynastic monarchs and the citizens of the state (Russell, 1979). However, its meaning has been reinterpreted among Aboriginal people, whose governance was based on consensus decision making. Though it's an uneasy fit among First Nations Peoples in Australia it has been colloquially accepted as referring to the supreme power of a nation. As a foreign concept,

sovereignty came to represent the autonomous power of nations. The term became the closest framing of Aboriginal ancestral rights to govern ourselves and enact our right to self-determination. Dodson contends that justice for Australia's Indigenous Peoples, required the underlying power dynamics to be addressed, 'ultimately this is a question of sovereignty, or the power to have power' (Dodson, 1994, p.70).

However, Taiaiake Alfred argues that sovereignty is an inappropriate term for Indigenous Peoples, reflecting imposed foreign hierarchical social structures (2009, p.79). He cautions against adopting Western frameworks, suggesting the ideology of sovereignty legitimises hierarchies and political elites (Alfred, 2009, p.80). For Alfred, in adopting the word sovereignty, Indigenous Peoples are using the state as their model for governance, limiting their political goals and reflecting the values of the settler-state (2009, p.80). The term sovereignty confines First Nations to a limited form of autonomy, that relies on the recognition of the state, within a legal framework and under the authority of the state (Alfred, 2009, p.81). Further, 'concepts of Indigenous sovereignty that don't challenge these principles, in fact serve to perpetuate them' (Alfred, 2009, p.83).

For Alfred, 'sovereignty is an exclusionary concept rooted in an adversarial and coercive Western notion of power' and is the antithesis of Indigenous cultures (2009, p.83). He argues that the concept of sovereignty fails to question the structure of Indigenous oppression, while colonialism's power relations go unchallenged (Alfred, 2009, p.81). Significantly, Alfred contends, 'acceptance of Aboriginal rights and title in the context of state sovereignty represents the culmination of white society's efforts to assimilate Indigenous Peoples', where Indigenous People are framed as minorities rather than nations (2009, pp.83-84).

However, my use of the term 'sovereignty' differs from Alfred's. Though Alfred's definition of the word is accurate, the political implications of the word's use in a First Nations context in Australia are markedly different to Alfred's analysis. For Aboriginal People, the term sovereignty has been indigenised to represent the autonomy of Aboriginal People, it's the assertion of Aboriginal and Torres Strait Islander social and political structures through the enactment of our sovereignty. Rather than aligning with state processes of assimilation and market based economic frameworks, the term sovereignty has been adopted as an assertion of Aboriginal and Torres Strait Islander Peoples' independence from the state. Within an Australian framework, the term sovereignty is used by Aboriginal and Torres Strait Islander Peoples to counter the colonial claims of the state, to assert our unique ancestral claims of nationhood.

Although the term sovereignty is problematic, I use the term within this thesis as challenging settler sovereignty and as an assertion of Aboriginal nation rights. For Aboriginal Peoples, the term sovereignty directly challenges assimilationist approaches that subjugate and marginalise Indigenous Peoples, assuming Indigenous peoples are subservient to the dominant European culture (Dodson, 1994, p.67). Within an Australian context, Aboriginal sovereignty movements are closely aligned with resurgence campaigns, which define how the word is interpreted and implemented. Aboriginal conceptions of sovereignty do not align with patriarchal hierarchies and state hegemony, which are more closely associated with recognition and reconciliation processes. I address recognition, reconciliation and resurgence approaches, as outlined by Alfred and Corntassel (2014), and their implications on United Nations rights frameworks later in this chapter.

Aileen Morton-Robinson, a prominent Goenpul scholar, of the Quandamooka people of Queensland, Australia, argues that states assert their claims to colonized territories through international law, where the 'Australian national identity is built on the disavowal of Indigenous

sovereignty because the nation is socially and culturally constructed as a white possession' (2015, pxxi). She argues that Indigenous sovereignty challenges the imposed sovereignty of the imperialist project and the underlying power dynamics of contemporary Australia (Morton-Robinson, 2015, p.6)

According to Morton-Robinson, race in a colonial context is based on the possessive logic of patriarchal white sovereignty, that privileges white occupation and possession through property rights. Racism is used to justify the expropriation of Indigenous lands and punitive policies framed on a deficit model. 'A regime of power, patriarchal white sovereignty operates ideologically, materially, and discursively to reproduce and maintain its investment in the nation as a white possession' (Morton-Robinson, 2015, p.88). British sovereignty required a racialized interpretation that enabled the dispossession of Aboriginal People as if it were the result of a natural hierarchy and not as a result of theft and murder. It justified the transfer of Aboriginal lands to a foreign crown, settlers and their descendants based on a legal-political framework that ignored the rights of Indigenous People, while justifying those processes of invasion, colonisation and dispossession.

Morton-Robinson argues that a reliance on 'rights' discourse within what she terms a 'judicio-political framework' is inherently limiting. A rights framework 'does not reorient our conceptualization of power outside of a law, right, and sovereignty paradigm to think about Indigenous sovereignty and power in different ways' (Morton-Robinson, 2015, p127). She draws on the work of Foucault, acknowledging the theorist's work on biopower but highlights his lack of analysis of sovereignty in a colonial context. According to Morton-Robinson, Foucault provides new opportunities to analyse how whiteness racializes knowledge and regulatory mechanisms to prevent acceptance of Indigenous sovereignty (2015, p129). She questions whether the framework of rights forms new processes for Indigenous subjugation, through the reinforcement of white possessive

prerogatives through legislation, judicial decisions, regulatory mechanisms and policies (Morton-Robinson, 2015, p134).

Though Alfred warns of the danger of assimilation, and adoption of colonial structures, I argue the concept of sovereignty is a direct challenge to settler assertions of their imposed sovereignty. Morton-Robinson is more aligned with this thesis, asserting the concept of Indigenous sovereignty is a counter to colonial imposed sovereignty. However, both Alfred and Morton-Robinson question the use of rights frameworks, suggesting they tie Indigenous Peoples to juridical processes that justified colonisation and inadvertently act to empower settler-structures. Though this thesis acknowledges challenges in drawing on international law and human rights frameworks, I argue that judicial mechanisms and international rights frameworks provide opportunities to assert our sovereign rights as Indigenous Peoples to self-determination against overwhelming domestic power disparities. In this dissertation, I argue for the strengthening of these processes for Indigenous Peoples.

The sovereign rights of Indigenous Peoples also raise the potential for the recognition of the dual sovereignty that exists in settler-states. Kevin Bruyneel asserts an Indigenous sovereignty that is neither separate of state sovereignty nor is it assimilated within settler societies. Rather, Bruyneel contends Indigenous Peoples' sovereignty occupies a third space, which challenges the premise of confining Indigenous sovereignty to a set location, based on imposed colonial assumptions of settler-states' political authority (Bruyneel, 2007, 229).

Bruyneel explores the third space of sovereignty, that as a result of the impact of colonisation and dispossession, is not solely defined by location or the binaries of 'assimilation or succession, inside or outside and modern or traditional' (Bruyneel, 2007, 217). Rather, Indigenous sovereignty is

inassimilable within settler-states, it continues to exist in a 'postcolonial nationalism [that] does not presume a divide between rural and urban Indigenous communities; rather...they exist on a nationalistic continuum in which political activities and identity generated and given life in the urban centers can feed back to the reservation' (Bruyneel, 2007, 144).

There is merit in Bruyneel's assertion of a third space of sovereignty, which, though grounded on ancestral connections to country, can also cross locations. Significantly, according to Bruyneel, this is 'a political trajectory that may well be *in time* with the more encompassing reassessments of sovereignty that have been taking place' (Bruyneel, 2007, 216). For Bruyneel, the term sovereignty has survived colonial experiences of dispossession to persist spatially in a third space, and for me there is merit in acknowledging that differing experiences of colonisation and dispossession don't weaken sovereign claims based on ancestral connections and cultural values.

Whilst this thesis acknowledges the contribution of these works in highlighting issues in the definition and use of the term sovereignty for Indigenous People, I investigate the correlation of local assertions of Indigenous sovereignty and global processes of Indigenous rights to self-determination in international jurisprudence. My examination of international processes highlights how the concept of state sovereignty in international law is malleable, raising the potential for a redefined definition of sovereignty that responds, re-configures and reflects the self-determination of Indigenous Peoples.

For Australia's First Nations Peoples, Indigenous assertions of sovereignty are bound to ancestral country, but also continue unabated in urban and relocated regions, where ties to our lands, waterways and ancestors cannot be broken by dispossession. Despite our location, or the impact of colonialism, our sovereign rights persevere, asserting resistance to settler-states and rights to our

self-determination and autonomy. These assertions of self-determination and sovereignty extend, not just between locations, but also from local to global rights contestation and promote norm shifting that I explore in this thesis and seek to extend. I consider how we seek to use international legal structures in enforcing this assertion in the next section.

## 2.3 Going Global: Leveraging International Law

The development of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the Working Group on Indigenous Populations (WGIP) marked a significant advancement in the recognition of Indigenous ancestral rights. Though international law has been framed by nation-states to reflect and justify their history of imperialism, the recognition of Indigenous rights has been a hard-won development, as a result of international pressure by Indigenous Peoples. While there are a growing number of academics who dedicate themselves to reviewing Indigenous Peoples' rights in international law and its implications for state and Indigenous relations, such as Sheryl Lightfoot (2016), Moana Jackson (2020) and Alexandra Xanthaki (2007, 2014) to name a few, international law expert and former Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, is one of the more prominent (2004, 2009, 2008, 2013). Anaya asserts that had standard human rights instruments been applied fairly to Indigenous Peoples the Declaration would not be necessary, with no additional rights outlined in the Declaration that don't apply elsewhere in existing human rights standards. He clarifies, 'the purpose of the Declaration is to remedy the historical denial of the right to self-determination and related human rights so that Indigenous Peoples may overcome systemic disadvantage' (Anaya, 2009, p59).

Anaya contends that self-determination was the most contentious aspect associated with the development of the Declaration, (Anaya, 2009, p59) though, it is grounded within existing human

rights frameworks (Anaya, 2009, p60). States had traditionally viewed self-determination as aligned with the concept of independent statehood. Those States that objected to the Declaration, Australia, the United States, Canada and New Zealand, which I address in chapter five, did so, according to Alexandra Xanthaki, because of the potential for secession, through the recognition of Indigenous self-determination (Xanthaki, 2014, p.71). However, Anaya contends that Indigenous Peoples almost universally reject secessionist aspirations but seek to secure their social and cultural distinctiveness through their own governing institutions (Anaya, 2009, p.60).<sup>1</sup>

The Declaration confirms Indigenous Peoples' right to self-determination over their internal affairs in accordance with their own particular political institutions, so self-determination is 'viewed as simultaneously distinct from, yet joined to, larger units of social and political interaction, units that may include Indigenous federations, in the states within which they live, and the global community itself' (Anaya, 2009, p62). Other rights, as stipulated by Anaya, such as rights to treaties, ancestral lands and reparation for lands lost, stem from this fundamental principle of self-determination.

The final draft of the Declaration both recognizes and limits the right of self-determination through article 3 and 4, with article 46.1 specifying the territorial integrity of the state (UNDRIP). According to Xanthaki, this provides Indigenous Peoples with a 'looser' definition of self-determination. However, Xanthaki confirms UNDRIP does allow for secession in exceptional circumstances, if the people hold a distinct territory and there has been systemic discrimination and egregious social, political and economic inequality, with impinged capacity to maintain their cultural identity (Xanthaki, 2014, p.71).

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<sup>1</sup> The four states that previously opposed the Declaration have all since endorsed it between April 2009- January 2011.

In relation to the legal status of UNDRIP, Anaya asserts that though the Declaration is not a convention, its articles relate to existing conventions and treaties that provide binding human rights obligations in international law (Anaya, 2009, p.79). Anaya also contends that the Declaration can be accepted as forming customary international law, which is also binding (Anaya, 2009, p.99). Customary international law requires global consensus, it needs to be widely accepted by the affected states, with obligations attached (opinion juris) (Anaya, 2009, p.99). Anaya contends that 'once a rule has attained the status of customary international law, it can only be abrogated by a new norm of customary law'(Anaya, 2009, p.101). I expand on UNDRIP's acceptance as customary international law in chapter five. Yet despite broad endorsement of UNDRIP, many settler-states, such as Australia, have failed to develop a national implementation plan. I will consider this shortfall and means to strengthen international instruments and their effectiveness at the national level in chapters five and six, which then inform the findings outlined in chapter seven.

Anaya contends there are two aspects to self-determination: an internal approach reflected in Article 3, which includes the right to political, economic, social and cultural development free of discrimination. And there is also an external self-determination defined as 'the right to determine freely their political status and their place in the international community based on principles of equal rights and exemplified by the liberations of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation' (Anaya, 2009, pp.75-76). UNDRIP, according to Anaya, limits self-determination to 'matters relating to their internal and local affairs' in article 4 (Anaya, 2009, p.66). Yet Anaya agrees with Xanthaki that 'should Indigenous Peoples still be under conditions of colonial and alien domination or subjects of racist regimes, they will, of course, be entitled to the exercise of external self-determination, but beyond these cases they will not' (Anaya, 2009, p.66).

Other scholars, such as Sheryl Lightfoot, look to the potential for transformational change within international law. Lightfoot highlights that UNDRIP was unique in enabling marginalised Indigenous Peoples to actively engage in the development of UNDRIP as non-State actors (Lightfoot, 2016, p.199). According to Lightfoot, 'Indigenous rights, as embodied in UNDRIP, represent a moment of revolutionary transformation in global politics' (Lightfoot, 2016, p.4). She asserts that Indigenous People sought 'a set of rights that if implemented, would ultimately bring legal, political, social, and cultural change to the entire international system' (Lightfoot, 2016, p.12).

Lightfoot contends that Indigenous Peoples have fundamentally changed the conception of self-determination from being dependant on a state structure to being applied to nations of Indigenous Peoples, within the imposed borders of settler-states. This required a significant shift from tying self-determination to state territorial sovereignty, fundamentally changing the notion of states and the United Nations system (Lightfoot, 2016, p.13). 'Indigenous rights push the meanings of decolonisation and self-determination into new terrain, beyond purely statist conceptions. Self-determination and decolonisation are evolving on the international level, and Indigenous rights have an important role to play in the ongoing global conversation surrounding that evolution' (Lightfoot, 2016, p.202).

Lightfoot argues that Indigenous Peoples draw on rights to pressure states to reconsider their relations with Indigenous Peoples, to one that recognises Indigenous rights to self-determination (Lightfoot, 2016, p.203). According to Lightfoot, it is those states most threatened, who feel Indigenous rights emphasise the illegitimate foundations of the state, that are the most reluctant and intransigent (Lightfoot, 2016, p.203). However, Lightfoot asserts 'Indigenous rights are not a threat to the existence of states per se, but they are a direct threat to any doctrine, discourse, law, norm, political institution, or system that denies Indigenous Peoples individual and collective rights'

(Lightfoot, 2016, p.202). Such states may seek to promote a global image of a liberal society respectful of rights, while remaining averse to the recognition of those rights in practice, given the legacies of colonialism embodied in their institutions. These challenges to the recognition of Indigenous rights and the transformative potential of United Nations mechanisms and processes are central themes addressed in the results chapters of this thesis, which I consider across chapters five, six and seven and which underpin the proposed findings outlined in chapter seven.

According to Lightfoot, global 'understandings of decolonization and self-determination have also fundamentally shifted with the passage of UNDRIP towards new future constructions. Old colonial doctrines, such as the Doctrine of Discovery, plenary power, and terra nullius, have all been delegitimized...with Indigenous Peoples now agents of decolonization' (Lightfoot, 2016, p.18). Lightfoot refers to this as a 'subtle revolution', where the global community can look to a new future that has plural sovereignties and negotiated power relations (Lightfoot, 2016, p.19).

However, significantly, UNDRIP fails to provide a prescriptive means for enacting rights but rather leaves this for Indigenous Peoples locally to negotiate with setter-states, leaving options from self-government, autonomy, participation within state structures or concurrent dual sovereignty open for interpretation and negotiation (Lightfoot, 2016, p.202). However, Lightfoot warns 'the formidable challenge is to create new meaning that does not result in a diminished, second-class form of self-determination'(Lightfoot, 2016, p.18).

Alexandra Xanthaki also follows the transformative premise, acknowledging the Declaration is the first instance where self-determination in the contemporary rights framework has been recognized for any subgroup (Xanthaki, 2014, p.69). Xanthaki contends Indigenous Peoples had altered the

concept of self-determination and its definition within the Westphalian system, which had previously privileged state sovereignty over sub groups (Xanthaki, 2014, p.69).

While Xanthaki asserts UNDRIP has extended the meaning of self-determination beyond being conceived as an independent state, ‘the UNDRIP did not only change who the beneficiaries of the right to self-determination are; it also changed what the scope of the right is’ (Xanthaki, 2014, p.71). UNDRIP provides a right to self-determination that goes beyond an internal mandate, to also include matters of international jurisdiction, including the right ‘to maintain and develop contacts, relations and cooperation across borders’, within Article 36.1. It also recognises treaties between Indigenous Peoples and states within preambular paragraph 15 and has agreements with states enforced through Article 37 (Xanthaki, 2014, p.73). The Declaration provides for Indigenous rights to decision making, their own representative body, and capacity to negotiate with the settler-state (Xanthaki, 2014, p.73).

However, Xanthaki, Lightfoot and Anaya each warn of the limitations which constrains Indigenous application of the Declaration, in Article 46:

*Nothing in this Declaration may be interpreted as implying for any state, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.*

However, Dodson’s earlier work from 1994 emphasises the potential of global processes to hold settler-states accountable: ‘Indigenous Peoples have quickly recognised that international law,

word processors and even human rights rhetoric can hold the lines of power as fiercely as the guns and strychnine of times past' (Dodson 1994, p.74). His concerns regarding states' resistance to Indigenous rights is still applicable, being based on their 'recognition that the ground of their own sovereign integrity, being built on the dispossession of others, is fundamentally unstable' (Dodson 1994, p.70). However, Dodson contends that it is people that are sovereign rather than states, 'rights are inherent in peoples and do not derive from deliberations of the UN General Assembly. Nor do they depend on its recognition for their existence' (Dodson 1994, p.70).

Anaya, Lightfoot, Xanthaki and Dodson add to the discourse on Indigenous rights, the Declaration and the United Nations' potential for change in the global order. Though international law recognises Indigenous rights, the challenge for Indigenous Peoples has been moving from the existence of a right to its enactment. However, intransigence among settler-states, the lack of implementation and enforcement mechanisms for gross breaches are identified as requiring further investigation in this thesis and are expanded on in the results chapters and subsequent findings.

These scholars bring important insights that I draw on in this research and which also helped inform my theoretical approach, outlined in chapter three. Anaya confirms Indigenous rights to control our internal affairs, to reparation and to our traditional lands, our governance and to negotiate treaties. Additionally, Xanthaki's analysis of UNDRIP's impact on Indigenous Peoples' claims to self-determination, particularly in relation to the international reach of Indigenous authority, is useful for this study. While significantly both Xanthaki and Lightfoot emphasise the transformative potential of international law. That Indigenous Peoples are agents of our own decolonisation and the development of future conceptions of self-determination, with the concurrent dual sovereignty of Indigenous Peoples open to future negotiations confirms the relevance of this study. Though the

fundamental illegitimacy of settler-states, as Dodson noted, has not been addressed, a role remains for international law to consider future avenues that may support a shift in relations from contemporary colonial repression to decolonisation, shared sovereignty and post-colonial relations.

### 2.3.1 Constraints of International Law

Irene Watson and Sharon Venne are more critical of the capacity of UNDRIP to draw international law into the domestic realm, with Article 46 actively undermining its application, where ‘international legal norms [are] disabled from being applied to the Declaration’ (Watson & Venne, 2012, p.99). They note 46 (1) establishes that ‘the paramountcy of state sovereignty is guaranteed against all other claims including those colonized and dispossessed Indigenous Peoples’, while article 46 (2) is likely to ensure the ongoing unequal and minority status of Indigenous Peoples’ (Watson & Venne, 2012, p.103).

Watson and Venne argue that rather than asserting Indigenous rights, the Declaration diminishes them, subjecting them to domestic laws and recognition and negating Indigenous Peoples’ status as entities in international law, thus weakening the capacity to draw on the United Nations Charter as Peoples (Watson & Venne, 2012, p.104). ‘We have ended up with a UN Declaration which is largely rhetorical and full of hollow statements without any power or remedy for Indigenous Peoples’ (Watson & Venne, 2012, p.104). They also highlight the limitations of the Indigenous mechanisms, the United Nations Permanent Forum on Indigenous Issues (UNPFII) and Expert Mechanisms on the Rights of Indigenous Peoples (EMRIP), as controlled by States within the United Nations structure. While the UNPFII hears directly from Indigenous Peoples, its reports go to the United Nations Economic and Social Council, which has no capacity to progress issues further, so cannot hear complaints or draft standards (Watson & Venne, 2012, p.106).

Watson and Venne contend that Indigenous Peoples' concerns could not compete with other global human rights abuses, such as war and starvation, so would not be a priority for Council members (Watson & Venne, 2012, p.106). Further, with the abolition of the United Nations Working Group on Indigenous Populations (WGIP) and the studies it undertook, such as on 'Free, Prior and Informed Consent' and the Report on 'Treaties, Agreements and other Constructive Arrangements Between States and Indigenous Peoples', have been left in permanent suspension. Meanwhile Indigenous experts, such as the Special Rapporteur on Indigenous Peoples, Forum Members and Experts of EMRIP are voluntary positions, with limited capacity to develop studies and undertake investigations (Watson & Venne, 2012, p.107).

Though Watson and Venne argue that UNDRIP is substantially constrained, and Indigenous issues cannot be progressed to the Human Rights Council (HRC), Indigenous Peoples have since pressured for a review of EMRIP. As a result, the HRC has subsequently extended EMRIP's mandate to enable Indigenous Peoples to determine the themes of studies and can progress issues to the HRC, and potentially to the General Assembly. Though these developments are in themselves inadequate, it sets a precedent for further progress.

This thesis acknowledges many of the concerns raised by Watson and Venne. However, developments achieved over recent years, though modest and clearly insufficient, highlight a potential transformative capacity to adapt mechanisms and amend processes. Though a glacially slow process, I contend that we need to extend and augment opportunities at the United Nations to hold the violators of Indigenous rights to account, rather than withdraw, which I elaborate on in subsequent chapters. Without strengthened United Nations avenues for justice, Indigenous Peoples would be vulnerable to the whims of imperial settler-states, without the potential to raise violations in international fora, with the checks it provides.

## 2.4 Recognition or Condoned Repression

Settler-States have previously undertaken recognition, reconciliation and apology processes as a domestic means to address violations of Indigenous rights. However, whether Indigenous Peoples should seek to be recognised by settler-states and state-based bodies is an ongoing debate among Indigenous academics and other scholars. An examination of the limitations of national recognition, reconciliation and apology processes provides this study insights as to why Indigenous Peoples seek adjudication and reparation processes within international law. As a result, recognition and reconciliation frameworks have been criticised for legitimising states, while at best securing 'minor and symbolic concessions in place of policies that respond to deeper demands for justice' (Eisenberg, 2014, p.296).

The recognition of rights through domestic recognition and reconciliation processes are inherently limiting, according to scholars such as Taiaiake Alfred (2005, 2009, & 2015) and Glen Coulthard (2014), who argue that human and Indigenous rights frameworks within the international legal system are dependent on state recognition of the recipients of those rights. The processes that may allocate or appeal the recognition of Indigenous rights are either through settler legislature or judicial processes which have been framed to defend the state and have historically condoned the dispossession of Indigenous Peoples. These scholars argue that rights frameworks that are dependent on the settler-state reimpose the dominance of the state, as both the perpetrator and beneficiary of abuses of Indigenous Peoples. Whether Indigenous People should engage with the settler-state and the United Nations to seek recognition of Indigenous rights challenges the premise of such analysis and I set out in subsequent chapters a justification of the position taken.

Recognition processes have also been challenged by scholars such as Nancy Fraser (1995). Although she does not address the specific rights of Indigenous People to self-determination emanating from their sovereignty and ancestral ties, she raises relevant questions regarding recognition and redistributive approaches. Fraser argues injustices experienced from racial and gender-based oppressions are 'bivalent', requiring both cultural recognition and redistribution to address economic and often generational inequity (Fraser, 1995, p.80). For Fraser, neither recognition nor redistribution alone will address gender or race-based inequality (Fraser, 1995, p.69).

Where identity and nationality struggles do not call for redistribution, they are according to Fraser, recognition-based struggles (Fraser, 1995, p.68). Fraser suggests recent political theory has prioritised the recognition of groups (Fraser, 1995, p.70). This has been at the expense of a more just redistribution of resources, goods and decision making, - and in respect of Indigenous Peoples the return of traditional lands. While both economic inequity and a lack of recognition interrelate, economic injustice requires redistribution in the form of political-economic restructuring, redistribution, and decision making that transform the fundamental structures of society. Whereas Fraser aligns recognition to the marginalisation of a group, which may determine socio-economic injustices, as a result of that lack of equal recognition (Fraser, 1995, p.71).

Fraser contends that recognition claims tend to promote group differentiation while distribution claims tend to seek equality to remove differing treatment. Fraser sees redistribution and recognition as fundamentally contradictory in their aims (1995, p.74). However, she recognizes that oppressed groups may seek both recognition and redistribution, which she terms the 'recognition redistribution dilemma' (Fraser, 1995, p.74). Affirmative remedies associated with recognition processes, such as multiculturalism, don't seek to restructure the underlying generative frameworks that contribute to that disparity but rather seek to ensure equality in treatment (Fraser, 1995, p.82).

When combining affirmative and redistributive approaches with recognition and transformational strategies, Fraser suggests affirmative redistribution, or targeted redistribution leads to resentment, without the underlying causes addressed. Thus, it requires further assistance, which is perceived as 'inherently deficient and insatiable' and leads to resentment (Fraser, 1995, p.85). Combining affirmation and recognition, such as with multiculturalism, supports group differentiation but only superficially reallocates, with the causal structures remaining in place. While combining transformation and recognition deconstructs existing structures, restructuring relations of recognition, thus destabilizing group differentiation. (Fraser, 1995, p.87).

However, transformational redistribution reduces social inequality, though undermines conception of recognition, with universalism. Redistribution and affirmation, the liberal welfare state, supports group difference but can result in a backlash and misrecognition, with difference at odds with transformative universalism deconstructing difference. For Fraser, affirmative redistribution is compatible with affirmative recognition as both promote group differences (Fraser, 1995, p.88). Similarly, according to Fraser, transformative redistribution is compatible with transformative recognition as 'both undermine existing group differentiation' (Fraser, 1995, p.88). While affirmative redistribution, or affirmative action policies, do not enable a deeper level redistribution, leaving intact the deeper structures that generate disadvantage' they are also likely to feed resentment at perceived special treatment (Fraser, 1995, p.89). Equally, affirmative recognition, anti-racism programs that seek to revalue blackness can challenge the universalism of the liberal welfare state so may illicit backlash by those that are not recipients.

Transformative redistribution, or economic restructuring, according to Fraser, when combined with transformative recognition, the deconstruction of race, are both complementarily focused on deconstruction and avoid social resentment. However, Fraser acknowledges these are not a priority

for those impacted, given people are often culturally attached to their identity and economically structural change is less feasible. Fraser also acknowledges that injustice operates along a range of differing axes of intersecting injustices, of class, race, gender, sexuality, and so on. She suggests that combined transformative redistribution and transformative recognition approaches will likely be more effective in all instances.

This analysis doesn't address Indigenous Peoples, whose claims are fundamentally tied to their identity, their claims for sovereignty and self-determination, unlike gender or race. These are particularly relevant to Indigenous debates on recognition and reconciliation processes, given they raise questions as to whether those processes are distributive or transformational and seek to address the underlying causes of disparity, which for Indigenous Peoples is related to loss of traditional lands and their self-determination as Peoples.

According to Iris Marion Young, Fraser 'conceptualizes transformative redistribution as incompatible with affirmative recognition' (Young, 1997, p.152). While Young agrees with the overall premise of Fraser's argument, she contends the promotion of economic justice in opposition to culture is counterproductive. Young purports Indigenous, women's and LGBTQ movements assert recognition as a means to achieve socio-economic justice, albeit in different ways depending on the context in which they are making their claims (Young, 1997, p.148). She suggests that in establishing a dichotomy between the two Fraser is misinterpreting cultural identities, such as Indigenous, feminist and gay movements, as calling for limited recognition, rather than recognition as a means to more substantial social-economic justice.

Indigenous Peoples do not consider cultural recognition as an end but conceive cultural recognition to be tied to their land. Young contends that Fraser's rejection of cultural recognition plays into

conservative opponents who seek to refuse the distinct economic and political interests of oppressed peoples (Young, 1997, p.158). According to Young, recognition can lead to greater levels of redistribution in response to cultural demands, whether based on race, women, gay or Indigenous Peoples, 'the two struggles are continuous' (Young, 1997, p.159). Young suggests Fraser has exaggerated the polarization between redistribution versus recognition, in her assertion that recognition and 'politics of identity' diverts 'radical politics from confronting economic power'. Such binary approaches, according to Young, actually contributes to a right-wing agenda and further marginalizes economically disadvantaged groups (Young, 1997, p.158).

However, while Young highlights the need to maintain a focus for Indigenous Peoples and others, that incorporates both recognition and redistribution, Fraser's argument is also useful in consideration of Indigenous Peoples. For Indigenous Peoples positive discrimination programs can actually act to remove the focus from the broader binary to a focus on individuals overcoming disadvantage. For example, employment programs around mining sites in Australia have resulted in limited short-term benefits for a few, at the expense of environmental and community well-being. Such approaches detract from the substantive dichotomy of the contemporary expression of colonisation between Indigenous Peoples and settler-states.

Glen Coulthard considers the use of apologies, truth and reconciliation processes, commissions of Inquiry and individual reparations, as orchestrated processes that call on the victims of policies to forgive while leaving the current beneficiaries of colonial rule unaffected. In his seminal work 'Red Skin White Mask', Coulthard's exposes how violent strategies of dispossession in the earlier phases of invasion and colonization were replaced by oppressive forms of governance, that sought to placate First Nation Peoples through recognition. Indigenous self-determination has been usurped

from the preceding rights agenda, where 'recognition has emerged as the dominant expression of self-determination within the Aboriginal rights movement in Canada' (Coulthard, 2014, p.2).

Coulthard draws on Franz Fanon, whose work 'Black Skins White Mask' identified colonialism's ability to coax colonized peoples to identify with unequal and limited forms of recognition by the settler-state, and that duplicated colonial power relations and reinforced the repression of the colonised (Coulthard, 2014, p.32). Fanon recognised the psychologically damaging impact of colonialism's repression and racism, as tools of subjugation, where colonized people internalised their devaluation as normal (Coulthard, 2014, p.32). Such processes used racism to portray the colonized as uncivilized and inferior to justify the expropriation of their lands. Yet, according to Coulthard, changing the social structures of colonialism alone was insufficient if it didn't address the duality of both the structural and psychological impact of colonization.

Coulthard contends that the Canadian government has shifted from its previously exclusionary and assimilationist approach to reconciliation and recognition while actually maintaining colonial power relations (Coulthard, 2014, p.6). The drivers of colonization have not changed. Referencing Patrick Wolf's assessment, he argues that 'the primary motive (of settler colonialism) is not race (or religion, ethnicity, grade of civilization, etc) but access to territory' (Coulthard, 2014, p.7). Where 'recognition' is granted by the state it would not disrupt but rather replicate those power relations, if it fails to interrogate the deeper drivers of colonialism. For Coulthard this requires the "realization that capitalist economics and liberal delusions of progress' have served as the 'engines of colonial aggression and injustice'" (Coulthard, 2014, p.36).

Coulthard asserts Marx's analysis, 'highlights the ways in which power is structured through ownership' and exposes the states' role 'in the accumulation of capital and the redistribution of

wealth from the many to the few', is relevant for Indigenous assessments of colonialism (Coulthard, 2014, p.8). The conscious destruction of communal social structures are ways of 'indoctrinating the Indigenous population to the principles of private property, possessive individualism and menial wage work' and proved applicable and useful (Coulthard, 2014, p.12). However, Coulthard acknowledges Marx needs to be examined and reconfigured based on an Indigenous analysis, with Marxists' espousal of a 'return to the commons' as a redistributive strategy threatening Indigenous lands and risks implicating the left in Indigenous oppression (Coulthard, 2014, p.12).

Coulthard makes a compelling argument in his analysis of state condoned recognition processes and their judicial systems that will, he asserts, be constrained to maintaining the status quo (Coulthard, 2014, p.40). Similar strategies that maintain the framework of contemporary colonialism are at play across settler-states. While there has been a greater focus on the recognition of cultural rights in recent years, recognition processes alone cannot address the illegitimate basis of colonial states. Though there has been rhetorical recognition of Indigenous rights by a number of settler-states, their translation into meaningful self-determination and Indigenous led decision making has been more muted, particularly in relation to rights to free prior and informed consent, with rights to veto resource extraction that has driven state hunger for Indigenous lands. It is these limitations so forcefully outlined by Coulthard, and others examined here, that must inform this review of United Nations mechanisms and strategies to strengthen the assertion of Indigenous rights which I outline in chapter seven.

Jeff Corntassel and Cindy Holder also question the capacity for apologies and formal recognition/reconciliation measures to acknowledge past wrongs (Corntassel & Holder, 2008, p.465). Corntassel contends that in conceiving such mechanisms as a means to neutralize historical abuses, such processes are set up to fail, actively undermining a focus on reparation and reclamation

of lands and resources taken. Reconciliation mechanisms result in silencing discussion on the foundations and motivations of violence or how to address the causes of that repression, while ignoring Indigenous rights to self-determination. In practice, acknowledgements rarely address the fundamental power imbalance and rarely provide substantial material compensation or redistribution to address past grievances but rather tend to be symbolic in nature (Corntassel & Holder, 2008, p.465). According to Corntassel, recognition processes 'shift the discourse away from restitution of Indigenous homelands and resources and ground it instead in a political/legal rights-based process that plays into the affirmative repair policies of states and ultimately rewards colonial injustices' (Corntassel & Holder, 2008, p.472).

Corntassel and Holder argue that in failing to address issues of restitution or redistribution, apologies and truth commissions are fundamentally flawed, neglecting to deal with the structural issues facing Indigenous Peoples (Corntassel & Holder, 2008, p.466). Instead, they contend, the underlying drivers of the power disparity and marginalization that were a result of colonization and dispossession can only be addressed by recognizing Indigenous Peoples' inherent self-determination, rather than assuaging state guilt, whilst perpetuating those power imbalances (Corntassel & Holder, 2008, p.468). Corntassel and Holder assert that 'decolonization and restitution are necessary elements of reconciliation to transform relations with Indigenous communities in the way justice requires' (Corntassel & Holder, 2008, p.467). However, state reconciliation processes are affirmative in nature rather than transformative, articulating wrongs but not addressing the underlying causes of those wrongs (Corntassel & Holder, 2008, p.468).

The issue for Aboriginal People isn't binary categories of recognition versus reparations, but control over our ancestral lands, having our own governance bodies and the decision-making and resources to define our economic and cultural priorities and the form of development we seek.

Acknowledgements of previous violations are inadequate if they fail to also address the harm caused and the fundamental disempowerment of Indigenous Peoples. While reparations can facilitate self-determination, economic restitution provided through jobs on a mining site, or limited financial compensation tied to the destruction of ancestral lands, will not counter the deleterious impact on cultural obligations and the identity of Indigenous People. Rather, than either affirmative or transformative approaches, for Aboriginal and Torres Strait Islander Peoples the capacity for meaningful decision-making is based on cultural recognition and required for the necessary redistributive justice that Fraser warns us not to neglect.

The works by Fraser, Young, Coulthard, Corntassel and Holder on recognition and reparative approaches and whether they are affirmative in nature or transformative, are useful in assessing the effectiveness of existing initiatives, both in the domestic realm of settler-states and at the United Nations, which I review in chapters five and six. Moreover, they are critical considerations in the finding chapter of this dissertation, which seeks to formulate untapped opportunities to for the United Nations to more proactively address the violation of Indigenous rights and support Indigenous Peoples and states to move beyond a relationship premised on conflict to transition to a post-colonial relationship, that can respectfully be coterminous. However, the potential benefits of Indigenous engagement within global processes and international law are also questioned by Indigenous scholars.

## 2.5 Indigenous Resurgence: Resurgent Indigeneity

Whether Indigenous Peoples seek to engage with United Nations processes is challenged among a school of 'resurgent' Indigenous academics who contend engagement with the state-based body further empowers states' domination of Indigenous Peoples and condones contemporary colonial

structures and processes. They warn that such engagement requires Indigenous recognition by settler-states and would lead to the co-option and assimilation of Indigenous Peoples. Resurgence is a new approach to decolonisation that strives to break free from the political and legal frameworks (Alfred, 2011, p.92) which contribute to the repression of Indigenous Peoples through unjust treaty processes and land rights that fail to provide full freehold allodial title.

Taiaiake Alfred, a resurgence scholar, urges Indigenous Peoples to repudiate state-based processes, moving from begging to be recognised by the state, to demanding structural decolonisation (Alfred, 2011, p.81). According to Alfred, resurgent approaches recognise Indigenous Peoples' lived experiences are 'acts of survival against colonizing states' efforts to eradicate them culturally, politically and physically'(Alfred & Corntassel, 2005, p.597). Resurgence asserts an ethical and political process of decolonisation through cultural regeneration, that is founded on Indigenous Peoples' traditional values that maintain First Nation's distinctive claims (Alfred, 2011, p.81). Indigenous resistance is based on the reassertion of Indigenous decision-making, languages and cultural identity, economic self-determination and nation to nation relations with the colonial state (Alfred, 2009, p.172).

Alfred contends resurgence begins with the self, requiring altered ways of thinking, that can then 'manifest as broad social and political movements to challenge state agendas and authority' (Alfred & Corntassel, 2005, p.611). Resurgence seeks a fundamentally different relationship with the state, not based on processes that rely on the benevolence of the state but through a decolonisation movement that seeks to transform society (Alfred, 2011, p.80).

Alfred and Corntassel argue that the state imposes definitions of 'aboriginalism' as a legal entity that establishes a legal and political relationship of inferiority of Indigenous People to the settler-state

(Alfred & Corntassel, 2005, p.600). Rather, state definitions of indigeneity, which rate blood quantum, as in the United States, or the extent of traditional ways of life, as in Canada, seek to define the degree of legitimacy attributed to indigeneity, which is used to pit Indigenous Peoples against each other (Alfred & Corntassel, 2005, p.601). Alfred argues the settler society is pathological, normalizing the outcomes of colonization, that perceive the individual rather than the situation as the problem. It requires a social amnesia and historical denial that has enabled contemporary settler-states to blame Indigenous Peoples for their poverty and dependence on welfare, while the reasons for that dependency are not questioned but are considered inevitable and invisible.

A resurgent approach contends that an assimilationist philosophy pursued by settler-states will lead to the annihilation of Indigenous communities and their cultural distinctiveness (Alfred, 2011, p.83). Alfred warns of the deleterious implications of co-option, where Indigenous values are usurped for market-based objectives. He contends that state funding or a voice for Indigenous Peoples is conditional on the extent that they adopt capitalist values (Alfred, 2009, p.143). For Alfred, there are two approaches to Indigenous rights, one that asserts Indigenous nationhood that is in opposition to an integrationist agenda, and one that collaborates with the state (Alfred, 2009, p.122). Resurgent decolonisation is a war zone, where the violence of invasion has transformed to a repression that seeks to assimilate Indigenous Peoples to abrogate Indigenous claims (Alfred, 2011, p.96). Resurgence scholars assert that the strength of Indigenous resistance is in robust Indigenous unity, 'it is ultimately our lived collective and individual experiences as Indigenous Peoples that yield the clearest and most useful insights for establishing culturally sound strategies to resist colonialism and regenerate our communities' (Alfred & Corntassel, 2005, p.601). Resurgence is a form of decolonization that seeks to break free of imperial indoctrination (Alfred, 2011, p.92).

Resurgence strives to strengthen Indigenous communities, and then reform the broader society, to move beyond the use of force to one of respectful coexistence. However, Alfred warns 'we cannot expect a better future in the absence of a commitment to take action, to attack and destroy the heart of colonialism'(Alfred, 2009, p.180). Indigenous Peoples need to break free from the myth of colonialism and the internalising of its ideology of consumerism, 'delusions of greed' and acquiescence, where 'continued cooperation with state power structures is morally unacceptable' and negotiation is useless (Alfred, 2011, p.94). According to Alfred, 'the end goal must be formulated as a spiritual revolution, a culturally rooted social movement that transforms the whole of society, and as political action that seeks to remake the entire landscape of power and relationship to reflect truly a liberated post imperial vision' (Alfred, 2011, p.86).

However, and significantly for this thesis, Alfred is also critical of drawing on a rights framework built around a legal structure that privileges the economic elite in society (Alfred, 2011, p.90). According to Alfred, Western conceptions of rights are individualistic, where 'Aboriginal rights are benefits accrued by Indigenous Peoples who have agreed to acquiesce to the state'(Alfred, 2009, p.176), and are subject to the national economic interests.

While many of Alfred's points are salient, and my approach aligns in a number of ways with a resurgent approach, in that both seek to transform society to establish decolonisation through nation-to-nation relations between Indigenous Peoples and settler-states, we differ in significant ways. Alfred contends that there are two broad approaches for Indigenous Peoples, one that asserts Indigenous nationhood and one that collaborates with states and seeks to assimilate. This thesis argues that establishing nation to nation relations and structural transformation is necessary for Aboriginal Peoples in Australia to overcome the legacy of colonialism. In an Australian context this

requires engaging with the United Nations, rights frameworks and global standards to provide some leverage and accountability beyond the impunity of the state itself.

Though a rights framework is comparatively weak compared to the power of the state, it is not the conception of rights that undermines their assertion, nor does a rights framework require the forgoing of Indigenous autonomy, self-determination or sovereignty. Rather, I contend that rights frameworks can be used against the settler-state to assert our ancestral claims and obligations and significantly, our rights to self-determination. I argue that to fail to assert our sovereignty and status as nations in international law fundamentally weakens the position of Aboriginal and Torres Strait Islander Peoples and leaves us vulnerable to the impunity of the Australian settler-state. Rather, rights claims move the debate beyond the arbitrary domination of the state to the international arena and affirms our nation-to-nation status.

Audra Simpson also advocates a resurgent or 'refusal' approach in opposition to recognition politics, where recognition and its implied consent are used to condone the dispossession of Indigenous Peoples and imposed structures of colonization. Simpson outlines the politics of refusal in her book, *Mohawk Interruptus* (2014), where she argues refusal is an ethical and political stance in contrast to seeking to be recognised and is grounded on the assertion of one's own sovereignty (Simpson, 2014, p.11). Simpson documents a historic action of refusal, the Kanehsata:ke 78 day armed refusal against further dispossession (Simpson, 2014, p.148). During the stand-off, the government sent 2650 soldiers to deal with 55 warriors, which resulted in three deaths, but led to the Government purchasing the land in question and the establishment of a Royal Commission on land sovereignty and Indigenous rights in Canada (Simpson, 2014, p.152). The Kanehsata:ke nationhood, is according to Simpson, 'driven by their refusal of recognition, their refusal to be enfolded into state logics, and their refusal, simply, to disappear' (Simpson, 2014, p.185).

For Simpson, colonial law was used to dispossess Indigenous Peoples, and citizenship was used as a ruse of consent, which implied acceptance of the appropriation of lands and imposed colonial structures. She argues that treaty making is a further example of coerced consent, where agreements were secured under the threat of violence and marked power disparities (Simpson, 2017, p.20). For Simpson, the politics of refusal is 'tied to a refusal to disappear or acquiesce to state legitimacy and power' (Simpson, 2017, p.22). Refusal rejects imposed power structures, justified by electoral processes that leave Indigenous Peoples' votes impotent against the majority will. Simpson argues that 'refusal rather than recognition is an option for producing and maintaining alternative structures of thought, politics and traditions away from and in critical relationship to states' (Simpson, 2017, p.19). Rather, discourses of recognition and reconciliation, with hollow promises of reparative or transitional justice, are merely 'state driven performance art' (Simpson, 2017, p.23).

Though resurgent and refusal scholars would not align themselves with United Nations processes, there are synergies and lessons that can be drawn from the assertion of self-determination, the implementation of praxis approaches and recognising the potential for co-option diluting actions and possible outcomes. Taking these lessons in hand, this thesis nevertheless seeks to explore how proactive assertions of Indigenous self-determination and our unique rights within United Nations fora may still be able to augment the assertion of our self-determination.

Gina Starblanket also emphasises the praxis nature of resurgence, as 'a process of critically informed action or praxis rather than a body of theory or ideas' (Starblanket, 2018, p.28). Starblanket contends that resurgence is firmly associated with praxis. However, unlike other resurgent theorists, Starblanket chooses to engage, conscious of the contradictions of seeking to achieve Indigenous political objectives while engaging within state facilitated liberal structures and processes, which she

acknowledges fail to question the power disparity that contemporary colonialism continues to replicate (Starblanket, 2018, p.29).

Starblanket defines resurgence as community organising, fostering discussions of how traditional values may be reconceptualised with integrity and dignity to be expressed through a contemporary cultural revival (Starblanket, 2018, p.29). It is a political resistance expressed through local and interpersonal assertions of ancestral ways of being, reinforcing Indigenous values, ontologies and axiology, healing and strengthening communities through the revitalisation of culture. It incorporates a critical introspection to consciously seek to achieve greater levels of cultural awareness (Starblanket, 2018, pp.29-30). However, though decolonization may be referenced, for Starblanket, resurgence is not restrained as a response to the settler-state but is rather a revival of Indigenous customary ethos. Starblanket highlights the relational quality of the approach, how it impacts on interpersonal and political interactions, taking care not to duplicate hierarchical, paternalistic, individualistic or communal assumptions.

Rather than specifying a form of resurgence as Alfred outlines, Starblanket advocates a resurgent process, based on Indigenous philosophies, on relations and gradual transformation (Starblanket, 2018, pp.31-32). Though Starblanket defines resurgence as community organising, reconceptualising traditional values through a customary cultural revival, and advocates a focus on praxis, she contends that engaging with states fails to question colonial power disparities (Starblanket, 2018, p.29). As with Alfred, there is overlap with Starblanket and my own focus on praxis and the assertion of Indigenous sovereignty. However, I argue that engagement with the state does not prevent the challenging of the disparate power relations between Indigenous Peoples and settler-states. Rather, the assertion of Indigenous sovereignty requires it and is central to my own theoretical approach outlined in the next chapter.

The Maori scholars, Makere Stewart-Harawira and Moana Jackson, also resonate with resurgent approaches, advocating for the need to draw from traditional cultural values, ontologies and axiology to assert their sovereignty. However, they also incorporate the potential for engagement with settler-states and global Indigenous rights advocacy to secure outcomes for Indigenous Peoples. It's a stance that moves closer to the proactive engagement in asserting our self-determination that I seek to examine in this study, though I argue in subsequent chapters, it's critical for Indigenous People to define the terms of that engagement.

Stewart-Harawira ties resistance with what she frames as 'resilience' (Stewart-Harawira, 2018, p.160). Resilience fosters new modes of engagement and disengagement in response to renewed threats to Indigenous lands by extractive industries, such as the 'Idle No More' campaign, which draws on traditional cultural values to instigate nonviolent protests (Stewart-Harawira, 2018, p.171). These antagonisms, inflamed by the pressures of globalism have led to a renewed phase of resistance in defence of traditional lands, water and the environment (Stewart-Harawira, 2018, p.159).

Indigenous rights challenge the legitimacy of settler-states that have responded with concerted and coercive efforts to incorporate Indigenous Peoples within a capitalist development agenda (Stewart-Harawira, 2018, p.167). Stewart-Harawira contends that states have responded enacting contemporary forms of expropriation or strive to extinguish Indigenous rights through legislation (Stewart-Harawira, 2018, p.174). Corporations and states have sought to pacify Indigenous claims through limited compensation or 'benefit sharing', that have legally silenced traditional owners, while leaving little capacity to reject extractive developments (Stewart-Harawira, 2018, p.171).

However, Stewart Harawira recognises the limitations of international human rights law, with the Declaration on the Rights of Indigenous Peoples (UNDRIP) considered non-binding and aspirational by former British colonies (Stewart-Harawira, 2018, p.163)'. She acknowledges that the UNDRIP and international human rights system are flawed and warns of a state based global system that is incapable of protecting Indigenous rights, when 'the cause of this failure lies in the dominance of capital over human rights' (Stewart-Harawira, 2018, p.169).

Stewart-Harawira, takes a more nuanced position than resurgence approaches, which reject engagement, by acknowledging the Indigenous Peoples' engagement with the United Nations has led to a shift from state assimilationist objectives to the recognition of an Indigenous rights framework (Stewart-Harawira, 2018, p.162). She recognises Indigenous Peoples' role in the transformation of international human rights law, transformation that accrued directly from the protracted, multi-faced struggle for the recognition and maintenance of Indigenous cultural identities, rights and practices' (Stewart-Harawira, 2018, p.162)'. A new 'politics of indigeneity' has coalesced globally in resistance to the increased pressures of corporate globalisation and threats to Indigenous territories. It calls for changes to the international human rights system and Indigenous relations with nation states (Stewart-Harawira, 2018, p.162). The Indigenous rights framework, according to Stewart-Harawira, has 'emerged as one of the most powerful voices against the devastating impacts of global capitalism'.

Stewart-Harawira's 'resilience' approach most closely aligns with my own. She also advocates for drawing on traditional cultural values to assert Indigenous sovereignty and condones engagement with settler-states and global rights advocacy to secure outcomes for Indigenous Peoples. Stewart-Harawira advocates for non-violent resistance, new modes of engagement and disengagement to challenge the legitimacy of settler-states. She warns of tactics of assimilation and silencing through

legislation and limited benefit sharing. Significantly she also acknowledges the limitations of international law and UNDRIP with its non-binding character as flawed, though she recognises that international law is transforming as a result of Indigenous struggles. Stewart-Harawira recognises this 'politics of indigeneity' in calling for changes in international human rights and Indigenous relations with nation states. However, we depart in a key significant way. As outlined in the next chapter, my theoretical approach advocates for the proactive seeking of transformational relations with states through the recognition of Indigenous sovereignty and for the alteration of United Nations structures to better reflect and defend Indigenous rights. This theoretical approach ties a requirement to proactively seek to contribute to these processes with the transformation of oppressive power structures.

Moana Jackson also draws on the values of precolonial culture as the basis for 'whakapapa', or the line of decent and ancestral connection to the land, rivers and mountains, 'as the source of relationships and knowledge' (Jackson, 2020, p.137). Jackson defines colonization as the violent denial of rights to life, lands and the ability for Indigenous Peoples to govern themselves (Jackson, 2020, p.133), where colonisation has recalibrated into new forms, as 'a process of dispossession and control rather than a historical artefact' (Jackson, 2020, p.134). Victim blaming and racism are ideologies of colonization that are used to deflect the causes of entrenched disadvantage (Jackson, 2020, p.134). Jackson asserts, 'colonisation fomented injustice: systemic privileging of the Crown and a relationship in which it assumed it would be the sole and supreme authority' (Jackson, 2020, p.145). Colonisers compounded their violent appropriation of lands by misrepresenting the past, 'obscuring the injustice of what they were doing. History became a kind of rebranding' (Jackson, 2020, p.145). These revised histories degraded complex ontologies and philosophies as myths and legends, in Australia this depreciation was termed 'the dreaming'.

Jackson, however, departs from scholars such as Alfred who assert a decolonial intent, arguing instead for an 'ethic of restoration', rather than using the terms 'resurgence' or 'decolonisation'. This approach seeks to restore kawa or customary protocols, to enable balanced relationships founded on iwi or nation, and hapu or clan self-determination, rather than grounded on deconstructing imposed colonial structures and racist attitudes (Jackson, 2020, p.149). This approach draws on ancient lessons to address the most egregious wrongs 'and to then whaka-papa, or build new relationships' (Jackson, 2020, p.149). However, he warns, restoration, like colonisation, is also a process and 'will require long term social and economic as well as political and attitudinal transformation' (Jackson, 2020, p.153). Decolonisation cannot occur within structures imposed through colonisation but rather requires 'the restoration of place in a non-colonising future [which] can only be assured with the recognition and effective exercise of iwi and hapu self-determination' (Jackson, 2020, p.150).

Jackson's approach, like the other Indigenous approaches listed here, advocates for cultural restoration. Jackson highlights that the impact of colonisation and dispossession was reconstrued and rebranded as control. However, though he recognised decolonisation required self-determination, he believed this necessitated building new structures rather than deconstructing colonial structures, acknowledging the process would require long term 'social and economic as well as political and attitudinal transformation' (Jackson, 2020, p.153). This thesis also emphasises the need for new social structures, however, I assert that the level of transformation sought also requires that a focus on decolonisation is maintained.

Each of these scholars assert the need for a form of resistance to the impact of colonisation, whether through resurgence, refusal, resilience or an ethics of restoration, and all advocate drawing on the wisdom of customary values. They each acknowledge the crucial lessons our ancestors have

honoured for millennia, that we are interlinked with our environment, which can assist us to face multiple crises and mounting pressures. They also promote collaborative communal action or praxis, combined with introspective reflexivity, that seek to influence broader attitudinal and structural change within society. However, they vary in their degree of engagement with settler-states and the United Nations, reflecting the gamut of positions on Indigenous engagement.

While each of these scholars adds depth to the analysis of Indigenous rights and the assertion of our ancestral claims, this thesis contends that in the Australian context, First Nations peoples need to leverage the United Nations and emerging global standards of Indigenous rights to progress Indigenous self-determination domestically. Though I align with elements of resurgence, refusal, resistance and the ethics of restoration, these scholars do not specifically consider the international and United Nations dimensions of Indigenous claims, so I take a more nuanced and distinctive position. In drawing on principles of informed communal praxis, grounded on ancestral values and philosophies, I seek to engage with United Nations mechanisms to foster and strengthen the potential for transformative change. Doing so requires engagement with the settler-state to assert developing norms that recognise Indigenous Peoples as nations, struggling against the oppression of colonial structures.

Though the United Nations is flawed, it provides a powerful avenue to hold settler-states accountable within a global arena that is gradually transforming as a result of the unrelenting assertions of First Nations Peoples. While shifts in international law are incremental, Indigenous Peoples have substantially strengthened Indigenous agency within United Nations processes to hold settler-states accountable. The United Nations raises Indigenous grievances beyond the limitations of domestically framed processes to those within international law, where rights norms are influencing the definition of key terms and who may raise issues within United Nations fora. Though

there are clearly limitations, the potential to extend and enhance the impact of Indigenous advocacy will be assessed in subsequent chapters and will respond to the approaches espoused by the various scholars outlined here.

## 2.6 Conclusion

Throughout this chapter I have drawn on range of Indigenous scholars who speak to the assertion of Indigenous self-determination, through foundational concepts such as Indigenous sovereignty, also pointing out how settler-states have been threatened by Indigenous claims of sovereignty that challenge their legitimacy. This thesis argues that changing global conceptions of sovereignty and an enhanced recognition of Indigenous rights may provide new opportunities for strengthening the expression of and lived experience of Indigenous self-determination.

The chapter doesn't resile from the impediments Indigenous Peoples face in drawing on United Nations mechanisms to assert our self-determination, as outlined by theorists such as Watson, Venne and Alfred, examined earlier. However, I contend that the international system of rights provides an opportunity to challenge the impunity of settler-states. While recent decades have highlighted the capacity to alter the definition of critical terms, increase Indigenous access and strengthen relevant mechanisms, in response to gross and persistent breaches of Indigenous rights, at an albeit glacial pace, this thesis asserts that this potential has not been exhausted.

Indigenous rights frameworks and the international legal system are dependent on nation-state recognition, as Coulthard, Lightfoot and Corntassel highlight, with state recognition processes failing to challenge oppressive contemporary processes of colonization or address the deprivation caused as a result. This thesis argues for Indigenous engagement to pressure settler-states for effective

reconciliation processes that are transformative and responsive to emerging global norms. I assert a transformative approach that seeks to secure structural change in the power dynamics between Indigenous Peoples and settler-states, which I outline in the following methodology and theory chapters. In doing so, this thesis strives to contribute to debates on potential means to reframe relations between settler-states and Indigenous Peoples to overturn the adversarial and inequitable power relations between settler-states and Indigenous Peoples.

This chapter also documents the emerging school of resurgent, refusal, resilient and restorative advocates that profess the recovery of Indigenous cultural mores as means to resist and confront global capitalism, with its reinvigorated colonialism, expropriation and co-optation. Though First Nations in Canada, USA and Aotearoa/New Zealand have established some capacity to assert their self-determination, I contend that within an Australian context, an isolationist political agenda would be counter to Aboriginal aims to assert our self-determination. It is the underlying objective in combining resistant praxis, framed on Indigenous values and axiology that may promote and augment engagement in the United Nations as a key means to alleviate the comprehensive powerlessness experienced by Aboriginal People within the settler-state.

This thesis seeks to draw on and extend these approaches, combining praxis with engagement through United Nations mechanisms to leverage the required change to assert our sovereignty and self-determination. I contend that Indigenous engagement is required to further shift international norms, cognisant of their potential to influence domestic relations between settler-states and Indigenous Peoples, to move beyond contemporary colonial oppression. At the same time, this thesis argues for a more proactive assertion of a transformative rights agenda. I contend that this demands a dedicated transformative Indigenous rights theoretical approach, grounded on communal praxis, which I outline in the following chapter, as necessary to extend United Nations

norms and mechanisms to effectively strengthen the assertion of Indigenous self-determination domestically, to meet the requirements of a just international legal system and the political transition demanded by Indigenous Peoples.

## CHAPTER 3

### SEEKING TRANSFORMATIONAL CHANGE

## Proem: Where I'm from

*Growing up, my families' histories and the region of our traditional lands were frequently recounted. The mother of both my grandfathers, Lucy, is perhaps four years old in a photo, and the eldest of two Aboriginal kids that look out of place among a large Irish family standing by a rough timber hut in Springsure, bullock team in the background. The picture is dominated by an old man with a large white beard down to his belt.*

*It was the 1870s following a particularly brutal period of massacres through central Queensland, in response to the Cullin-La-Ringo killings, where the local Aboriginal community had reacted to the kidnap of youths and murder of several Gayiri people. The coordinated attack that left 19 settlers dead and was the largest killing of British people in Australia's history (Colonial Massacres, n.d.).*

*The repercussions for that defence, fed by brutal impunity, led to the massacre of an estimated 370 Gayiri people and the decimation of Aboriginal communities for hundreds of miles. It is not known how that young mixed-race child survived, she was too young to comprehend and there were no records of her birth, as was the practice for Aboriginal children. A Pastoralist's wife in central Queensland recalled in her diaries that her grandmother had told her how, during those times, Aboriginal women would leave babies out the front of the early homesteads, in a bid to save their children.*

*Though Lucy was provided a basic education by the lay preacher and his wife, she was later disowned when she married an Aboriginal man, Bill, who had travelled inland from the coast, near Frazer Island. His father was a white man, Tim Eatock, and with his mother an Aboriginal woman, there is no record of his birth. Together, Lucy and Bill fled to NSW in the late 1890's to avoid the Queensland Act (1896), which forced surviving Aboriginal people onto missions and reserves.*

*Together they had eight children, with a number born on the riverbank near Brewarrina, an Aboriginal birthing place, in far-western New South Wales. There were stories of their work driving cattle, where Lucy was the cook. On one occasion there was a flood, where Bill repeatedly swam with each child and Lucy across the currents, exhausted he persevered until all reached safety. But once there with no food, he had to hide in bushes with the older darker children as Lucy sought food supplies from a homestead. It was a hard life and eventually they separated, Lucy moved taking the younger children to seek work as a domestic, with Bill keeping the older darker boys.*

*These histories recorded where we were from. They documented the struggles and hardship of the time, how they overcame the adversity of the flood, and how they had to hide those with darker complexions when in need. There was a different value, depending on skin tone, if they could pass as darker from hard work in the sun, or if it betrayed their Aboriginality.*

## 3.1 Introduction

In examining whether the United Nations is a useful mechanism for Indigenous Peoples in asserting our rights to self-determination, this chapter outlines the theoretical basis for the study. The chapter considers why a specific theoretical approach, which I term Transformative Indigenous Rights Theory (TIRT), is required to effectively respond to the question and advance the thesis' assertion of Indigenous self-determination.

Section 3.2 provides an explanation of Transformative Indigenous Rights Theory (TIRT), as a theoretical approach that proposes the need for a transformative change in relations between Indigenous Peoples and settler-states to one that recognises the sovereign self-determination of Indigenous Peoples. This theory is based on the understanding that what has driven and continues to drive injustice against Indigenous Peoples is, at its core, the continuing colonial dynamics that suppress Indigenous sovereign self-determination, driven by economic imperatives that designate Indigenous Peoples as lesser beings within settler-states. As such, the establishment of meaningful justice can only occur through nation-to-nation relationships based on Indigenous inherent sovereignty and self-determination. Though this objective is realistically unachievable within a research study, this theoretical approach remains the overall objective, because self-determination, as affirmed through UNDRIP, cannot be achieved without a nation-to-nation relationship as conferred through the recognition of Indigenous sovereignty.

Section 3.3 establishes why I undertook a TIRT approach in response to the research objectives to advance the rights and aspirations of Indigenous communities. TIRT seeks to enact a decolonial approach in promoting state compliance of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). As such, TIRT advocates for transformational social and structural

change to challenge existing inequitable power disparities and to assert the rights of Indigenous Peoples.

Section 3.4 provides an overview of types of social science theories and appraises categories of transformative theories with an explanation of why these theoretical approaches were insufficient to address the needs of this study. Though some alignment can be made with several of these approaches, they do not address the specific needs of TIRT in seeking to transform settler-states and Indigenous relations to respect the sovereign self-determination of Indigenous Peoples.

Following, section 3.5 reviews differing conceptual frameworks of human rights, including, natural law theory, social constructionist framing, the deliberative school, the protest school and discourse approaches. I then outline my own conceptions of Indigenous rights as inherent rights, passed down from our ancestors, though these rights are asserted through direct political action and the leveraging of international law. This approach is within a constructionist framework, where Indigenous Peoples draw on and seek to reform and strengthen international law as a political strategy to assert our rights against powerful political and economic forces.

Section 3.5.1 provides a critique of rights frameworks and whether they challenge the root cause of violence and injustice or detract from more substantive change. The depoliticising character of human rights is examined, with the state and law framed as 'neutral' arbiters, where international laws are rarely enforced and states determine if rights are aspirational or binding. Additionally, the incapacity to appropriately monitor and control global corporations and extractive industries, results in a failure to account for the role of the market economy in ongoing violations of Indigenous rights. However, I argue that despite these difficulties, Indigenous People still use human rights frameworks in a bid to move abuses beyond the subjugation of settler-states to the jurisdiction of international

law. A critique of the limitations of human rights is necessary for investigations that strive to inform potential reforms of international law and to challenge violations based on contemporary expressions of colonialism.

This leads into section 3.5.2 which canvases several key debates in Indigenous rights, including whether indigenous rights are human rights and can be considered part of universal rights, and whether Indigenous rights should be based on distinctive Indigenous cultural practice is considered. This discussion leads to consideration on whether Indigenous rights have requirements for cultural performance, which has ramifications for Indigenous identity in rural versus urban contexts, with cultural practice often communal in nature and is frequently place-based. The role of UNDRIP and whether it creates new rights or reflects existing rights is also examined, with consequences on whether rights are considered aspirational or legally binding. An understanding of these debates and their implications for Indigenous rights informs the development of this theoretical framework.

I argue that Indigenous rights are a component of broader human rights frameworks, though they have specificity for Indigenous Peoples as a result of Indigenous ancestral connections to their traditional lands and the often pernicious impact of colonisation. I contend that Indigenous rights reflect the distinctive worldviews and value systems of Indigenous Peoples, that are passed through generations and don't cease even where Indigenous Peoples are moved from their traditional lands. Rather, the continuance of Indigenous culture post dispossession is a reflection of the strength of Indigenous People culture, with an ontology that is deeper than visual displays of continuous practices.

Section 3.5.3 commences with an assessment of the impact of UNDRIP and Indigenous rights within international law. The resulting extension of concepts such as self-determination in international law

had implications on the Westphalian system. Significantly, this review of Indigenous rights in international law raises discrepancies between the onus on settler-states to implement UNDRIP and a broad lack of compliance among them. It also required settler-states themselves to enact Indigenous rights domestically. Nevertheless, it provides Indigenous Peoples with international recourse to the United Nations and importantly opportunities to move relations towards shared sovereignty.

The chapter then considers the capacity of settler-states to respond to these developments in international legal standards at the domestic level. This assessment required a review of the presiding liberal social structures of former British settler-states and their democratic governance structures. The development of neo-liberalism and dominance of market-based approaches, with their objective to assimilate and erase Indigenous claims, is investigated for its influence on domestic responses. Despite these challenges, the capacity for settler-states to address their legitimacy deficits against their ability to accommodate the sovereignty of Indigenous Peoples through a dual sovereignty is assessed as a critical further area to canvas.

Section 3.5.4 extends this debate through engagement with several political theorists who recognise that, as minorities in democratic processes, the interests of Indigenous Peoples are systematically marginalised in decision making. Approaches such as special minority rights, participatory parity and differentiated citizenship may assist to overcome this exclusion. However, states' own complicity in failing to address their legitimacy deficit leaves activism as a key recourse Indigenous Peoples. I draw on these theorists to argue that there remains an opportunity for liberal democracies to develop a responsive conception of justice, through the recognition of a shared sovereignty with Indigenous Peoples.

Finally, the Chapter draws on these modes of analysis to formulate my own theoretical approach through a TIRT lens of analysis. This section provides a review of why a decolonization approach is a fundamental basis to TIRT research. I outline the influence of James Tully and Michel Foucault as theorists who recognise a role in theory for examining power relations, contestation and opportunities for change. Though Foucault didn't address the oppression of Indigenous Peoples, post-colonial theorists have considered his questioning of normalised and invisible power structures as highly relevant. In the development of TIRT, both Tully and Foucault's commitment to transforming power structures, and Tully's advocacy of theory to seek practical outcomes, testing the potential for transformation informed and is echoed in my own approach.

TIRT adopts the premise that Indigenous rights reflect Indigenous Peoples' inherent connections as custodians of country and waterways, but where our rights have only been affirmed through struggle, challenging the legacy of colonialism. This thesis argues that TIRT provides the theoretical framework required to analyse Indigenous rights, scrutinize the underlying power relations and promulgate Indigenous rights to self-determination and aspirations for decolonisation. The proems at the start of each chapter also reflect the TIRT framework in drawing lessons from my families' cross-generation cultural transmission and struggles against colonialism.

### 3.2 Defining Transformative Indigenous Rights Theory

In providing a framework to assert Indigenous sovereign rights to self-determination, TIRT clarifies the objectives and provides direction to the research. TIRT contends that the required transformation to address the ongoing repression of Indigenous Peoples will only be secured where Indigenous sovereignty and nation-to-nation relations are secured. It is only within this more equitable framework that the required reparations and associated land redistribution can occur. As

a result, ethical work with Indigenous communities must seek to contribute to the assertion of Indigenous sovereignty. TIRT research seeks to contribute to a broader momentum for change but does not anticipate the research or individual praxis will secure transformative outcomes. Rather TIRT and its associated praxes may over the longer-term contribute to the transformation sought. An underpinning principle of TIRT is the recognition that like the repetitive flow of water on rock, persistence can wear down overwhelming resistance.

TIRT research seeks to challenge the myriad power structures that maintain colonial frameworks, including the impact of patriarchy, and fosters a focus on possible alternatives. TIRT encourages research to align strategically with local, national and global initiatives and to incorporate praxis or proactive actions into the research methodology. The role of research in contributing to academic debates and broader public discourse is also embraced. Additionally, in recognising a TIRT approach is part of longer-term strategies, TIRT acknowledges change will not occur in response to individual acts or research, and in doing so, it **removes perceived** limitations of what may be possible in the current political climate.

Additionally, TIRT requires undertaking critical study, historically contextualised, through a reciprocal collaborative relationship with Indigenous peoples, that engages critical reflection and encourages the questioning of normative legitimacy. Central to a TIRT approach is an incorporation of reflexivity both throughout the research phase and in drawing on Aboriginal/Indigenous experiences. In this study I have incorporated reflections on mine and my families' experiences through the proems at that start each chapter.

TIRT encourages a critical subjectivity, conscious of one's attitudes and opinions and inherent influences on the researcher's way of thinking, their reflexivity, their ability to consider, respond and

reflect in relation to others and circumstances. Subjectivity is formed through awareness and reflection, proactively reviewing one's own and others' perspectives. It is, as Paul Patton surmised with regard to Foucault, 'a capacity for critical reflection on their current state and a capacity to 'chart paths for future transformation'' (Patton, 2014, p.15). In the following section I consider why a TIRT approach was necessary before outlining the various influences that contributed to its development, before providing a more detailed explanation of this theoretical framework.

### 3.3. Why A Transformative Indigenous Rights Theory

I developed TIRT in response to the specific needs of Indigenous rights research within the social sciences. Existing frameworks for the analysis of human rights fail to adequately account for the disempowerment and oppression of Indigenous Peoples. Contemporary colonialism, though often invisible to the broader society, conveniently expunges the fact that the origin of settler-states' prosperity is the theft and murder of Indigenous Peoples. This thesis contends that the contemporary manifestation of colonisation, the repression, rights violations and resistance to the assertion of Indigenous self-determination, demands a specific theoretical framework.

Given the failure of settler-states to ameliorate the legacy of colonialism, TIRT seeks to challenge the Australian states' resistance to enacting UNDRIP. The settler-states claim that those rights, conferred by the General Assembly in 2007, are aspirational, rather than incurring positive obligations on them. Though liberalism and democratic institutions have the capacity to address the ongoing injustices of colonialism, without political will to shift social norms and economic structures, settler-states will continue to reflect the existing power disparities that marginalize and sustain the exploitation of Indigenous Peoples.

While critiques of rights discourse have highlighted deficiencies in the analysis of rights implementation, with the pervasive failure in compliance of Indigenous Peoples' rights, this thesis contends that Indigenous rights analysis requires a transformative rights agenda. A TIRT approach incorporates a decolonizing intent and draws on international human rights law to assert Indigenous self-determination, in a bid to secure the societal structural change required.

In developing TIRT, I have established key principles that ground its approach. A TIRT analysis promotes Indigenous Peoples' aspirations and incorporates participants of the research as active contributors to the research. Though not deterministic in the methodological approach taken, TIRT is prescriptive in the intent of the research, focusing on empowering participants through participatory and collaborative research. Significantly, TIRT research responds directly to the aspirations of Aboriginal and Torres Strait Islander Peoples and the political climate they now face.

Social and political theory has the capacity to clarify and question approaches and outcomes. It enables the teasing out of underlying motivations and whether they facilitate Indigenous decision making or sanction existing market-oriented approaches that continue to repress and exploit our communities. To ignore the theoretical basis for thought disarms Indigenous perspectives and the capacity to challenge assumptions and power structures. We need to demystify theory to unravel and question the underlying thinking behind approaches.

Simpson and Smith argue for what they term 'theoretical promiscuity' (2014, p.9). According to Simpson and Smith, 'different forms of theorisation can produce forms of analysis that take up political issues in ways that have important consequences for communities' (Simpson & Smith, 2014, p.7). This thesis also seeks to draw from leading Indigenous and non-Indigenous academics and theorists in forming a theoretical approach that responds to the specific requirements of this

research. The theories on which I draw help make sense of the processes of colonisation, their ongoing impact, and the factors that continue to promote Indigenous oppression, as well as informing the most effective means for resistance against them.

### 3.4 Categories of Theoretical Approaches

According to Danermark, et al, 'a theory has two basic components- concepts and the assumed relations between them' (2019, p.144). Theory is used to understand and explain social reality, it provides an interpretive framework that conceptualizes the 'structure, agency and the interrelation between the two concepts' (Danermark, 2019, p.140). Theory relates motives to actions and in Grounded Theory draws as a starting point, 'individuals everyday understanding of reality' (Danermark, 2019, p.148). Theory is useful, according to Grounded Theory approaches, if the conceptualising of the specific social context is reflected in the data (Danermark, 2019, p.147). Danermark, et al contend 'this work should not be reduced to a method. It involves reasoning with concepts, abstracting, interpreting, testing and modifying established concepts and developing new ones, grounding concepts and testing hypothesis' (2019, p.162).

This theoretical approach proposes that the intent of research, analysis and associated praxis is to proactively seek to contribute to transformative change for Indigenous Peoples. TIRT sets out a proactive Indigenous targeted transformative theoretical approach that, unlike resurgent approaches TIRT seeks to engage, not as collaborators, but rather in a bid to strategically target pressure to enhance opportunities for the transformational change required. TIRT requires that the researcher, through their study, strives to actively contribute to momentum for transformational change broadly sought by Indigenous peoples, to assert their self-determination, their inherent sovereignty and their decision-making.

According to Raymond Morrow and David Brown there are three theoretical languages in social science: meta-theory, normative theory, and descriptive theory. TIRT fits within normative theory given it addresses ideas of how something ought to be. ‘Normative theory refers to the theoretical language which examines as well as support ideas of how something ought to be. It can be theories focusing on moral, political or ideological issues’ (Morrow, 1994, p40). Their review of theoretical approaches also establishes TIRT as substantive theory, given it refers to a specific area of inquiry, as opposed to formal theory.

In reviewing transformative theories, Turnhout et al contend there are four broad categories of transformative change theories (Turnhout, 2023). Though there is some overlap with requirements for Indigenous Peoples, these theoretical approaches are fundamentally inadequate to meet the transformative needs of this study. I outline these theoretical categories below, with reference to their applicability to a TIRT approach.

### *1) Individualist and behaviourist approaches*

Individualist and behaviourist theories are associated with individual grass roots initiatives to secure collective behavioural change, while drawing on peer identity and shared values to drive actions, skills, knowledge and economic resources to secure change (Turnhout, 2023, p7).

TIRT takes a broader perspective in addressing the specific needs of Indigenous Peoples. Indigenous Peoples are unique in being historically and politically recognised as ‘peoples’, so cannot be adequately reflected by theoretical references to individuals, or references based simply on shared identities. Indigenous Peoples have very specific political rights as sovereign Peoples recognised in international law.

## *2) Institutional Approaches*

Institutional theoretical approaches relate to the policies and regulations, social structures, shared social conventions and norms of society. Institutional change requires strategic approaches as they emphasise continuity and are resistant to change (Turnhout, 2023, p15). Institutional approaches include citizen movements, which may strive for small wins that culminate in more transformative change. Institutional change involves bricolage, the working with what is already there, ‘prodding of the imagination on what is ‘thinkable’ contributing to framing and reframing the problem at hand’(Turnhout, 2023, p16). These approaches place ‘emphasis on the power relations at play, the agency of the communities involved in collective processes’ and seek ‘to reveal its systemic or root causes’ (Turnhout, 2023, p16).

Though there is overlap between the structural change sought by Indigenous Peoples and a focus on systemic root causes and power relations, Institutional approaches are not adequate to address the transformative change sought by Indigenous Peoples. TIRT and Institutional approaches share similarities, acknowledging the resistance of state structures and the need for a strategically incremental approach to radical change. However, it is the distinct power relations between a settler-state and Indigenous Peoples and the assertion of Indigenous sovereignty that sets Indigenous theoretical frameworks apart from mainstream Institutional approaches.

## *3) Systems Approaches*

Systems approaches are defined as ‘the subjective interests and pre-analytic assumptions of the researchers’ which are informed by their world view (Turnhout, 2023, p19). Systems theoretical frameworks incorporate both top-down, such as policy interventions and bottom-up driven change, where states are responsive to community instigated initiatives or respond to feedback from

community consultations or submission processes. However, policy approaches have been criticised in 'not going beyond reformist or shallow change and have not addressed deep leverage points that are required for transformative change' (Turnhout, 2023, p20).

TIRT incorporates a subjective analysis and encourages an understanding of the influence of Indigenous researchers' world views and historical contexts, and the Indigenous communities' experiences are particularly relevant for non-Indigenous researchers. However, systems approaches don't reflect the level of transformation required for Indigenous Peoples. Additionally, systems approaches don't incorporate the level of Indigenous agency that is required to secure the outcomes sought by a TIRT framework.

#### *4) Relational and Post-structural Approaches*

Relational and post-structural approaches are aligned with political economy, feminism, discourse theory, practice theory, decolonisation and Indigenous research. Turnhout, et al also align this approach with critical theory, with its focus on power, politics, repression and marginalisation (Turnhout, 2023, p24). Relational and post-structural approaches are focused 'on economic paradigms, including capitalisms (and its roots in colonialism), growth oriented, and neoliberal paradigms and their contribution to the exploitation of humans and nature' (Turnhout, 2023, p25).

These approaches highlight the transformative change required to address the foundations of capitalism and decolonial approaches to enable the 'redistribution of power' (Turnhout, 2023, p25). Turnhout also outlines the role of social movements as drivers of transformative change, incorporating broad mobilization, the development of radical alternatives and political campaigns (Turnhout, 2023, p26).

This theoretical category is most closely related to a TIRT approach because it incorporates Indigenous and decolonial approaches. Though TIRT may fit within this broad category of post structural theoretical approaches, the specific theory that TIRT outlines is not sufficiently distinguished within the broad category. TIRT is unique in seeking structural change because it specifies the assertion of Indigenous sovereign self-determination as a clear objective, even while accepting that this objective is unlikely to be achieved through any single piece of research. However, TIRT contends that research studies must work with Indigenous communities to contribute to a broader global Indigenous movement to assert continuing Indigenous sovereignty as 'Peoples'. The term sovereignty is used because the concept of self-determination is being inaccurately used by settler-states to denote Indigenous advisory input into state policy approaches, rather than the comprehensive decision-making, reparations and land re-distribution that Indigenous Peoples within settler-states are entitled to and that denotes real self-determination.

TIRT requires substantial structural change to the power relations between Indigenous Peoples and settler-states. While relational and post-structural approaches also incorporate the role of social movements to secure transformative change through political campaigns, the level of coordination and shared objectives of the global Indigenous rights movement in securing outcomes in international law sets the global Indigenous rights movement and the need for TIRT apart. While there are overlaps, and TIRT fits within a broader relational and post-structural framework, it does not provide sufficient specificity to inform the development of this research and the need for a distinct theoretical approach in contributing to the assertion of Indigenous sovereignty, and its associated methodology. The specific principles required to reflect a TIRT approach are outlined at section 3.7.3 of this chapter.

### 3.5 Context of Rights Analysis

In developing a theoretical approach to support the implementation of Indigenous rights, it is necessary to first consider the conceptual foundation of the human rights framework that Indigenous Peoples are drawing on to assert their inherent rights as 'peoples'. While the assertion of Indigenous rights has gained momentum over recent decades, the orthodox conception links the development of human rights to the period following World War 2 with the establishment of the United Nations and the Universal Declaration on Human Rights setting out in Article 1:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood (UNGA, 1948, Res. 217A).

Marie-Benedicte Dembour suggests there are four broad schools of thought that provide the conceptual basis of human rights. Natural Law Theory emerged during the Enlightenment, with Francisco de Vitoria, De la Casa and Hugo Grotius. Natural law theorists contend people have rights simply by virtue of being human and attribute the source of human rights as emanating from God, the universe or human reason (Dembour, 2010, p.3). Natural theorists view rights as universal and advocate for human rights as realisable through substantive laws (Dembour, 2010, p.9).

Rhiannon Morgan argues that this transcendental construct of rights has traditionally impeded the study of rights within the discipline of sociology, as it was overly metaphysical rather than grounded on historical practice. Morgan asserts that a social construction perspective better correlates to the study of society (2011, p.36). A social constructionist approach situates knowledge production within a political context of power relations, to which people respond and seek to amend or construct.

Sheryl Lightfoot, in her analysis of global Indigenous rights within International Relations, argues that social constructivist approaches can analyse the contested process of developing new norms in the context of global Indigenous rights. However, what 'constructivist IR does not sufficiently theorise is the Indigenous movement's underlying resistance to the existing international system in which it takes part and the fundamental changes which would be necessary in the international system in order to fully accommodate Indigenous Peoples rights' (Lightfoot, 2009, p51).

Though Dembour contends there can be overlap between the major schools of thought she has identified, the deliberative school views human rights as a development of political values of liberal societies through a social agreement (2010, p.7). According to Dembour, deliberate proponents tend to be less interested in the foundation of human rights than the justification of human rights (2010, p.7). The Deliberative perspective is also reliant on international law to enact democratic decision making. The deliberative school of thought, she suggests, 'conceives of human rights as political values that liberal societies choose to adopt,' noting that this approach now dominates (Dembour, 2010, p.3).

A further school of thought, the protest school seeks to use human rights to contest injustices in society, to assert the rights of marginalised peoples and reduce social and economic disparity, repression and injustice (Dembour, 2010, p.3). Protest theorists attribute human rights as an outcome of struggle. According to Dembour, protest adherents tend to be distrustful of human rights law, conscious that law is controlled by the elites (2010, p.6). The protest school focuses on the social obligation to ensure rights are respected for all peoples, particularly those more disempowered peoples.

Finally, while the discourse school considers the language of human rights can on occasions achieve outcomes, they don't consider a rights conception as addressing injustice (Dembour, 2010, p.6). Though some discourse proponents may advocate for social justice, they generally focus on the failures of human rights, where promises rarely delivers real outcomes (Dembour, 2010, p.8). Discourse scholars are critical of the natural school's imperialist tendencies, its discounting of differing societal values and its ignoring of underlying power relations. Dembour suggests, the discourse school is more aligned with the protest school which denounces injustice (2010, p.9).

These four broad schools of thought assist in an analysis of various approaches, such as that of Sharon Speed (2008), who Dembour associates with the discourse school. According to Speed, 'the widespread utilization of human rights as a discourse of resistance reflects the hegemonic position of both Western legal institutions and the liberal ideology of the global market that sustains them...Theoretically, we can learn more by looking at the various reappropriations of the discourse of human rights, and the way that they emerge in particular interactions: the way the tool is held by particular social actors in particular contexts' (2008, p.18). In reviewing the Zapatistas campaign in Mexico, Speed notes that while the Zapatistas drew on the views of the Catholic Church, that rights are innate and 'situating God as the highest authority, rather than the sovereign or state', they also aligning with Indigenous conceptions of their inherent rights (2008, p.41).

In the Chiapas the Zapatistas reformulated human rights, abandoning negotiations with the Mexican state and instead built on a conception of rights that pre-existed the state, and didn't require state endorsement (Speed, 2008, p.53). According to Speed the Zapatistas' political struggle is based on asserting their own conception of their rights, 'resistance is coterminous with power. In the current context of globalisation, resistance always has the potential, through the constitutive power of social

struggle, to challenge sovereign power by utilising the tools at hand and asserting alternative logics' (2008, p.37).

The approach adopted in this thesis is framed around my own Aboriginal conceptions of our sovereign rights to our self-determination, these rights are inherent, they are passed from our ancestors and immersed in cultural obligations. For many Indigenous Peoples, their intrinsic rights are transmitted across generations and grounded in culture, so are not 'natural' rights in a western sense. Indigenous rights, though innate, are politically conceptualised, articulated and asserted through a process of political struggle. This approach acknowledges that the recognition of Indigenous rights is attributable to Indigenous Peoples' agency and contestation against the historic and continuing legacy of colonialism. This conception also recognises that Indigenous Peoples' draw on international law to counter the hegemony of the state and contemporary expressions of colonialism as an extension of this struggle. However, Indigenous rights are not conferred by a legal framework, rather they precede it.

### 3.5.1 Rights Critiques and their Implications

Debates over human/Indigenous rights raise concerns around the capacity of rights frameworks to consider the causal, structural and historical factors that contribute to injustice. Susan Marks argues that human rights advocates have focused on documenting abuses rather than examining the root causes (2011, p.57). She documents how reports from eleven Special Rapporteurs showed structural causes of human rights violations, while few translated those causal connections into effective recommendations (Marks, 2011, p.62).

The depoliticising character of human rights is canvassed by David Kennedy, who questions whether human rights detract from more emancipatory approaches, where participation and procedure replace more justice-oriented redistribution and empowerment approaches. Kennedy argues that rather than addressing injustice, human rights act to maintain 'existing distributions of wealth, status and power' (2002, p.109). According to Wendy Brown, human rights can be viewed as 'a cultural form of liberal imperialism; they are a guise in which the globalisation of capital drapes itself' (2004, p.451).

The contradictory role of the state in addressing rights is raised by Upendra Baxi, as the framework of rights 'casts the state and law as 'neutral arbiters of injury rather than themselves invested with the power to injure'' (1998, p145). This leaves rights violations dependant on the political will of states, where rights are not adequately enacted or enforced, leaving states themselves to determine if rights are aspirational or concrete. According to Marks, rights may be perceived as stabilising the social structures that replicate oppressions and inequity, rather than challenging those political powers (2011, p.72).

Additionally, critiques of rights frameworks include their incapacity to appropriately monitor and control global corporations and extractive industries (Kennedy, 2002, p109). The right to development has raised further concerns, where development initiatives impose extractive economic models conceived through a neo-liberal market framework that fails to address poverty, while enacting high environmental costs. Human rights, according to Brown, fail to account for the fact that capitalism is founded on 'colonialism and a global economy in which the wealth of core states is predicated in part on the poverty of the periphery' (2004, p.456).

Further, Baxi condemns what he terms the 'often elephantine gestation period' which generally resulted in soft human rights laws, that have little impact on conduct, while hard laws are rarely enforced. Kennedy similarly contends that where processes and institutions have been established to address human rights abuses, the failure to address the causal factors contributes to little impact on the ground (Kennedy, 2002, p110). More significantly, Baxi emphasises that rather than human rights violations being random attacks on individuals, they are the conscious expression of global politics (1998, p.145).

Despite these legitimate concerns and limitations around human rights frameworks, I argue that Indigenous People use human rights frameworks in a bid to move abuses beyond the impunity of settler-states to the jurisdiction of international law. The assertion of human rights has been used by Indigenous Peoples, in combination with on the ground activism, to leverage outcomes and strengthen Indigenous claims. Joyce Green, who is aligned to the protest model of the four frameworks, contends that 'the relationship is adversarial, and every right won is through struggle on the hostile terrain of settler-state courts and legislature' (2014, p.4). It has also required Indigenous Peoples to exert a transformational premise, to reinterpret, adapt, extend and strengthen existing international human rights law. In this regard, the approach taken here is consistent with Shannon Speed's view that, 'human rights discourse and practice can simultaneously be a discourse of globalised neoliberal capitalism, as well as an effective tool in its resistance' (2008, p.181). In this endeavour Indigenous Peoples draw on and seek to reform international law to challenge the historical, political and economic causal factors that continue to foster the violation of Indigenous rights.

### 3.5.2 Debates in Indigenous Rights

The question of whether indigenous rights are in fact human rights and thus binding on states is also critical. States often justify a failure to implement Indigenous rights by asserting that they are a distinct set of rights specific to Indigenous Peoples, so are aspirational and not legally binding, as required with human rights. The assertion that UNDRIP is aspirational was cited by Australia when they endorsed it in 2009. Jenny Macklin noted, 'the Declaration is historic and aspirational. While it is non-binding and does not affect existing Australian law, it sets important international principles for nations to aspire to' (Macklin, 2009, p3). This has enabled the ritualistic endorsement of Indigenous rights by settler-states that claim to be compliant global citizens while failing to respect those rights (Clemmer, 2014 p.104).

Peter Kulchyski argues that Indigenous rights are not human rights, asserting that each emanates from a different justification and conception of rights. While Kulchyski claims human rights are universal, deriving from the enlightenment and 'the rights of man', Indigenous rights, he contends, reflect a 'cultural particularism' (2013, p.21). He draws on the Canadian Supreme Court to argue that Indigenous rights are tied specifically to cultural practice. In the determinations of *Van Der Peet* (1966), on the right to harvest fish, the court found that, 'in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right (para 46)' (Kulchyski, 2013, p.41). Kulchyski further asserts that there has been a 'conceptual confusion between aboriginal rights and human rights' (2013, p.37). He argues that the *Der Peet* court finding stated:

'Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights

enshrined in the Charter [Canadian Charter of Rights and Freedoms], aboriginal rights must be viewed differently from charter rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal' (Kulchyski, 2013, p.42).

Kulchyski agrees that many rights articulated in UNDRIP are human rights, including those related to social and economic marginalisation, attempted genocide, dispossession of land, victims of repression and violence, rather than specific rights related to Indigenous Peoples (2013, p.53). In this sense, he suggests there are two forms of Indigenous rights, property rights and political rights that are Indigenous specific. Indigenous political rights, he contends, don't derive from property rights, but rather, 'aboriginal cultures are the waters through which aboriginal rights swim' (Kulchyski, 2013, p.41). Indigenous rights, he asserts, derived from prior occupancy while aboriginal title is related to claims to land (Kulchyski, 2013, p.41). However, to frame Aboriginal connection to land through a property lens and reframe it as a property title fails to recognise the distinct ontology and interconnectedness of Indigenous culture, where land is not distinct and open for commodification.

A further element of this debate concerns a perceived conflict between cultural relativism and the universalism of human rights. Kulchyski contends human rights are generally tied to an urban context while Indigenous rights, like customary rights are in a rural context, where 'aboriginal rights are the customary rights of Indigenous Peoples. There is a performative element to aboriginal rights, in as much as they are grounded in the embodied practice' (2013, p.48).

However, this thesis argues that a focus on cultural practice distils complex ontology to narrow western definitions of Indigenous culture, dependant on visual practices, ignoring their distinctive

values and worldviews. Indigenous rights are grounded in an ontology and values based on reciprocity, recognising an onus of responsibility for the community. I question whether Kulchyski is imposing western conceptions of modernity and presumptions of assimilation in urban environments in determining which rights are Indigenous and which are human rights. Joyce Green rejects Kulchyski's notion that Indigenous rights relate only to culturally specific practices and so are not a form of human rights (2014, p.4). Green argues that Indigenous rights are a species of human rights, not a separate set of rights, which she sees as critical to a path of decolonization (2014, p.6).

While Kulchyski acknowledges Indigenous rights emerged through struggle (2013, p.70), he argues that human rights are inherently constrained to seek a form of equality which is inconsistent with differentiating Indigenous rights. Rather than being empowering, Kulchyski asserts, UNDRIP frames Indigenous Peoples as victims in need of the benevolent support of states. Kulchyski argues that in placing Indigenous rights within the United Nations human rights system, asserting Indigenous rights as an extension of human rights, universalism will always trump cultural difference, so Indigenous rights will always take second place (2013, p.54).

However, I argue that rather than being victims, UNDRIP is a reflection of the collaborative strength of Indigenous Peoples globally to assert our rights in a state based international body. Indigenous Peoples' rights seek equality of self-determination, where all 'peoples' can reflect their cultural differences and distinctive values. UNDRIP reflects those rights as distinguishing Indigenous Peoples from the colonising settler-state, with ongoing historical and cultural ties to country, historical 'ownership' in a western sense, to lands forcibly and violently expropriated and which continue to carry a legitimacy deficit.

Richard Clemmer asserts that UNDRIP provides an additional level of rights to the Universal Declaration on Human Rights, and while not undermining any existing individual based rights, it also provides for collective rights to ownership, cultural expression, self-determination, restitution, 'free, prior and informed consent', group decision-making and rights over traditional lands and waterways (2014, p.101). Clemmer argues that abuses against Indigenous Peoples are due to their collective rather than Indigenous status (2014, p.110). Clemmer misses critical distinctions of Indigenous rights in asserting that those issues impacting Indigenous peoples, the 'forced relocations, ...exploitative labour practices replacing self-sustaining economies with dependent ones, disposing of collectives through discrimination or neglect', 'are precisely those that impact non-Indigenous communities' (Clemmer, 2014, p.109).

To contend that the abuse of Indigenous rights is as a result of their collective status ignores the brutal experiences of colonisation, the dispossession, the contemporary oppression and the ongoing political imperative to deny Indigenous rights as a legacy of that colonialism. Indigenous rights are distinguished in UNDRIP from other human rights violations because of that history and the historical denial of Indigenous rights in domestic and international law.

Mililani Trask asserts that UNDRIP doesn't create new rights but rather confirms Indigenous Peoples as recipients of existing human rights (2012, p.328). Trask argues that while declarations are formally non-binding and aspirational, 'it cannot be applied to the Declaration on the Rights of Indigenous Peoples when it is used as an interpretative standard for state obligations contained in human rights conventions, and where the obligation, or alleged violation, pertains to Indigenous Peoples' (2012, p.334).

In this thesis I recognise that Indigenous rights are a distinct form of human rights recognising the unique historical context of Indigenous experience and oppression. Indigenous rights as a component of human rights recognise Indigenous equal rights as 'Peoples' in international law. Indigenous rights are also inherent rights passed from our ancestors, as peoples with ongoing connections and obligations to country, that pre-exist colonisation and the settler-state. These rights have been asserted through political struggle with our rights to self-determination as 'peoples', separate to that of colonising settler-states. While we draw on international law, our rights are not bestowed by that law but rather precede it. International law simply recognises those pre-existing rights.

### 3.5.3 Indigenous Rights Within International Law

It is the capacity to hold settler-states accountable to the global community, provided through standard setting and review by international human rights instruments of the United Nations, that draws Indigenous Peoples to what is essentially a state-based system. International law is determined by sovereign states and is based on the premise of non-interference in the domestic workings of other states. James Anaya surmises, 'International law is between not above states, findings its theoretical basis in their consent' (2009, p.44). The principal basis of non-interventionism of sovereign states historically left Indigenous Peoples' experiences of colonisation and the appropriation of their lands outside of international protections (Anaya, 2009, p.44).

Indigenous rights discourse, indeed all human rights discourses, directly challenges the Westphalian basis of states. The Westphalian system is enshrined in the United Nations and refers to the principle of state sovereignty in international law, where states are equal despite their size, and have full control of their domestic sphere. However, international human rights law has developed from

international law that only recognised states, to recognising individual's rights. Indigenous Peoples' claims extend the recognition of rights from states and individuals to 'peoples' with independent rights to self-determination within existing settler-states, as well as claims as 'peoples' within international law.

The extension of international law to incorporate Indigenous Peoples through UNDRIP, based on the universal principles of the UN Charter, provided Indigenous Peoples opportunity to use international legal instruments to leverage better outcomes and hold settler-states accountable. While UNDRIP took more than two decades to be established, it marked a departure from the United Nations being an exclusively state based body, drawing Indigenous Peoples into negotiations on UNDRIP. The recognition of Indigenous rights and capacity to participate in United Nations forums, albeit as non-Government Organisations rather than as nations, provided unprecedented engagement by non-state peoples and bodies within United Nations instruments. Additionally, the broad endorsement of UNDRIP by the General Assembly in 2007 brings increased pressure on settler-states to implement those Indigenous rights specified in UNDRIP.

This increased participation has highlighted a discrepancy between internationally accepted minimum standards for Indigenous rights endorsed through international law, and a failure to implement this through domestic legislative and policy approaches. Though UNDRIP asserts Indigenous Peoples as equal parties to universal human rights (O'Sullivan, 2017, p.102), including the right to self-determination, it has largely failed to be enacted after almost 20 years, drawing criticism that it has remained symbolic. Jeff Corntassel highlights how the failure to achieve legally binding human rights standards and a continued state resistance to self-determination, has resulted in an illusion of inclusion in global forums, where 'tactics of exclusion, domestication, and assimilation are still part of standard state practices towards Indigenous peoples today (2008,

p.111).’, He argues that ‘the pursuit of a political/legal rights discourse leads Indigenous Peoples to frame their goals/issues in a state-centered (rather than a community centered) way’ (Corntassel, 2008, p.115).

Sheryl Lightfoot argues that where settler-states that espouse a liberal democracy find international rights norms don’t align with their national interests, such states may publicly endorse but fail to implement those rights or undertake what she terms ‘selective endorsement’ (Lightfoot, 2016, p.96). According to Lightfoot, endorsement can be used to mediate global scrutiny, where states maintain their reputation as compliant with human rights by interpreting existing legislative and policy approaches as aligning, without fundamentally changing their existing approaches (Lightfoot, 2016, p.97). Such ‘selective endorsement’ also acts to domesticate Indigenous right, beyond global scrutiny.

Where settler-states are starting to move towards implementation plans, Indigenous Peoples have raised concerns about them developing national action plans based on state definitions of the rights they will recognise, without sufficiently engaging with Indigenous Peoples in defining what constitutes those Indigenous rights (Perley, 2018, p.2). David Pearly et al. argue, ‘the very idea of ‘rights’ as something granted to citizens by a sovereign is the language of colonialism’ (2018, p.2). The very concept of self-determination and UNDRIP would be undermined if states, rather than Indigenous Peoples defined how Indigenous rights should be recognised.

The paradox of human rights law is that the states responsible for the implementation of human rights frameworks through domestic laws, are also the same states responsible for breaching Indigenous rights. Other than oversight mechanisms of the United Nations, states are the granter, adjudicator and defender of rights in the domestic realm, where settler-states are either the

perpetrator or overseer human rights abuses, and where limited national judicial systems are the only means to seek justice (Speed, 2008, p.26). The concepts of rights, according to Speed, 'do not challenge the notion of the state/sovereign as the legitimate source of rights and the law as the sacred site of their establishment' (Speed, 2008, p.47). The inherent weakness of this international legal framework is that calling on states to establish laws to police their own actions result in the most egregious of breaches rarely eliciting a global response.

With rights recognition dependent on state compliance, Indigenous rights that are promoted through studies instigated by the United Nations tended to focus on safe topics, such as those undertaken by EMRIP when the topic was selected by the Human Rights Council, up until 2017. This resulted in six of the first eight topics dealing with education, language and culture, disaster risk reduction, cultural heritage, health and discrimination in business. Though these are important, only two dealt with the more controversial topics that examined power relations, the right to decision-making and access to justice. However, since 2017 the topic of EMRIP reports have been determined by EMRIP Members and have canvassed 'free, prior and informed consent' (FPIC), reparations, displacement, right to lands, self-determination, treaties, militarisation, national and regional monitoring of UNDRIP and domestic legislation established to implement UNDRIP (EMRIP website).

Domestic legal systems enforce the power of national elites, where neo-liberalism's dismantling of regulations opens Indigenous lands to increased threats by global markets. According to Speed, the 'normalizing power of the law, the unparalleled legitimacy it gives the state, and the command-obedience relationship it maintains with its citizens becomes particularly dangerous given our current global juncture' (Speed, 2008, p.139).

The recognition of Indigenous rights has provided Indigenous Peoples with international recourse to contest the state's political authority and assert their political, social and economic rights. According to Dominic O'Sullivan 'Indigenous/state political relationships are distinguished by state reliance on domestic laws and political influence to counter Indigenous claims to shared sovereignty, which is becoming increasingly relative and relational, rather than the absolute indivisible and incontestable domain of the state' (O'Sullivan, 2017, p.106). O'Sullivan asserts that UNDRIP acts to move Indigenous Peoples and settler-states to a point of implied 'shared relational and relative national sovereignty' (O'Sullivan, 2017, p.102). However, rather than ameliorating rights recognition O'Sullivan contends that, 'instruments of International law such as the Declaration have become a site of tension between domestic authority and international norms of justice' (O'Sullivan, 2017, p.106). The last two decades have heightened this discord over a lack of legitimacy of settler-states because of intensified pressure on Indigenous lands and resources resulting in increased dispossession with the extension of globalization (Tully, 2008, p.266). In response, some Indigenous Peoples are seeking new treaty processes to be negotiated to implement Indigenous rights, that reaffirm nation to nation status and provide for 'free prior and informed consent', with capacity to reject resource extraction (Perley, 2018, p.3).

It is the necessity to bridge this disjuncture between international law, and the entrenched failure by states to enact Indigenous rights in Australia, which has motivated this study. Following this examination of Indigenous rights in international law, a review of the social structures influencing settler-states and their capacity to address their legitimacy deficit is warranted. James Tully argues that 'if Canadian governments fail to enter into negotiations to recognise the status of the Aboriginal Peoples as equal yet prior nations, then they violate the inherent right of self-government, the ground on which the legitimacy of the global system rests' (2008, p.234).

### 3.6 Indigenous Challenges to State Supremacy

The assertion of Indigenous rights challenges state supremacy and contests state legitimacy. The continuing social, economic and political inequality experienced by Indigenous Peoples in liberal societies challenges liberal conceptions of justice. The legitimacy of settler-states rests on their acknowledgement and reparation of their treatment of Indigenous Peoples. James Tully contends that, 'a society is legitimate and worthy of obedience if and only if the members suffering an injustice have the right to initiate political, legal or constitutional change and the other members have a duty to enter into negotiations in good faith to rectify the injustice' (2008, p.235). Where states fail to address this disparity, where Indigenous rights are not recognised, nations are increasingly being challenged on a 'might is right' approach that is an anathema to liberal democracy, international law and the United Nations Charter on which European settler-states base themselves (Tully, 2008, p.234).

In this regard, democratic decision making such as majoritarianism is not sufficient to provide legitimacy. According to Euan McDonald, unless it incorporates consent of the membership of that community, the validity of democratic decision making is questionable (2014, p.189). Further, even domestic judicial processes among settler societies have highlighted a legitimacy crisis. Legal cases such as, *Calder vs Canada* in 1973 (Tully, 2008, p.268), and the 1992 *Mabo Case* in Australia, raised the existing legal quandary regarding the legitimacy of the invasion and dispossession of Indigenous Peoples in those territories based on the fictitious assertion of *terra nullius*. Maria Giannacopoulos refers to this legitimacy crisis as a sovereign debt, where the origins of colonial settler societies, the basis of their wealth, is without legal basis but is concealed by a broad social denial, which attempts to distinguish contemporary Australian society from the violent appropriation of the past.

Giannacopoulos surmises ‘theft is not a moment in the past but an active technology of colonial power. This seemingly limitless accumulation of debt is the disavowed pre-condition for the very existence and economic viability of contemporary Australia’ (2017, p.35).

The TIRT approach undertaken in this thesis seeks to expose this legitimacy deficit and promote a greater focus on the potential to transform relations between Indigenous Peoples and settler-states within contemporary liberal society. I argue that contemporary perceptions of justice and the legitimacy of settle-states rests on addressing the historical and extant injustices that can no longer be unquestioningly ignored or condoned and that continue to oppress Indigenous Peoples. To inform the development of this theoretical approach, an examination of key features of former British settler-states, their influence on the political climate is warranted, before assessing the capacity to shift societal norms to respond to Indigenous claims. The final section of this chapter then elaborates on the theoretical framework that I have developed to facilitate this research.

### 3.6.1 Contesting Existing Structures

Indigenous rights challenge the legitimacy of settler-states, their attempts to justify the legacy of colonial imperialism and their efforts to extinguish Indigenous Peoples’ unique claims. Settler-states have shown themselves as unwilling to treat Indigenous Peoples with the same human rights entitlements afforded to other citizens. According to Joyce Green, ‘the racialization of Indigenous Peoples (is) [as] a state stratagem that legitimises their exploitation and blames contemporary Indigenous Peoples for their suffering consequent to that exploitation’ (2014, pp.5-6). The repression of Indigenous Peoples has required the compartmentalizing of their poverty and human rights abuses from the causal factors of dispossession, deprivation, state violence and racism that continues to define Indigenous experience.

The international human rights system reflects the promotion of individual rights, as a central tenet of classical liberal theory and is a feature of former British settler-states. Liberalism defines rights as individualistic, egalitarian and universal, with rights, theoretically, applied to all people equally irrespective of ethnicity, social class, sexuality or nation (Patton, 2016, p.14). However, much liberal theory supports the premise of Westphalian sovereignty that justice must be delivered through the state. States assert the interests of elites, establish civil and legal structures and foster societal norms that promote their interests, often at the expense of Indigenous Peoples. However, Indigenous Peoples on whose lands the wealth of the nation is based continue to be economically, socially and politically marginalised. A correlation between theories of colonialism and capitalism is drawn by Susan Brophy, where contemporary liberal settler-states continue to incorporate strategies of racial essentialism and exclusion into the systemic legal structure of the state to undermine the interests of Indigenous groups (2012, p.47). According to Brophy, it is not the ideals of liberal democracy alone that promote oppressive relations but the intermingling of such ideals with capitalist objectives within a neo-liberal ideology, that are executed through relations of colonial exploitation (2012, p.48).

While liberalism defined itself as ostensibly espousing individual freedoms, Paul Patton argues liberalism established a regime of controls to facilitate capitalist markets. Patton asserts, 'liberal government did not simply endorse freedom but established limitations, controls and various forms of coercion to ensure the kinds of freedom needed for the effective operation of markets' (2014, p.22). A key feature of liberal states was the provision of welfare services and protections to ameliorate the worst excesses of capitalism, however, in the 1980's liberalism's privileging of capitalist market forces morphed into the more virulent form of neoliberalism. Paul Patton argues, 'neoliberalism reinvented the aims as well as the techniques of liberal government and sought to

extend the reliance on market mechanisms to areas of civil and social life previously exempt' (2014, p.22). This heightened form of capitalism advocated for the privatization of resources and services, the deregulation of markets, unencumbered free trade and a move to government managerialism. According to Isabel Altamirano-Jimenez, 'neoliberal globalism is reshaping the substantive recognition of Aboriginal cultural difference and inherent rights' (2004, p.349).

A central means of justifying liberal and neoliberal capitalist societies is the democratic framework of decision making that, in theory, provides universal enfranchisement through citizenship. However, according to Euan MacDonald, 'democratic legitimacy claims, like all constitutional legitimacy claims, only have purchase over those who agree to belong to the association in question' (2014, p.186). Liberal democratic electoral processes provide indirect decision-making and accountability to citizens on the operation of government. However, operating under democratic processes of a majority-wins paradigm always leaves Indigenous minorities at the whim of powerful elites and majority votes (Tully, 2004, p.102). James Tully argues that the democratic realisation of rights through representative government has previously failed to protect Indigenous minorities (2013, p.186). Rather, institutional structures inherently protect the majority that benefit from Indigenous dispossession (Tully, 2013, p.186). For Indigenous minorities, majoritarian rule frequently excludes them from decision making, forcing Indigenous claims into a politics of contestation.

Dominic O'Sullivan suggests liberal democracy is a fraught means of providing citizens with shared authority, with liberalism's pervasive weakness its focus on commonalities, rather than an ability to mediate difference. O'Sullivan asserts that Indigenous Peoples' assimilation into the broader 'culturally homogenous community is positioned as an essential precondition for full democratic participation' (2017, p.61). Strategies of assimilation are a common feature of colonized states, following initial phases of invasion, extermination, dispossession, segregation and suppression. Tully

asserts that policies of assimilation equal a form of 'difference blind liberalism' (2008, p.264). He contends that 'the long-term aim of the administrators of the system has been to resolve the contradiction by the complete disappearance of the Indigenous problem: that is, the disappearance of Indigenous Peoples as free peoples with the right to their territories and governments' (Tully, 2008, p.262).

Foucault's concept of governmentality is useful in analysing how processes of democracy and liberalism can be used to repress political and social struggles. According to Foucault, western societies whose power was previously expressed through warfare 'gradually became invested in the order of political power' (Patton, 2014, p.23). Foucault posed that this transfer of power from direct force in states of war, developed through a process of governmentality to a subtler form of exertion (Patton, 2014, p.19). For Foucault, power does not involve direct confrontation between contending forces, but forms of action on populations, where these are considered as natural phenomena (Patton, 2014, p.21). Governmentality does not refer to the narrow sense of government controls but rather it encapsulates 'all modes of actions more or less considered and calculated, which were destined to act upon the possibilities of action of other people (Tully, 2008, p.124). If the assertion of power requires an intensification to maintain control, then it transforms to a 'structure of domination' (Tully, 2008, p.126). Foucault's analysis of power informs an examination of Indigenous Peoples where settler-states have transferred from invasion to governmentality as a means of control and erasure of Indigenous claims.

Patrick O'Sullivan takes a similar analysis in relation to Indigenous Peoples' experiences of neo-liberalism having taken an interventionist paternalistic form that he refers to as 'neoliberal public management' (2018, p.202). For Indigenous Peoples, neoliberal ideology 'developed into a complex hybridisation of neo-liberal strategies that today target every dimension of Aboriginal life, from

social security payments to school attendance to the way that Aboriginal organisations do business' (Howard-Wagner, p.14). This managerial approach in Aboriginal communities enacted highly interventionist and coercive policies, as outlined in the introduction, to instil compliance and an openly assimilationist intent. In basing policies on a neoliberal market framework, the state rejects the notion that Aboriginal values and community aspirations may vary from capitalist profit-based conceptions.

The assimilation of a compliant Indigenous elite, which suggests a path out of marginalisation and poverty through the adoption of the dominant non-Indigenous culture, is claimed to benefit Aboriginal communities to legitimize the continued exploitation of Indigenous lands. Tully contends settler-states' aim in assimilating Indigenous Peoples is to disappear Indigenous claims (2008, p.262). However, Indigenous Peoples' claims are 'to be recognised as 'peoples' with the 'universal' right of self-determination, based on prior occupancy and sovereignty, and thus to be recognised as 'equal' in status to other 'peoples' in international law and federal constitutional law' (Tully, 2004, p.94). Tully recognises that struggles are about underlying inequalities 'not some hypothetical conflict between diversity or special treatment on one side and the defenders of universal equality and the status quo on the other' (Tully, 2004, p.94). Importantly for this study, Tully argues that a settler-state can consist of more than one group with internal self-determination, and that Indigenous Peoples require self-determination to express the freedoms asserted in liberal thought.

Democratic principles and liberalism are explored below, not as a suggestion to further enculturate and absorb Aboriginal People as part of the broader colonial project, but rather to argue that liberal conceptions of democratic principles, which dominate contemporary settler-states, are in fact compatible with Indigenous calls for the recognition of dual sovereignty. The existing sovereignty of Indigenous Peoples, having never been ceded, can potentially bring legitimacy to problematic

assertions of colonial-based sovereignty by settler-states, through concurrent dual sovereignties. Significantly, it provides an opportunity for settler-states to move beyond the current forced occupation to post-colonial relations with Indigenous Peoples.

### 3.6.2 Liberalism's Capacity to Respond

A number of political theorists have addressed the potential for liberal settler-states to recognise the unique claims of Indigenous Peoples. They contend that rather than seek equality of treatment, Indigenous Peoples ought to assert their rights as 'peoples' on the basis of the fact that they held pre-existing sovereignty prior to settler-state invasion and colonization and so require a distinctive status. For Indigenous Peoples looking to uphold their sovereign rights to self-determination, it can be useful to draw on relevant mainstream conceptions of democratic process. We can do this by examining the work of political and social theorists who highlight the potential for democratic systems to incorporate more deliberative models, to be more responsive to Indigenous grievances and who emphasise the need for settler-states to constructively confront their legitimacy deficit.

The need for 'special minority rights' is argued by Phillip Pettit, who acknowledges that some will object to rights which don't treat all people equally as a breach of a founding principle of liberalism. However, he contends, most will recognise that in this case, the point of difference is to achieve greater equality through the recognition of actual differences and the disadvantages experienced by a minority group (Pettit, 2000, p.202). Special minority rights acknowledge that the majority will not reflect the specific needs of minorities for their survival or circumstances. Pettit contends that if 'democracy requires a regime under which people have equal and full contestatory as well as electoral standing, then we should have no difficulty in seeing special minority claims as a natural part of a broad democratic package'(2000, p.215).

Pettit's focus is on minority groups and to the extent this would apply to Indigenous Peoples, it is because they are conceived of as a minority, rather than as an outcome of unique claims of sovereignty. Where democratic processes fail to respond to culturally distinctive minority claims, such as for Indigenous Peoples, then Pettit argues that 'the only recourse possible is for the state to give over its decision-making powers on a range of issues that affect the minority to their own representatives and, as it will be, their own government' (2000, p.214). Dominic O'Sullivan extends this argument with regard to Indigenous Peoples, asserting liberal democracy can potentially provide 'a way of mediating power relationships and reconciling indigenous nationalism with the harmonious sharing of national sovereignty' (2017, p.63).

O'Sullivan asserts 'participatory parity' as a means to decolonize Indigenous state relations. While O'Sullivan argues citizenship and liberal democracy are the means for enacting the shared sovereignty of people, he acknowledges Indigenous Peoples hold particular additional claims of sovereignty, noting 'citizenship's full possibilities do not develop from public benevolence, nor simply from the just intersection of rights and responsibilities, but from personal capacity'(2017, p.58). Rather than imposing a homogenous community, O'Sullivan suggests differentiated citizenship can move beyond simple recognition, to a revised relationship based on 'Indigenous Peoples' autonomy over their own affairs and some say over the ways in which they will contribute to national political decision making' (2017, p.61).

Liberalism's capacity to respond to Indigenous sovereignty is examined by Duncan Ivison, who argues that liberalism hasn't just emerged from a history of injustice but continues to actively perpetuate injustices, and questions the source of post-colonial normative legitimations of power (2017, p.124). Ivison highlights that a consistent criticism of liberalism is its failure and lack of capacity to address the underlying structural power relations where, 'to lack adequate control over

the laws, institutions and procedures to which you are subject (and which are unavoidable) is to lack freedom from domination' (2020, p.99). However, he notes, the 'structures of domination' can be invisible to those not subject to them, so for Indigenous Peoples 'political legitimacy needs to be pluralised' (Iverson, 2020, p.105).

Indigenous Peoples have been excluded with the 'promise of liberal legitimacy as perpetually deferred' (Iverson, 2017, p.128). According to Iverson, both justice and legitimacy, which are interdependent but not the same are required to achieve just outcomes. He distinguishes legitimacy from justice, with justice focusing on the outcome and legitimacy focused on the process of decision-making (Iverson, 2017, p.124). A focus on justification, according to Iverson, transfers the onus from states to their citizens and the accepted norms of society, which enables the contestation of norms to reflect the differing perspectives of society. This enables what he terms a 'multi-personal' approach inclusive of differing views, which is responsive to a bottom-up process of reasoning rather than top-down (2020, p.104). The 'marriage equality' debate in Australia provides a recent example, where support through a voluntary plebiscite, reflected that the state structures were out of step with community norms and then accommodated that difference.

Iverson draws on the example of Indigenous political theory and Indigenous activism in highlighting the need for liberalism to overcome exclusionary processes, to facilitate the contestation and legitimation that enables a shifting of norms (2017, p.127). Self-determination, according to Iverson, has two elements, the Indigenous determined form of Indigenous Peoples' relations with the state and the capacity for self-governing autonomy. Significantly, Indigenous Peoples aren't national or cosmopolitan but are both national and international actors (2020, pp.109 & 110).

Iverson asserts, 'we should look for the glue of the liberal democratic belonging ... in the ways in which our democratic practices grapple with difference and disagreement' (2020, p.115). Indigenous Peoples provide opportunities to meet the challenges of dealing with enduring injustices, where, according to Iverson, 'liberalism can begin not only to address deep historical wrongs, but also to develop a compelling vision for the future of liberal democracy' (2020, p.116). Critically, Iverson questions, if 'the global structures of sovereignty and capital might appear so entrenched and yet based on such flagrant violations of liberal egalitarian principles, that we are at a kind of dead end for liberalism', which may require revising social norms outside of liberal democratic processes to enable indigenous sovereignty (2017, p.128).

O'Sullivan, suggests there is capacity for liberalism to respond to Indigenous sovereign claims, asserting that, 'together liberal democracy and indigeneity create opportunities for Indigenous Peoples to articulate their own conception of justice' (2017 p.64). However, it is apparent that the democratic liberal settler-state has to date failed to acknowledge Indigenous Peoples rights. As Kenneth Deer asserted during our interview, "Indigenous Peoples must demand their rights - they won't just be given" but these debates indicate a potential flexibility can be accommodated in contemporary settler-state where the necessary political will exists.

### 3.7 A Theoretical Foundation

The theoretical framework of this research was required to assert Indigenous sovereign rights and foster structural change both domestically and within international spheres, to give expression to Indigenous rights. However, existing theoretical approaches were found inadequate for the transformative task demanded. In response and having been influenced by a number of scholars

related to the assertion of Indigenous rights, I developed a theoretical approach I termed Transformative Indigenous Rights Theory (TIRT).

The work of James Tully's on public philosophy has particularly aligned with and informed my own praxis-oriented approach. Tully advocates tying academic research pursuits to the political challenges facing marginalized, but particularly Indigenous communities, while espousing that such research also engages with those peoples enmeshed in their struggle for justice. It is an approach that both compliments and is useful to Indigenous Peoples' assertion of their rights. He proposes undertaking research that exposes the struggles, social structures, power relations and opportunities for contestation and change to analysis. Tully asserts, 'studies in public philosophy are thus specific toolkits offered to civic activists and civic minded academics working on the pressing political problems of our time' (2008, p.4).

Tully argues political theories can either endorse the usurpation of Indigenous rights, condoning state actions of repression and dispossession, or they can support processes of Indigenous resistance by challenging the legitimacy of these practices (2008, p.266). The public philosophy Tully espouses is distinguished in not proposing theory from above the fray of political contestation, rather he advocates that researchers expose the historical and normative social manifestations to public scrutiny. In aligning critical philosophy more closely to specific struggles, Tully seeks to support more practical outcomes rather than add to abstract theory.

Public philosophy strives to reassess areas of contestation around governance, challenging the existing structures, questioning their natural and neutral status. It is an approach committed to transforming power structures to better reflect those currently repressed to assert alternative means to govern themselves. Tully asserts, 'it is not only an interpretative political philosophy, but

also a specific genre of critique or critical attitude towards ways of being governed in the present - an attitude of testing possible transformation' (2008, p.16).

For Indigenous peoples, and for this research project in particular, Tully's innovation is in the melding of philosophical thought with that of required political action on the ground in a bid to achieve transformational change. It is an 'analysis of the limits that are imposed on us and an experiment with the possibility of going beyond them' (Tully, 2008, p.82).

### 3.7.1 Bedrock Principles of TIRT

The approaches Tully and Foucault espouse assisted in the development of my own Transformational Indigenous Rights Theory (TIRT). As with Tully and Foucault I seek to challenge and illuminate existing power structures. Additionally, TIRT is grounded on a transformational premise that seeks to upend the perceived natural order and legacy of colonialism. Significantly, however, TIRT is a theoretical approach that strives to assert Indigenous Peoples aspirations, seeks practical outcomes and envisions a future determined by Indigenous Peoples. It is an approach that examines liberalism's capacity to respond and seeks to prize open space to promote Indigenous conceptions of more positive relations between Indigenous Peoples and settler-states.

A foundational principle of TIRT is enacting a decolonisation premise, that drives the transformative imperative. Decolonisation is a unique requirement for Indigenous Peoples. It draws on postcolonial theorists, such as Franz Fanon, Edward Said, Gayatri Spivak, Ngũgĩ wa Thiong'o and others, who confirm the ongoing impact of colonialism even after it formally ends. For Indigenous Peoples, where the social structures of colonialism remain intact through the influx of settler populations, I argue

that an Indigenous specific response is demanded to address this form of contemporary colonization.

Though decolonising processes have been established globally, in being subjected to settler-states, Indigenous Peoples' experiences are distinct from other processes of colonisation. For Indigenous Peoples the colonisers have generally stayed on the colonised territories, with settlers frequently vastly outnumbering the Indigenous Peoples. Yet despite these imposed state structures, Indigenous Peoples' enduring sovereignty continues to persevere irrespective of the ongoing expressions of colonialism, the settler-states denial of their culpability and repression, while police take the role of an occupation force.

TIRT asserts that to move beyond the contemporary legacy of colonisation, a concerted transformative decolonisation is required to address the structural oppression imbedded throughout the social, economic and legal structures of the settler-state. TIRT contends that research must facilitate Indigenous Peoples' assertion of their sovereignty and their self-determination as Peoples, to overcome experiences of colonisation through Indigenous conceived and empowering responses.

Beth Swadener and Kagendo Mutua assert that 'decolonising research is not only concerned with building a theoretical foundation for studies that claim to engage in decolonising endeavours, but also many decolonising researchers are actively engaged performatively in decolonising acts framed variously as activism, advocacy, or cultural reclamation' (2014, p.11). Such action-based research may go beyond prevailing traditional Western academic approaches to research, by both engaging and empowering Indigenous Peoples in the form of those actions. Research undertaken within a

decolonisation intent moves beyond the abstract analytical to incorporate praxis. Swadener and Mutua argue, 'decolonising research is performative - it is enmeshed in activism' (2014, p.5).

However, Brendan Hokowhitu warns that decolonization theory has been adopted as the 'panacea' or cure all for Indigenous researchers assessing contemporary Indigenous society, the impact of colonization, and its ramifications (2016, p.85). Hokowhitu raises concerns that Indigenous Studies merge theory and method in what he terms a 'decolonial utopianism' (2016, p.90). According to Hokowhitu, decolonization theory restricts the exploration of Indigenous Peoples' experiences to that of being colonized (2016, p.89). For Swadener and Mutua this can prescribe a binary polarisation of Western versus non-Western, and Indigenous 'insider' approaches that can be difficult to verify, which can reinscribe privilege and exploitation (2014, p.6). They contend that decolonisation research can also come from what they term a neo-positivism and an 'identity politics' backlash on interpretative research (Swadener, 2014, p.12).

Hokowhitu also argues that decolonisation approaches promote the pre-colonial as inherently superior and authentic, implying that post-colonial culture is illegitimate, of less value or less legitimacy than the precolonial form of Indigeneity. This causes what Hokowhitu terms an 'ontological blunder' where the concept of indigeneity is removed from the present to focus on a romanticised pre-colonial past (2016, p.91), developed through a 'Western metaphysical pre-occupation with ontology's quest to uncover pure identity' (Hokowhitu, 2016, p.89). This he suggests is extended to place Indigenous Peoples in antithetical opposition to modernism, which promotes the notion of pre-colonial Indigenous societies being 'pre-modern'. According to Hokowhitu, 'the current preoccupation of Indigenous theorists with the idea of 'decolonization' has developed a schizophrenic envisioning of an authentic Indigenous self-located in a pre-colonial past and, thus, divorced from the materiality of the present' (2016, p.89).

However, linking decolonization with the espousal of pre-colonial or pre-modern cultural practices is also a misnomer. Decolonization does not assert that culture is inherently tied to a historical place in time, rather it asserts the empowerment of Indigenous Peoples and their capacity to evolve and develop their culture in response to their historical and contemporary experiences of colonization and aspirations for their communities, based on Indigenous cultural frames and ways of being, their axiology and ontologies. Decolonial research seeks to expose the structural power relations, the social and economic disparities between colonized Indigenous Peoples and colonizers. It aims to redress the underlying structures that contribute to those divergencies, through justice and reparation imperatives and the defence and promotion of Indigenous self-determination and sovereignty.

Further, Tuck and Yang articulately argue that decolonisation cannot be used as a metaphor for social justice, critical methodologies and the decentring of epistemologies. Rather, decolonisation must seek to counter the legacy of colonialism and strive to address the power disparity and dispossession experienced by Indigenous Peoples (2012, p.1). They are critical of decolonising processes that are framed to assuage settler guilt, with gestures around social justice and equity, that may question a focus on settler's perspectives but fail to address the underlying sovereignty and dispossession of Aboriginal people (Tuck, 2012, p.2). According to Tuck and Yang the term decolonization has been used in the educational sector to refer to the invisibility of settler colonialism in curricula and institutional governance structures while also promoting settler worldviews over a range of minority views, through research that reassert and rationalize the existing oppressive structures and that work to re-centre whiteness (2012, pp.2-3).

Importantly, Tuck and Yang also caution that 'there are parts of the decolonization project that are not easily absorbed by human rights and civil rights-based approaches to educational equity' (2012,

p.3). The constraints of a decolonisation approach within human rights frameworks, where settler-states are the determiner of which rights are recognised domestically, further emphasises why a transformative approach is necessary. This investigation of Indigenous rights addresses these concerns by framing the study around the assertion of self-determination within a transformative approach that questions the structural power dynamics and explores options for alternative relations. As such, this research takes a proactive decolonisation approach in a bid to assert the sovereignty and self-determination of Indigenous Peoples as a core objective of the research.

### 3.7.2 Leveraging Transformation

In developing the theoretical approach of this thesis, I also consider the transformative potential of global Indigenous networks and activism. Tully suggests globalisation is, on the one hand, a contemporary form of imperialism that no longer requires colonization but rather relies on its imposition through global markets and its influence over a local governing class (2008, p.132). Globalisation has established International financial institutions that instil hierarchical structures to accommodate international trade and resource extraction from Indigenous lands (Tully, 2008, p.128). At the same time, globalisation has provided 'opportunity structures' through global Indigenous networks that support Indigenous activism, where human rights breaches can be uploaded across the world, increasing pressure on states and corporations through broad engagement via live internet feeds.

Indigenous Peoples contest the premises of neoliberalism and its market-based globalization, confronting and challenging the hegemonic ideology of neo-liberal capitalism. Globalization demands and opens new spaces for resistance. Shannon Speed argues that the use of force against Indigenous Peoples can undermine the legitimacy of settler-states, where global Indigenous

networks have effectively used social media as a means to counter considerable power imbalances. The Zapatista have cogently asserted a form of rights not granted by the state and which challenges state power (Speed, 2008, p.32), and in doing so are not only reconfiguring the discourse of rights but reflecting their needs and asserting engagement with the state on their terms (Speed, 2008, p.32). Speed suggests, 'local mobilizations of the global discourse of human rights are products of this kind of complex dialogic interaction... in which "local" people participate actively, bringing in their local histories, understandings, and goals' (2008, p.33).

Sheryl Lightfoot asserts what she terms, 'Global Indigenous Politics' is unique in responding to the merging of local aspirations with global advocacy, while incorporating a transformative agenda where both theory and practical outcomes converge to seek change domestically and at the international level (2017, p.56). The transnational Indigenous rights movement is embedded in grass roots activism, which according to Lightfoot, is 'deeply anti-colonial in both nature and practice, and consistently and in multiple ways challenges international structures of dominance and subordination' (2017, p.72).

Building on the work of theorists such as Tully, Speed and Lightfoot, a TIRT approach is enmeshed within the Aboriginal voices, aspirations and strategies it seeks to promote. The means of analysis incorporates praxis focused given the urgency of the rights issues Indigenous Peoples face. Abstract theory disengaged from the realities of struggle cannot not respond effectively to the oppression experienced by Indigenous Peoples. Achieving change requires pushing the envelope, extending possibilities and holding states accountable by whatever means can be garnered.

### 3.7.3 Enacting a TIRT Framework

A TIRT research approach is defined by and grounded on nine key principles. First and foremost, TIRT research must reflect Aboriginal/Indigenous peoples' priorities and needs to work closely with Aboriginal/Indigenous communities to support the assertion of Indigenous self-determinations and seek to contribute to Indigenous aspirations for decolonisation. Additionally, in undertaking a TIRT approach the research needs to 2) challenge oppressive structures; 3) question what may be; 4) strategise at the local national and global levels; 5) incorporate praxis; 6) not be constrained by the status quo; 7) contribute to public discourse; 8) recognise that research is part of an ongoing process; and 9) draw on and be guided by our forebears.

This research also endeavours to draw on my own experiences and heritage as an Aboriginal rights defender. The proems at the start of each chapter provide another avenue to document personal testimonies of histories and subjective experiences that inform and bring a broader historical and cultural context to this study. As Foucault asserts, 'we have to know the historical conditions that motivate our conceptualization. We need a historical awareness of our present circumstance' (Patton, 2014, p23).

Aboriginal people draw from our lived experience through a historical frame, immersed in the repercussions of a pernicious history of invasion and expropriation. We are informed at a personal level where trauma lives on through each preceding generation and are reminded as we move about our lives of the incarceration rates, the suicides, the removal from our ancestral lands, severed from our mother's tongue, and bullied through a bureaucracy that seeks to control our actions, our behaviours and the way we think. Our participation is constrained and our voices silenced, from a society deeply threatened by the truth of Aboriginal claims, where according to Sandro Mezzadra

et. al., 'oral narrative has been the most potent weapon in retrieving the contentious past' (2013, p.35).

TIRT requires undertaking a critical study, historically contextualised through a reciprocal collaborative relationship, that engages critical reflection and encourages the questioning of normative legitimacy, as promulgated by Tully and Foucault. According to Tully a 'genealogy provides a toolkit for understanding the relations of knowledge, power and ethics in which they think and act' (2008 p.83).

In analysing power relations within a decolonial framework, TIRT asserts that it is also necessary to consciously consider the pervasive impact of patriarchy within the broader colonial social structures of society, while also evaluating its prevalence within our own Indigenous communities, often as a result of colonialism. My own community was matriarchal, and Aboriginal women across Australia had their own ceremonies and sacred business, 'they had specific economic and social rights and obligations in regard to ritual and other affairs that were specifically 'women's business'' (Berndt, 1983, p.15). Indeed, Indigenous communities globally generally respected women as contributors to their communities, as bearers of future generations and as a life-giving force. A TIRT analysis needs to consider the impact of colonisation, the patriarchal values it sought to impose, and how these may be reflected in contemporary expressions of Indigenous culture, political relations and assertion of Indigenous rights. It also recognises that this requires specific consideration of colonialism's impact on Indigenous women, to ensure research doesn't inadvertently replicate those patriarchal structures and processes imposed on Indigenous communities.

TIRT research actively works to decolonise by:

i. Reflecting Indigenous Priorities

Responding to political priorities as identified by the Aboriginal/Indigenous community to assert Indigenous self-determinations and promote decolonisation. In undertaking a TIRT study, the researcher must work closely with Aboriginal/Indigenous communities, to collaboratively identify the research topic and the methodological approach to implement it.

ii. Challenging oppressive structures

Reviewing and critiquing the use of repressive and disciplinary power to suppress Indigenous Peoples, identifying and analysing what Foucault termed biopower structures, considering the complex weave of power throughout society, often portrayed as natural, that can go unchallenged. It requires a review of any existing formal mechanisms for Indigenous Peoples to assert their self-determination and decision-making and how these might be utilised or how they may lack capacity to facilitate Indigenous decision-making. Additionally, TIRT research reflects on politics and power-structures that either block, control or facilitate decision making. Significantly, TIRT examines the capacity of Indigenous Peoples to effectively respond to areas of contestation.

iii. Questioning what may be?

A TIRT analysis actively encourages a longer-term perspective of what alternatives may be possible to strengthen the expression of Indigenous sovereignty and self-

determination. A longer-term approach assists to free thinking from current repressive experiences which may constrain a survey of potential outcomes.

iv. Strategising at the local, national and global level:

TIRT uses a range of strategies to identify, develop and exploit opportunities to challenge structural power disparities. These may vary from local and national actions to pressure settler-states, to international advocacy to leverage domestic outcomes and hold settler-states accountable. These strategies may take the form of direct action/protest to using the legal and institutional mechanisms available, to highlight the disparity between global commitments and national implementation and to seek accountability for violations of Indigenous rights.

v. Incorporating Praxis

Praxis or action-based research is a key strategy of TIRT that seeks to proactively empower participants and politically respond to areas of contestation. However, the form TIRT takes will depend on the analysis provided through the strategising phase. It may take the form of national processes through political protest, hosting Indigenous gatherings on a theme, submitting written submissions and raising media attention on a particular matter. Additionally, a praxis may include an international focus through engagement in United Nations mechanisms and/or submitting complaints or legal action. Importantly, all international strategies are directly tied to local aspirations. The praxis initiative will depend on what is deemed the most effective strategically.

vi. Do not be constrained by the status quo

Research topics should be informed by the aspirations of the Indigenous community, in collaboration with the researcher, to address injustices and assert Indigenous rights to self-determination. Placing too much weight on consideration of the limitations of current political climates can inadvertently act to restrain perceptions of what may be achieved and indirectly undermine decision-making. Though this may be a pragmatic consideration, it can act to censor praxis to what may be considered as feasible. In a climate of suppression this will be more acutely felt by those subject to that repression and so must consciously be challenged. Coordinated praxis in whatever form can in itself act to empower and counter experiences of oppression.

vii. Contributing to public discourse

Research should endeavour to contribute to public discourse, to hold settler-states publicly and internationally accountable to further norm contestation and/or to contribute to Indigenous local, national and global political networks. It should also seek to counter discourses that promulgate racism. This is an important strategy to counter broader social endorsement of punitive and oppressive approaches targeted against Indigenous Peoples. In addition, proactive campaigns can educate the public on state obligations in relation to Indigenous rights. Further, it can foster an awareness of the benefits for both Indigenous and non-Indigenous peoples of treaties and the acknowledgement that settler-states' legitimacy depends on the recognition of the dual sovereignty between Indigenous Peoples and states, to move to post-colonial and respectful relations.

viii. Recognise that research is part of an ongoing process

Research should also recognise that it is part of a continuous and perpetual struggle. We are building on efforts of our ancestors, forebearers and warriors who've gone before. It recognises that the struggle is of a people and will pass to the next generation. This is our underlying strength against stark power disparities. Our just claim through our unceded sovereignty carries on beyond the life and capacity of any individual.

ix. Draw on and be guided by our forebearers

We are born within a cultural, political and historical context that inform our perspectives, our aspirations and our approach. This final principle actively draws on the lessons learnt from our families, our communities and our forebearers. This principle ensures the researcher takes time to consider the lessons that can be drawn from our communities, our families, from our past and those of previous generations. This implements the subjective historicizing that is core to Aboriginal and Indigenous experience, knowledge and motivations. In this thesis I have incorporated this additional level of reflexivity in the proems at the commencement of each chapter.

TIRT encourages both a critical subjectivity, conscious of one's attitudes and opinions and inherent influences on the researcher's way of thinking, their reflexivity, their ability to consider, respond and reflect in relation to others and circumstances. Subjectivity is formed through an awareness and reflection, proactively reviewing one's own and others' perspectives, it is, as Paul Patton surmised with regard to Foucault, 'a capacity for critical reflection on their current state and a capacity to 'chart paths for future transformation' (Patton, 2014, p.15).

### 3.8 Conclusion

This chapter has outlined the theoretical approach of this study; it has considered the overall objective of the research and the theoretical framework necessary to guide this analysis. In reviewing existing theoretical frameworks and the transformative agenda of this research, related to the usefulness of the United Nations and Indigenous rights frameworks, it became apparent it demanded a specific dedicated conceptual framework.

In order to develop an appropriate theoretical approach, the chapter examined the philosophical basis of rights and investigated the limitations of human rights frameworks, where critiques question the capacity to consider the root causes of rights violation and whether rights detract from more emancipatory approaches. An analysis of Indigenous rights required an examination of the source of rights, which concluded that Indigenous rights predate colonisation, with these rights asserted through struggle. Whether Indigenous rights can be considered human rights or are formed as special cultural rights has repercussions on the legal obligations to implement them or if they are aspirational in nature.

This analysis provided the necessary framework to consider Indigenous rights within international law, which affirms Indigenous rights to self-determination. The implications of UNDRIP and Indigenous self-determination on the Westphalian system have been deliberated. Additionally, an interrogation of Indigenous engagement at the United Nations against a broad failure to implement UNDRIP, was warranted as a central theme of this thesis.

The capacity of Indigenous Peoples and rights frameworks to influence settler-state's liberal social structures, claims of democratic participation and market-based structures were investigated. This

section examined the capacity for settler-states to be reformulated to recognise the dual sovereignty of settler-states and Indigenous People, to incorporate Indigenous self-determination. The legitimacy of settler-state sovereignty, which is questioned through Indigenous rights to self-determination and the capacity of settler states and international law to respond, also inform this theoretical approach.

I then outlined key theorists that further informed the development of Transformative Indigenous Rights Theory (TIRT) which I concluded was necessary to frame this research. Adopting a decolonisation premise combined with a praxis approach, that effectively combines theory with practice, seeking to empower those Indigenous participants through the process was required to achieve the substantive transformative change this research sought to advocate. A TIRT theoretical framework provides clarity for the review and analysis of the data, the formulation of the findings and the basis of analysis on which to evaluate the research and whether it met its objectives. It also provides clear direction on the development of an appropriate methodological approach, which I outline in the next chapter.

## CHAPTER 4

# IMPLEMENTING A TRANSFORMATIVE INDIGENOUS RIGHTS

## METHODOLOGY

## Proem: The struggles of the 1930's

*My mother's father was born on the River at Brewarrina NSW, following the families' retreat from the reach of the Queensland Act 1895, which confined Aboriginal people to government reserves or church run missions. As my family history was recounted, my grandfather and his five brothers, all boxers, would stand around their mother, Lucy, as she spoke from a wooden box in the Domain Park, Sydney, during the 1930's Depression (Townsend, 2009, p.15).*

*By 1932 the unemployment rate had reached 32% in Sydney. Lucy would send her sons on pushbikes to the outskirts of Sydney to catch rabbits and pick black berries before distributing rabbit and berry pies to those in need, particularly the families of those jailed for protesting (Townsend, 2009, p.16).*

*The oral histories with which I was raised spoke of how the family was targeted by police at unemployed workers marches, with one in Glebe, particularly brutal, as the police bashed Lucy on Glebe Point Road, then an elderly matriarch separated from Bill. According to Hall Greenland, 'Lucy Eatock emerges as an extraordinary activist of Aboriginal background' (Greenland, 1998, p.311).*

*It was a time of frequent evictions and the unemployed resisted. My paternal grandfather was involved in the Bankstown riots, where a former soldier and his family were provided notice of eviction in May 1931, from 92 Brancourt Avenue, Bankstown. My grandfather, Richard Alexander (Alec), was one of seventeen men who set up to defend the family, they piled sandbags and barbed wire around the house and set up a 24-hour picket (Cottle, n.d, p.1)*

*On 17 June, the defence was violently broken by 40-armed police breaking through the front and rear door in the early hours while firing live rounds, two were hit including my grandfather who was shot in the upper thigh (Townsend, 2009, p.15). 17 men were arrested charged with 'resisting and obstructing the police'.*

*Hundreds attended the court in support where 'Eatock, an Aboriginal activist' was the only one not to receive concurrent sentencing, so served 2 years, the longest sentence. Alec was recorded in court as stating, "I am not guilty...It seems the whole thing is class and racial oppression, nothing more or less" (Townsend, 2009, p.15) and historian Nadia Wheatley surmised 'It is very hard to believe that Eatock was rightfully convicted' (Wheatley, 1975, p.430).*

*The Bankstown and the following Newtown riots that occurred the next day led to a petition of 10,000 signatures to the Lang Labor government and the introduction of legislation that provided tenant protections and a suspension on evictions (Cottle, n.d, p.8 & p.10)*

*This legacy is part of the fabric with which I was raised, that emphasised our cultural responsibility for community, ingrained in me from an early age, which determined that contestation is entwined within our history, and that effective action is a collaborative endeavour, where hierarchies are only for the hard-earned wisdom of our Elders.*

## 4.1 Formulating A Transformative Indigenous Rights Methodology

The methodological approach taken in this thesis implements the Transformative Indigenous Rights Theory (TIRT) outlined in the preceding chapter, which informed the subject of this research and resolved the methodology undertaken. In assessing the value for Indigenous Peoples of drawing on the United Nations to assert their rights to self-determination, I determined that existing mainstream methodological approaches failed to proactively address the self-determining premise of this research that seeks to empower the Indigenous participants and counter the states' colonial narrative. TIRT requires that the methodological approach privileges Indigenous voices and enacts a decolonizing intent.

TIRT is informed by my indigeneity, which requires that my research reflect my obligations as a Gayiri and Badtjula woman. It is this defining heritage that imbues my values and ontology or, my way of being, formed by those experiences of indigeneity and colonization. It is this lived experience that motivates the subject of research and determines the theoretical framework, methodological approach and methods that align with this research. As an Aboriginal woman, my research is an expression of my cultural and communal commitments and determines my praxis. Adam Gaudry argues that research which promotes Indigenous aspirations and worldviews is part of a broader resurgence and decolonization movement that he terms 'insurgent research' (2015, p.243), which 'challenges existing relations of domination and subordination and offers a basis for political action' (Gaudry, 2015, p.248).

Research in a context of inequitable power dynamics can either replicate the existing oppression of colonialism or it can challenge it and seek to assert Aboriginal voices previously suppressed. As I outline in this chapter, my undertaking a TIRT methodology requires that the research seeks to

challenge power disparities by privileging Indigenous voices. This methodological framework draws on Indigenous axiology or value systems, grounded on cultural moral obligations, or deontology, to contribute to Indigenous epistemologies and expatiates Indigenous rights to self-determination. According to Margaret Kovach, 'Indigenous epistemologies challenge the very core of knowledge production and purpose' (2009, p.29).

The chapter outlines the TIRT methodological framework I developed, the conceptual basis on which it was framed and its requirement to respond to participants and my own Indigenous positioning. In constructing this approach, I reviewed other Indigenous methodological approaches and recognise that TIRT sits within a broader Indigenous epistemology.

The strategies employed to enact this approach are then described within the methods component of this chapter. TIRT demanded an Indigenous research epistemology and the adaption of an Indigenous determined Participatory Action Research, to develop a number of qualitative empirical data sets that included in-depth semi-structured interviews, participatory observation and a series of praxis-based actions, which I then triangulated to strengthen the validity of the research. I then outline the process of empirical data analysis, with consideration of what constitutes socially just and ethical research within Indigenous communities. I commence the chapter outlining the characteristics I conceived as fundamental to Transformative Indigenous Rights Methodology.

#### 4.1.1 The Imperative of an Indigenous Rights Methodology

Within hegemonic western frameworks, academic knowledge is an expression of power where research often reflects and reasserts existing power dynamics and structures of control. All research expresses a political perspective, whether it subtly condones existing power disparities and social

structures or actively challenges them. For Indigenous Peoples, historical records tell the story of those who usurped control, separating Indigenous experiences of dispossession, violence and exclusion from our current deprivation and attempted assimilation. The suppression of Indigenous voices contesting the tenets of colonialism has been ubiquitous. Indigenous communities and researchers have been judged on their capacity to assimilate, to reflect those imposed values based on capitalist exploitation and patriarchal structures of decision making. Those indigenous Peoples that are most assimilated, that problematize Indigenous communities, blaming those communities for their poverty, are often promoted as Indigenous leaders, as Linda Tuhiwai Smith terms it, 'idealized as the saviours of the people' (2021, p.73).

Margaret Kovach contends, 'there is a fundamental epistemological difference between Western and Indigenous thought, and this difference causes philosophical, ideological, and methodological conflicts for Indigenous researchers' (2009, p.29). Indigenous research that deals with political positions that run counter to existing elites and power structures has largely been excluded from academia until recent decades. According to Kovach, 'knowledge is neither acultural nor apolitical' (2009, p.30). Research and epistemologies have been used as part of an arsenal of the powerful to justify their domination and usurp the voice of the oppressed. Kovach argues, 'Indigenous methodology provokes substantive political and ideological shifts within Western research contexts' (Kovach 2009, pp.31-32).

While I draw on non-Indigenous research in this study, I also recognise that our experiences of colonisation, its ongoing legacy of oppression, and Indigenous Peoples differing world views add a further layer of complexity to Indigenous research. While it would be remiss to neglect the wealth of knowledge and experience of broader research and theoretical frameworks, I believe this cross fertilization from Indigenous frameworks can also inform mainstream epistemology. It is the

politicised nature of research in Indigenous communities and the need to strengthen Indigenous responses to that power disparity which both motivates and provides insight and value to Indigenous researcher perspectives.

Transformative Indigenous Rights Theory (TIRT) joins a growing school of Indigenous informed approaches that question the invisibility of colonialism, the assumption that colonialization is a historic event rather than a process that continues to assert settlers' interests over those of Indigenous Peoples, where the privilege of settlers is perceived as natural. Indigenous Peoples have been considered by western thought to be associated with an earlier phase of human development. Aileen Morton Robinson argues for the dismantling of what she terms 'possessive racialized knowledge', that defends colonizing power structures and asserts settler rights over Indigenous Peoples, while disavowing the historical violence and policies of dispossession (2016, p.112).

Indigenous Peoples are acutely aware that research is inherently political, often ideologically driven, and requires an analysis of power structures. Indigenous epistemologies also diverge from other epistemologies by having recourse to what may be undocumented Indigenous knowledges, delved from historical experiences, community engagement, political analysis and from personal experiences.

This research also aligns with a school of Indigenous research that incorporates a critical analysis of capitalist economic systems, given financial exploitation was a key imperative of imperialism. Colonialism justified the invasion and theft of resources, promoting the racial stratification of peoples, with its more recent iteration through globalisation. Margaret Kovach contends 'positivist approaches, with their propositions of neutrality and their service to a political and economic

agenda of capital (more currently globalisation), philosophically conflict with Indigenous social values' (2009, p.78).

The onus for Indigenous researchers is to seek to further just outcomes for Indigenous Peoples, for our communities. Jeff Corntassel deliberated on this conjuncture when his research was interpreted by academic institutions as 'activism', when undertaking what he termed 'applied' research conceptions. Corntassel perceived a resistance to research that moved beyond 'assuaging the guilt of white people' (2003, pp.161-162). However, Corntassel suggests he learnt to embrace the disparaging term, asserting 'Indigenous professors can be both activists for our people as well as accomplished academics' (2003, p.161).

TIRT is grounded on the assertion of Indigenous rights or 'activism' in research, through the augmentation of Aboriginal voices that seek to counter an oppressive colonial legacy. Tying research to practical aspirations of Aboriginal People opens the research to Indigenous ontologies or ways of knowing and instils an Indigenous epistemology. In doing so, TIRT seeks to contribute to the assertion of Aboriginal/Indigenous sovereignty; critically, however, it strives to challenge contemporary expressions of colonialism. The following section outlines the conceptual basis of a TIRT methodological approach, before considering the influence of other Indigenous epistemologies in the formulation of this approach. I then move on to an examination of the methods before considering the strategies initiated to implement it. Finally, I outline the process of analysis that was used to establish the findings.

## 4.2. The Scaffolding of Transformative Indigenous Rights Methodology

Indigenous Peoples are born into highly contested political environments, so there is a growing Indigenous epistemology, which this research aligns with, that ties research, theoretical approaches and methodologies to the assertion of Indigenous rights. For Lester Irabinna Rigney, Indigenist Research ‘must be overtly political’ (1999, p.118), while Linda Tuhiwai Smith argues that ‘Indigenous scholarship is forged through struggle’(2021, p254). This research seeks to respond to the inherent political contestation the Aboriginal community faces as colonised peoples within a settler-state. The methodological approach adopted in this thesis aims to implement the Transformative Indigenous Rights Theory (TIRT) outlined in the preceding chapter.

A methodological approach aligned to TIRT must seek to alter the power structures by asserting Indigenous sovereignty and striving to enact Indigenous self-determination. TIRT demands a critique of biopolitics, which Foucault defined as the diverse and often unseen means of control, the political machinations and biopower in society, where according to Paul Patton, “power must be understood in the first instance as the multiplicity of force relations immanent in the sphere in which they operate’ and that the condition of possibility of all power relations must be sought in ‘the moving substrate of force relations which, by virtue of their inequality, constantly engender states of power” (Patton, 2014, p.20).

Decolonization requires a critique of the various means through which colonialism continues to impact on Aboriginal People. Margaret Kovach emphasises the need for a decolonizing framework in Indigenous epistemologies to link with Participatory Action Research strategies.

Introducing Indigenous knowledges into any form of academic discourse (research or otherwise) must ethically include the influence of colonial relationships, thereby introducing a decolonizing perspective to a critical paradigm. Those active in Indigenous community research will look to a form of participatory action research methodology (Kovach, 2007, p. 30).

In implementing a TIRT framework through a decolonizing premise, the foundation of the research is based on Aboriginal value systems or axiology, reconnecting and reasserting those mores passed from previous generations and which are at the heart of defining indigeneity. It also requires a deep reflection on how research and epistemology can challenge the psychological impact of colonization on Aboriginal People, articulately argued in the seminal work 'Wretched of the Earth' by Frantz Fanon (1963). The subconscious adoption of broader societal values that clash with an Aboriginal axiology and ontology must be consciously challenged, as argued in Fanon's 'Black Skins White Mask' (1967), and further elucidated, through Ngũgĩ wa Thiong'o's work 'Decolonising the Mind: the Politics of Language in African Literature' (1986).

TIRT methodology requires the development of practical focused research strategies, targeted to respond to the political climate surrounding the research with consideration of the longer-term objectives and short-term outcomes. These strategies assert Indigenous Peoples' agency to actively challenge their disempowerment and marginalization. A TIRT praxis requires reviewing opportunity structures at a local level, considering their impact within national debates, and potential for leveraging international mechanisms.

Research is thus a strategic political act, to assert Aboriginal/Indigenous rights. Given the substantial and powerful forces it challenges, TIRT recognises this is inherently incremental in securing

outcomes, seeking to leverage longer term and more substantial change, rather than solely focused on immediate outcomes. Great change occurs through determination and persistence; it is rarely achieved through a single act. As Lesley Brown and Susan Strega contend, 'waves are powerful forces that carve deep channels in bedrock and create new routes' (2007, p.3).

The methodological framework recognises that struggle is a fundamental tool of survival of Indigenous peoples. As Linda Tuhiwai Smith asserts, 'struggle is a tool of both social activism and theory' (2012, p.199). According to Smith, struggle reflects group or collective agency rather than individual leadership, as struggle requires a collective mandate to be sustained over time (2012, p.200). Struggle is a reaction to the communal nature of oppression and is a collective response to the groups' shared need to strive against repression. It is this collective struggle for survival and the assertion of Indigenous rights through the leveraging of United Nations mechanisms, that seeks to influence broader social-political discourse and norms to achieve structural change, that informs the conceptual framework and directs the methodology and resulting methods of this research.

TIRT's praxis approach draws from Participatory Action Research (PAR) that seeks to overcome a sense of powerlessness and promote the views of Aboriginal People through the use and study of practical actions to achieve social justice outcomes. As Wicks, Reason and Bradbury assert PAR raises questions of 'how we might change things at the same time as studying them' (2011, p.9). PAR is undertaken by participants in response to their own political-social demands and must have practical consequences of improving a situation or increasing the understanding of that issue and considers the process and outcome as equally important (Kemmis, 2011, p.17). While Mike Pedler asserts, 'it can be argued that the purpose of the research in action research is primarily for the benefit of the people with the problem not the university' (Pedler, 2011, p.8.). PAR is central to the transformative aspirations of the TIRT methodology I am implementing. TIRT uses agency as a practical means of

empowering Indigenous Peoples to contribute to public discourse, merging actions based on political aspirations with academic study and knowledge promotion.

PAR developed from Critical Theory to assert a collective action of inquiry (Kemmis, 2011, p.7) within a constructivist paradigm (Ladkin, 2011, p.3). PAR implements a 'praxis', or committed action, seeking social transformation, emancipation or to influence social discourse (Kemmis, 2011, p.5), as opposed to a solely theoretical analysis. PAR combines theory and practice, but also activism and academic work to critique oppression, power disparities, identity and agency, which is harnessed in a bid to secure structural change. According to Wicks et al., PAR strives to combine 'the translation of philosophical, theoretical and political perspectives into practical knowledge' (2011, pp.13-14).

Collective agency provides capacity for greater impact through action developed in what Jurgen Habermas referred to as the 'intersubjective space' -or mutual agreement - to achieve agreed transformational objectives (Kemmis, 2011, p.11). For Habermas PAR endeavours are designed to problematise areas of contestation in public discourse (Kemmis, 2011, p.14) to challenge areas of 'legitimation deficits', which according to Stephen Kemmis are frequently tied to social movements (2011, p.14). 'It manifests itself in attitudes of collaborative reflection, theorising and social action directed towards emancipatory reconstruction of the setting (in terms of the personal and the political, the local and the global)' (Kemmis, 2011, p.18). TIRT praxis requires a conscious deliberation of the wider political context, the ideologies, histories and experiences that shape the perspective of the researcher and participants, and how particular actions may impact relations of power and inform the research (Kemmis, 2011, p.8). Hans-Georg Gadamer refers to this as 'effective-historical consciousness' (Kemmis, 2011, p.8).

PAR and praxis approaches are frequently aligned with social justice movements that seek transformational change and liberation from oppression and social/economic marginalisation. According to Fals Borda, 'contemporary participatory and action researchers draw on Foucauldian constructions of multiple discourses of power, referring to liberation as the creation of an alternative political, social and economic model' (Lykes, 2011, p.5). This thesis argues that all research within Indigenous communities is political in nature, whether overtly or covertly, it conveys an underlying ideological perspective that influences the methodology and contributes to the outcomes.

With this understanding of TIRT's conceptual framework, I move onto examine the influence of Standpoint and Feminist Standpoint to the development of a TIRT methodology. I then move into the methods undertaken to enact a TIRT methodology before considering key factors required in analysing the data and factors to consider in assessing the effectiveness of Indigenous informed and targeted approaches to research.

#### 4.2.1 Indigenising Methodologies

TIRT methodology requires, drawing on my own background as an Aboriginal researcher and my families' experiences to inform the research and the political objectives in the assertion of Indigenous rights it seeks to progress. Additionally, my cultural obligations require that the research also be guided by Aboriginal Elders, to collaboratively develop and determine the agreed priorities and the methodological means to achieve them. TIRT proactively draws from the researcher's and the Indigenous participants' experiences and oral histories concerning the impact of colonization, dispossession, policies of exclusion, attempted social engineering and assimilation and racism to shape the research.

This methodology is influenced by Feminist Standpoint Theory, which questions the neutrality of research, refuting the positivist tradition which claimed validity was determined through the objective analysis of data. Instead, Feminist Standpoint asserts the positionality of female researchers, to use their situated experiences and knowledge to contest patriarchal power, social structures, discourses and epistemologies that assert women's oppression as inevitable and natural, rather than recognising it as an outcome of structural and social repression (Morton-Robinson, 2013, p.335). Feminist Standpoint places women as researchers and subjects at the centre of a situated analysis that draws on women's experiences and processes of reflection to counter existing patriarchal power structures that contribute to the silencing and suppression of women's perspectives. Aileen Morton Robinson contends, 'Feminist standpoint theory accepts that political interests and moral values are part of knowledge production and they shape our research; as such, all researchers beliefs are inextricably a constitutive part of their standpoints' (2013, p.335). Sandra Harding argues Feminist Standpoint is both a theoretical stance and a methodological approach (Morton-Robinson, 2013, p.332), which enacts a 'strong objectivity' that challenges men's privilege and brings opportunity for new insights through women's engagement with the researched topic. Patricia Hill Collins extends this analysis drawing on Foucault's exposition on 'subjugated knowledge', in highlighting the intersectionality of oppression through race and gender, that represses black women's epistemology (Morton-Robinson, 2013, p.333). Aileen Morton Robinson further highlights the relevance of Standpoint for a TIRT approach, suggesting 'standpoint is an achieved status' formed through struggle (2013, p.333).

Morton-Robinson links Feminist Standpoint with Indigenous Standpoint, in recognising Indigenous lived experiences of colonisation can be drawn on by Indigenous researchers to develop knowledges that are more accurate and representative of Indigenous Peoples' differing ontologies and axiology

(2013, p.335). Indigenous Standpoint approach requires that Indigenous Peoples benefit from research, it is empowering and collaborative for the subjects of the study and is premised on the advocacy of self-determination and social justice for Indigenous Peoples (Morton-Robinson, 2013, p.336). Indigenous Standpoint approaches acknowledge the influence of the researcher in selecting the subject or problem being studied and methodological approach taken, reflecting their life experiences and underlying morality and ontology (Morton-Robinson, 2013, p.334). Indigenous Standpoint privileges the perspective of the Indigenous research participants as partners rather than subjects of research and acknowledges the contextual knowledge Indigenous researchers may bring.

Martin Nakata highlights how Indigenous research can challenge traditional research methodologies, where expectations of neutrality and distance from the research subject is not possible or desirable in Indigenous research. For Indigenous Peoples, attempts to impose a neutral observer paradigm would deny the knowledge, perspective and insights of Indigenous researchers. Nakata emphasizes that the background of an Indigenous researcher on Indigenous subject matter is definitive, drawing on Gaile Polhous who argues, 'the social position of the knower is epistemically significant' (2007, p.216).

However, Indigeneity is not sufficient on its own for robust research, rather it is a starting point for academic struggle, 'to forge' a critical Indigenous Standpoint (Nakata, 2007, p.217). Nakata argues it requires a 'struggling to understand one's experience through a critical stance on the social order within which knowledge is produced' (2007, p.216). While Standpoint relies on reflexivity, it maintains a distinction between experience and standpoint and does not make the researcher the focus of the study. Rather, according to Nakata, the rationale, arguments and discursive construction need to be persuasive and 'cannot assert a claim to truth that is beyond the scrutiny of others' (2007, p.217). Significantly, Nakata is also critical of an adherence to 'epistemic relativism' that siloes

categories of researchers and places a focus on 'who can know rather than what can be known' (2007, p.218).

Though Nakata warns of the danger of aligning work too closely with identity he also acknowledges that the cultural interface is comprised of 'a complex nexus between lived experience and discursive constructions', where histories and narratives together comprise differing realities that may be interrogated to generate new understandings (2007, pp.212-213). While the poems in this thesis provide snippets of my own lived experiences that inform my approach as a researcher and contributes insights into Aboriginal political approaches more generally, the TIRT approach undertaken in this thesis does not require personal narratives or Indigenous identity. Rather, the key aspect of a TIRT approach is to promote the sovereignty and political aspirations of the Indigenous Peoples who are the subject of the research.

Aileen Morton-Robinson has developed an Indigenous Women's Standpoint Theory that merges Indigenous and feminist standpoint. Morton-Robinson argues that Feminist Standpoint Theory fails to recognise Indigenous histories of colonization, the cultural/political context, or the moral imperative that drives Indigenous women researchers to assert their sovereignty through Indigenous epistemologies. Yet Indigenous Standpoint Theory does not reflect the additional oppression on Indigenous women, impacted by the intersecting oppressions of gender with race, class, sexuality, colonization and location, which uniquely shape Indigenous women's experience to differ significantly from Indigenous men. Aboriginal women's situated knowledge, though it will vary with each woman, is shaped by the omnipresence of patriarchal white sovereignty and its influence in Aboriginal communities, intersecting with the denial of Aboriginal sovereignty and rights (Morton-Robinson, 2013, p.339). Morton-Robinson asserts that 'one of the strengths of feminist standpoint theory is the inextricable link between theory, politics and practice and the ability to generate a

problematic from women's embodied lived experience' (2013, p.339). An Indigenous women's standpoint is required to fully appreciate the intersectionality of indigeneity and gender when analysing political and social structures and their impact on Indigenous women.

A TIRT methodology is further persuaded by 'Indigenist Research', as advocated by Prof. Lester Irabinna Rigney, who argues for a form of liberation epistemology, through an 'Indigenist Research Methodology' (1999, p.110). Rigney draws on critical theory to critique the influence of colonial history and its engrained racism on research epistemologies and methodologies, when assessing if they form a colonizing or emancipatory research framework (1999, p.111). Racism, Rigney asserts, has been used to legitimate structures of oppression that have been embodied through policies of social engineering which now permeate every aspect of society, its social formations and academic institutions to influence research practices. He notes, 'discourses of difference, are located at significant sites of power. We were racialized in order to exert power over us' (Rigney, 1999, p.112). Rigney contends that these issues will not be overcome by simply adding Indigenous researchers; rather Indigenous researchers have an obligation to create anti-colonial epistemologies to strengthen the emancipatory struggles of Aboriginal/Indigenous peoples. For Rigney, 'knowledge is not a learned reflection of the world but rather shapes the world in particular ways' (1999, p.115).

Drawing from Feminist Standpoint, Rigney's Indigenist Research approach recognizes that the lived experiences of Indigenous peoples, as with women, calls for the contestation of social structures, to overturn implicit assumptions of superiority and inferiority. In developing an Indigenist research approach, Rigney espouses three critical elements:

- 1) 'Resistance as the emancipator imperative' (1999, p.116), to further Indigenous peoples' struggle for self-determination and challenge continuing forms of oppression;

- 2) 'Political Integrity in Indigenist Research', tying research with the broader political struggle and adding accountability to the Aboriginal community (Rigney, 1999, p.117); and
- 3) It requires that Indigenous peoples set their own political agenda 'privilege[s] Indigenous voices in research' (Rigney, 1999, p.117).

An Indigenist approach requires constant reflexivity and community accountability, and the questioning of the researchers' own internalized colonialism.

Martin Nakata articulately argues that Indigenous Peoples are entangled in a contested 'cultural interface', an epistemic space between different ontologies and epistemologies (2007, p.218). The term Cultural Interface, as Nakata defines it, is not simply the intersection or clash of two cultures; rather it incorporates cultural and structural aspects that are contested. According to Nakata, it is a space of 'competing and contesting discourses within and between different knowledge traditions, and different systems of social, economic and political organisation'(2007, p.202).

Indigenous Standpoint, Nakata argues, views the 'cultural interface as primarily a site of struggle over the meaning of our experience' (2007, p.213). However, Nakata is critical of decolonisation approaches that fail to take into account the complex knowledge entanglements of the 'cultural interface'. Though useful in claiming a space in academia, Nakata is disparaging of its reductive and oppositional approach that promotes a dichotomy of 'us versus them' rather than an understanding of the cross-cultural interface, where a more nuanced approach is required that moves beyond the politics of indigenization and an Indigenous endogenous approach to knowledge production (2007, p.203).

Significantly, Nakata also warns against seeking an authentic Indigenous experience, as each are legitimate, whether urban or remote none is more authentic than another, but reflect the array of Torres Strait Islander experience, the varying impact of colonization and ensuing government policies. (2007, p.213). Yet, despite these differences, Nakata suggests that consensus tends to solidify in the face of a shared external threat, though people may diverge on the means to achieve that shared goal (2007, p.214).

Nakata is useful in reminding Indigenous researchers that while experience can contribute a greater depth of understandings on the impact of policies and approaches, this alone is not sufficient. I contend that identity, experience and narrative can add a rich layer to research, but epistemology is principally related to the contestation and interrogation of complex ideas and meanings. My approach through TIRT recognises that this contestation will occur both between Indigenous and non-Indigenous, but also among Indigenous Peoples themselves, in seeking to draw out new understandings from these entwined knowledge systems. In enacting TIRT, it also requires maintaining a focus on the assertion of Indigenous inherent rights, and the redistribution and transformation required to secure just outcomes for Indigenous Peoples.

### 4.3 Enacting Transformative Indigenous Rights

Developing a methodological approach that responded to the specific needs of this research and reflected a Transformative Indigenous Rights Methodology, required that the research be developed through both an 'insider' and 'outsider' paradigm, drawing on components of participatory action research, to formulate methods that were responsive to the research requirements. 'Insider-Outsider Theory' defines the positionality of the researcher, whether research is undertaken from within the social group of the research subjects, or as an 'outsider',

from an external perspective (Ospina, 2011, p.6). Indigenous researchers can be considered as undertaking 'insider research' when the study is focused on Indigenous content and the researcher draws on that knowledge to contribute to the research process (Ospina, 2011, p.46).

In undertaking this research, I recognised that I fit within an 'insider' paradigm, as an Indigenous person enmeshed within the Aboriginal community which is primary target group of the research. However, I also reflected an 'outsider' perspective, given I was also undertaking research on the views and perspectives of other Indigenous Peoples. This brought an additional onus to the research to ensure my own perspectives did not influence the interpretation of data of the views and experiences of Indigenous Peoples from other regions. The subjective interpretation within a qualitative approach requires constant review and reflection of both the process and the data analysis phase to challenge assumptions, examine underlying influences and to be accountable to accurately depict the views of the research participants.

In undertaking this research, I draw on my knowledge of Indigenous community concerns and aspirations, cultural values and protocols to promote the voice of the Indigenous participants of this research. TIRT methodology recognises insider knowledge contributes additional insights and instigates a qualitative analysis that draws on the views, perspectives and relationship between researcher and research subjects, to highlight common objectives. This research acknowledges the researcher is not neutral and so carries an onus to ensure additional levels of rigour in the research phase. Donna Ladkin argues, 'all research is biased in some way, it is about recognising your bias, being as upfront about it as possible and recognizing how it will colour your interpretations' (2011, p.20).

The transformational element that my approach seeks to implement has been attributed to collective efforts through a critical consciousness that incorporates praxis with a process of reflection, or as Paulo Freire, termed 'conscientization', where praxis and critical self-reflection, knowledge and power may be developed by those who are subject to oppression. It requires a self-reflexivity to identify, expose, and question the researchers' assumptions and biases (Nicholls, 2008, p.121-122). Such self-reflection requires not just a summation of the action or process but an assessment of the social and political dynamics and justification of the veracity of interpretations (Ladkin, 2011, p.18). Reflexivity is critical to position myself in relation to the research, the participants and the findings but also to provide a contextual analysis of the political machinations, both more broadly but also at the local level, and to review relational elements impacting on the research.

Given the 'insider' and 'outsider' frame of this research, and subjective position the researcher brings, several methods have been triangulated to counter the potential for bias produced by any one method, to ensure a robust review of the empirical data and strengthen the validity of the findings (Seale, 1999, p.473). According to Clive Seale, 'the multiplication of methods can help deepen understanding of different aspects of an issue' (Seale, 1999, p.474), increasing the depth, consistency and credibility of research. Though I have drawn on a series of in-depth semi-structured interviews as the foundation of the empirical data, I have also incorporated participatory observation research and an analysis of action-based praxis to triangulate the datasets, to add validity and rigour to the study.

My experience, having participated as an Aboriginal representative to the United Nations annually from 2011, was fundamental to my development of this research topic. It is also significant that this engagement with the United Nations was itself grounded on local praxis, through my engagement

in the Aboriginal political campaign for a Royal Commission into Aboriginal Deaths in Custody, run by the Committee to Defend Black Rights (CDBR) in the 1980's, where I was the National Secretary. The Royal Commission had been announced following presentations by the CDBR Chairperson, Helen Corbett (nee Boyle) at the United Nations, in July 1987, which had been followed by a further death. That announcement, on 10 August 1987, following years of protests since the death of John Pat in September 1983, highlighted the potential for the United Nations to influence the recognition of Indigenous rights within Australia. However, Aboriginal aspirations hadn't been assuaged by the Royal Commission, though it made recommendations for Aboriginal self-determination, those rights are yet to be achieved, 30 years later. It was that early spark that fired my interest in the potential of the United Nations, set against unrequited calls for a treaty and self-determination by Aboriginal and Torres Strait Islander Peoples, that determined the topic of this thesis. It was also those early experiences that reinforced the cultural requirements and benefits of collaborative praxis.

As a first step, given the international focus of the research, I established an International Indigenous Advisory Committee to provide overall Indigenous community guidance to the study. This International Committee included a representative from each of the five comparative settler-state locations the study was addressing. The Committee provided feedback on the proposed questions, the early phases of development and many were also interviewed as key experts from their region. However, the high level of demands on prominent Indigenous global experts also hindered feedback and resulted in a more informal process at the global level.

In addition to this global engagement, a national Indigenous Advisory Committee was established to provide direct advice and guidance to national components of the research. This Committee consisted of Elders prominent in Aboriginal rights advocacy, representing each state in Australia. A number of these Elders were Board Members of the Indigenous Peoples' Organisation-Australia

(IPOA), which I established in late 2015, in response to the Abbott Government's termination of small-grant funding for Indigenous leaders and emerging leaders to attend United Nations forums. IPOA was established as a members driven voluntary body following a meeting of previous Indigenous grantees. The IPOA members determined we would not be silenced by a lack of government funding. I was elected as chair of IPOA and then Co-Chair in 2017 when it was agreed to instil both male and female Co-Chairs. The national Board of IPOA has informed the political direction of praxis strategies and provided community accountability to the thesis.

Four settler-states were identified to consider their experiences related to the implementation of UNDRIP and whether these settler-states may provide insights to inform Australia. This approach acknowledged that given the limited length of this thesis and the broad themes being canvassed, it would not be possible to undertake more comprehensive comparative case studies. Canada, the United States of America and Aotearoa/New Zealand were drawn on to provide differing approaches from former British colonies, whilst Bolivia provided a contrast in having formally recognised its Indigenous Peoples' self-determination in its constitution.

The TIRT methodological approach incorporated a privileging of Indigenous peoples, their perspectives, concerns and aspirations. Qualitative in-depth semi-structured Interviews were selected as the key means for empirical data collection. A series of open-ended questions were drawn on to enable flexibility in the interview process, to allow the participants some flexibility to contribute and respond to the issues covered. Questionnaires and other forms of group engagement processes were not considered conducive to the depth of responses required to address the complexity of issues considered.

Indigenous experts were sought based on their experience and knowledge of United Nations processes with regard to Indigenous Peoples and also those Indigenous experts with a background in international law as it related to Indigenous Peoples. The identification of key themes that the interviews sought to address further informed the selection process, these included:

- Reasons Indigenous People seek advocacy at the United Nations;
- How concepts of sovereignty, self-determination and autonomy were relevant to the assertion of Indigenous rights;
- Were treaties useful in asserting Indigenous sovereignty;
- An analysis of Indigenous specific United Nations mechanisms and their effectiveness for Indigenous Peoples;
- A review of recent developments at the United Nations to enhance Indigenous participation and whether these were effective and sufficient; and
- Identifying opportunities at the United Nations to further enhance Indigenous participation and the recognition of Indigenous rights domestically.

Additionally, representation was sought from each of the settler-states identified, with consideration of a gender balance in the selection process. However, due to availability, a gender balance was not achieved in each location but is more broadly reflected across the total of interviewees. Each interviewee agreed to be identified in the research, as all are public figures, and generously agreed to contribute their experiences and views to the study. This selection was informed from my attendance at United Nations sessions and in recognition of the prominent role most of these Indigenous rights advocates had played. The interviewees selected are outlined in Appendix A.

Interviews were initially planned to occur during the two key Indigenous specific forums held at the United Nations, the United Nations Permanent Forum on Indigenous Issues (UNPFII), held annually in New York, USA, and the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), held annually in Geneva Switzerland. However, the intense time pressured environment wasn't conducive for all interviews. As a result, further interviews were undertaken on location at the interviewee's community. The interviews were generally undertaken over 1-2 hours to provide sufficient depth of discussion of local, regional and international experiences. The consistency of English as the national language across four of the five regions assisted this process, though, the Spanish language of Bolivia provided some additional challenges to the study, requiring a translator both during the interviews and site visits, and during the data analysis phase.

Interviews never occur in a vacuum but reflect people's own understanding of the historical-social context and political dynamics that influence the recognition of Indigenous rights by settler-states. A brief disclosure of my own biographical information, the intention of the research and motivation behind the study, placing the research within a cultural and political framework, were crucial in developing a shared collaborative ethos with the participants. Though this approach may be perceived as influencing the content, these disclosures developed a level of trust that facilitated a frank discussion of contemporary political machinations, relevant developments and debates. According to Tim Rapley, providing, 'a greater involvement of the interviewer's self, to progressively and incrementally build a mutual sense of cooperative self-disclosure and trust the interviewer must offer some form of strict or complementary reciprocity' (Rapley, 2004, p.22). This approach acknowledges that research is not a neutral process, rather these interviews sought to highlight a collaborative approach and shared objectives. According to Rapley, it alleviates a sense of hierarchy between researcher and interviewee (Rapley, 2004, p.12).

Participant and observational fieldwork enabled a review of the processes of United Nations mechanisms, and a further level of analysis of the practical and political challenges of participating within United Nations fora. Participant observation requires ‘thinking carefully about what is seen, interpreting it and talking to the actors to check emerging interpretations’ (Delamont, 2004, p.5). Gaining access as a participating observer provided opportunity for experiential learning whilst also strengthening affiliations and trust built on the shared experiences and objectives with research participants. Participant Observations also incorporated a reflective process to identify key themes and assess nuances. These reflective notes provided a further level of empirical data for analysis. Participant Observation also provided a first-hand review of settler-state participation and opportunity to analyse the capacity for issues raised to impact settler-states. Significantly, it also provided consideration of areas where settler-states and Indigenous representatives worked collaboratively to address Indigenous concerns and contributed to the research’s capacity to assess the level of state influence on proceedings. This participant observational analysis also facilitated an examination of the effectiveness of recent developments to increase Indigenous participation within United Nations forums and identify potential means to improve these processes further. Additionally, though the interviews and observational analysis provided the central source of data, a further level of analysis was provided through a series of praxis initiatives. Margaret Kovach highlights a correlation between qualitative research and participatory action research within a transformative research paradigm, where she asserts an obligation to give back to Indigenous communities (2009, p.27).

#### 4.3.1 Transformative Indigenous Rights in Praxis

The process of moving from selected research methods to praxis also transferred this research from an abstract conceptual analysis to actively engaging in the transformative premise of TIRT

methodology. For 'actions' to qualify as research, as opposed to a 'political action', praxis research initiatives needed to define the problem, analyse opportunities and potential outcomes, formulate an appropriate and responsive action, include criteria to assess its effectiveness, incorporate a self-reflective phase, and develop learnings from the process. According to Lardkin, an intentionality of outcome is required, that the action have practical consequences or benefits to the participants or it seeks to deepen understanding of a situation (2011, p.5). The methods developed sought to respond to the requirements of the methodology and proactively counter the silencing of Aboriginal political aspirations.

The praxis component of TIRT research developed specific actions that are triangulated with the methods outlined above, to proactively promote Indigenous aspirations for self-determination (Kemmis, 2011, p.7). This research identified five related praxis strategies, in collaboration with the national Indigenous Advisory Committee, which sought in differing ways to assess how international standards are drawn on at the local and national level, to support the implementation of Indigenous rights to self-determination on the ground. This action-based approach was designed to complement the more orthodox interviews, participatory observation, and reflexivity that were instigated throughout this research, as key qualitative empirical data sources. This thesis argues that a diversity of strategic praxis and methods strengthen the veracity of the overall findings, as it provided further comparative empirical data sets for analysis.

### *Praxis 1: Treaty Talks Workshop & Justice Through Treaty March*

The hosting of a national Treaty Talks workshop was approved by the National Aboriginal Advisory Committee', following Prime Minister Malcolm Turnbull's rejection of the recommendations of the 'Uluru Statement from the Heart', the recommendations developed from a national Aboriginal

gathering in Uluru, central Australia, that was the culmination of a series of thirteen community consultations on the constitutional recognition of Aboriginal and Torres Strait Islander Peoples. The Statement from the Heart resoundingly rejected the notion of symbolic constitutional recognition, rather it called for substantive structural change through a constitutionally enshrined representative Voice to Parliament and the establishment of a Makarrata Commission to develop a treaty and undertake a process of truth-telling. The campaign for a Voice to Parliament is elaborated on further in chapter six. The hosting of a 'Treaty Talks Workshop' sought to ensure long-held Aboriginal aspirations for a treaty were not over-shadowed by calls for a Voice to Parliament or dropped off the national discourse by the Prime Minister's rejection of the Statement for the Heart.

The Treaty Talks Workshop was established to provide Aboriginal community members an opportunity to discuss the potential, possible ramifications and concerns regarding the potential future development of a treaty between Aboriginal and Torres Strait Islander Peoples and the Australian Federal Government. The Treaty Talks Workshop culminated in a further related action, a 'Justice Through Treaty' protest march, to raise the public profile of Aboriginal calls for a treaty. The Indigenous Advisory Committee informed the planning and the programme of the Treaty Talks workshop, providing guidance and oversight over the selection of Aboriginal speakers over the three-day event.

The action enabled Aboriginal community members to discuss the potential of a contemporary treaty to constructively address Aboriginal self-determination, governance, decision-making, issues of reparation, land rights and redistribution. The feasibility of a treaty to provide the structural framework to achieve concrete and appreciable changes in relations between the Australian settler-state and Indigenous Peoples, to secure just outcomes that recognise Aboriginal sovereignty and provide a means to move beyond contemporary colonialism, were facilitated through this praxis.

However, though there was broad national support across the Aboriginal community, a non-Indigenous Trotskyist group called 'Solidarity' sought to undermine both the Workshop and the following Justice Through Treaty march. The Trotskyist Group was politically opposed to Aboriginal calls for a treaty and critical Aboriginal people determining Aboriginal political campaigns, claiming they amounted to 'identity politics'. These praxis events continued despite this external interference, given the disruption they caused to the research, and, given the broader insights they provide to this analysis, are briefly scrutinised in chapter five.

The 'Justice Through Treaty March' was held immediately following the Workshop, on 'Invasion Day'/Australia Day 2018. The 'Justice Through Treaty' march was a strategic initiative to raise the public profile of Aboriginal calls for a treaty, promote its viability to the broader community and contribute to public discourse, following the federal government's rejection of the 'Statement from the Heart'. It sought proactively to address concerns that the proposal for a national treaty may lose momentum among the competing public discourses. The march drew on prominent Aboriginal and non-Aboriginal speakers and highlighted Australia's failure to meet its international obligations. It also provided an example of a key local action that drew on international precedents, comparing Australia's lack of a treaty with other comparable settler-states, and arguing that a treaty had capacity to meet Aboriginal social justice objectives and transcend Australia's history of dispossession and contemporary colonisation. The Treaty Talks Workshop and Justice Through Treaty march are addressed in chapter 5 of this thesis.

### *Praxis 2: Case Study of Attendance at a United Nations Mechanism*

A further Indigenous Transformative Rights action research initiative was to raise the issue of treaty at the United Nations Permanent Forum on Indigenous Issues (UNPFII) in April 2018. The national

advisory committee agreed to support Independent Northern Territory MP Yingiya Guyula, who was the elected Parliamentary Member for the Northern Territory seat of Nhulunbuy, on a platform advocating for a treaty. In Attending UNPFII, Guyula sought to highlight his community's calls for a contemporary treaty between the Australian settler-state and the Yolgnu Nation and Aboriginal people. This initiative provided a case study to assess the capacity for Indigenous Peoples to utilise Indigenous mechanisms of the United Nations to assert their rights to self-determination. This action provided an analysis of a specific concern being raised, an assessment of its impact, consideration of the reasons for participating and whether the participant felt it was an empowering or useful process for them, and what they hoped it may achieve. The qualitative interview provided opportunity to dissect participation at the United Nations, review challenges, and assess whether it was considered beneficial. This process was further analysed through relational and collective reflexivity processes. This examination of attendance at United Nations mechanisms is assessed in chapter five, which introduces and scrutinises Indigenous focused mechanisms of the United Nations.

### *Praxis 3: Universal Periodic Review*

The Universal Periodic Review (UPR) is a mechanism under the United Nations Human Rights Council which facilitates a peer review of each of the 193 member-states of the General Assembly for their human rights compliance every four and a half years. The UPR commenced in 2008, and in 2020 Australia undertook its third review and in 2025 undertook its fourth review. Being a peer review process, other member-states review those members undertaking the UPR and rely on reports by those member-States, who report on their efforts to improve the human rights in their country. The shadow reports from the civil society sector in each nation under review highlight human rights violations and provide recommendations that member-state can undertake to enhance their human

rights compliance. This praxis contributed to the civil society reports to raise human rights issues impacting Aboriginal and Torres Strait Islander Peoples and provide recommendations on how to address these. Additionally, the two reports, in 2020 and 2025, provided an assessment on the effectiveness of the UPR process between reports.

This praxis provided an opportunity to draw international attention to human rights breaches in relation to the Indigenous Peoples of Australia but importantly it provided an opportunity to clearly document these issues and assess whether Australia may respond to these United Nations processes. In addition, this examination of the UPR provided opportunity to analyse whether other member-states may pick up Indigenous issues raised in the UPR NGO Report and raise them in their recommendations. It also provided an analysis of how the Australian government may formally respond and whether there is any follow up to issues that are raised. Thus, through this case study, this analysis provides insights into the effectiveness of the UPR process for Indigenous peoples. The Universal Period Review is investigated in chapter six, which provides an analysis of recent United Nations strategies that have been adopted to enhance Indigenous rights compliance.

#### *Praxis 4: UNFCCC Indigenous Troika*

The Indigenous Troika was an initiative jointly conceived by Brazilian Indigenous representatives and me at a meeting we held to consider ways to strengthen Indigenous engagement and decision-making of Indigenous peoples within the United Nations Framework Convention on Climate Change (UNFCCC). The launch of an Indigenous Troika, which mirrored the Conference of the Parties (COP) Presidency Troika, where past, present and future COP Presidents would work collaboratively to provide continuity across the annual COP international conferences. The Indigenous Troika would be represented by an Indigenous representative from past, present and future COPs, and see to raise

the need for increased Indigenous participation in climate negotiations and promote an understanding of the role Indigenous Peoples play as caretakers of country and how this could contribute to effective climate solutions at the COPs. The Indigenous Troika was formally launched at COP29 in Baku, Azerbaijan, in November 2024.

This praxis provided an analysis of an Indigenous initiated political strategy that proactively sought to strengthen Indigenous participation. Additionally, it sought to improve the quality of that participation, in seeking to enhance Indigenous input into decision-making. This praxis provided an assessment of the responsiveness of a member-state with a large Indigenous population and significant Indigenous region of the Amazon. The praxis also sought to review the UNFCCC's capacity to respond to local Indigenous concerns and whether shorter and longer-term outcomes may be achieved. It also provides a point of comparison of the relative responsiveness between Brazil and Australia, where Australia is partnering with Pacific Islands nations that are dominated by Indigenous Peoples as stewards of the Pacific water continent, which like the Amazon, also plays a central role in carbon sequestration. As a new initiative this political action is examined in chapter seven, which reviews further opportunities to promote the self-determination of Indigenous Peoples within United Nations processes and domestically.

These praxis research initiatives sought to provide further insights on the disparities between international law and national implementation and how they may be ameliorated. These praxis-actions reflected various stages of Indigenous engagement with United Nations mechanisms and are examined across the thesis. The various praxis strategies reviewed the capacity for Aboriginal/Indigenous Peoples to identify or develop opportunity structures to raise rights violations. These actions also enabled the study to assess their impact on the broader social discourse and provide an appraisal of government, public and media responses. Where interviewees

were directly engaged in these strategies they also provided an assessment of the reasons they participated, a qualitative reflection on the processes of engagement, what they hoped to achieve and whether participants felt it was an empowering or useful process for them. Significantly it also provided an analysis on whether the actions contributed to the overall objectives of the research, whether the United Nations may be useful to Aboriginal People in asserting our rights to self-determination.

#### 4.4 Analysing Transformative Indigenous Rights

The Transformative Indigenous Rights Methodology adopts an 'abductive' process of analysis, which commences from a theoretical position, it then requires an analysis of the in-depth interviews, observational analysis and the praxis action-based research, to draw inferences set against the theoretical approach (Day, 2004, p.26). Abduction requires the researcher to draw on the theoretical approach while analysing the data, however, it also requires broader consideration of data that may lie outside the initial theoretical framework.

Abductive analysis requires revealing the underlying mechanisms that lead to experiences and social phenomenon, that assess the 'ontological focus of what produces events' (Meyer, 2012, p.1). Abduction reconceptualises phenomena to offer plausible deeper interpretations of conceptions (Day, 2004, 27). 'Fundamentally, abduction is a means of forming associations that enable the researcher to discern relations and connections that are not otherwise evident or obvious' (Meyer, 2012, p.2), which enable the identification of data 'beyond the initial theoretical premise' (Meyer, 2012, p.2).

The qualitative data was analysed through 'Grounded Theory', which sought to privilege the perspectives of the Indigenous participants to identify key themes to develop coded empirical data. This enabled interviews to be analysed to identify similarities or differences, and to re-contextualize the data to form new insights (Creswell, 2009, p.13). The coding phases of open, axial and selective coding enabled a selective process of conceptualizing, categorizing, analysing, reviewing and further refining complex coded qualitative data. This analysis also incorporated 'verification theory' to assess, compare and verify the information provided by interviewees (Punch, 2006, p.69). In addition, it also included 'generation theory', where the analysis of the data strives to generate new ways of utilizing United Nations mechanisms to facilitate Aboriginal self-determination and decision-making within an Australian context (Punch, 2006, p.69).

Grounded Theory also enabled connections to be drawn between interviewee and regions, across defined themes that emerged within the empirical data. These comparisons and connections enabled further refinement of the developing themes and sub-themes, with consideration of causal connections. Grounded theory allows the development and analysis of theory that recognises what Ian Day refers to as, the 'multiple and conjectural character of causation (2004, p.29)' to facilitate the development of theory that may be both analytical and practical. Significantly, according to Day, Grounded Theory enables a shift in focus from identifying patterns to analysing powers (2004, p.29).

The analysis of interviews took a discursive analytical approach, identifying broad themes, and refining these based on an analysis of key words that recognised underlying meanings rather than word specific reference, cognisant that words may be used in differing ways. This analysis sought to identify patterns of particular concerns as well as more covert and structural issues raised through the data and its sub-texts. It also considered broader ontological issues, in addition to the practical experiences and aspirations of Indigenous advocates.

#### 4.4.1. Assessing Socially Just Research

Given its anti-oppressive objectives, Transformative Indigenous Rights Theory (TIRT) Methodology requires that the quality of the research be judged on its impact on Aboriginal People. According to Strega, socially just research requires differing '*social justice validity*' criteria, where the views of the community are critical to its evaluation (2015, p.145). In applying TIRT, this thesis contends the most significant factor for socially just research is ensuring the research intent is aligned with the aspirations of those marginalized participants of the research. Actively challenging disempowerment by working to enact Indigenous communities' aspirations, is an objective in itself, with the relevance of research judged by those Indigenous communities.

Ladkin also provides guidance on evaluating PAR approaches, including analysing whether they address a practical concern, the extent the process engaged with those subjected to outcomes, the degree of significance, whether the research considered differing ways of knowing, and whether it was useful. A praxis-action or method is determined useful if it has achieved improvements in the lived experiences of those subject to them, whether it was empowering or whether it contributes to achieving longer term outcomes (Ladkin, 2011, p.8). This thesis argues that the capacity to achieve immediate outcomes should not be the most critical driver of research. Research that actively challenges oppression may have less apparent outcomes, and Indigenous aspirations for substantial structural change may not be addressed if judged on an external perception of capacity to secure hard outcomes. If it relies too heavily on a purely pragmatic assessment, research would likely be constrained and not address fundamental injustices that may be more challenging.

A further criterion, according to Strega, is the capacity to be critically reflective, which requires researchers to question their positionality, and its impact on the research. The extent of critical

reflection 'highlights rather than obscures the participation of the researcher in the research process' (Strega, 2015, p.146). Smith acknowledges that in the current conservative climate, researchers that overtly advocate for rights can be targeted as politically motivated and their research denigrated or undermined by a perception of having an ulterior agenda (2021, p.198). According to Smith, external perceptions of authenticity or lack of it, have also been used to silence the voices of Indigenous Peoples who have borne the brunt of invasion, dispossession and colonization (2021, p.95). Yet it is our Aboriginality that obliges us to speak. We recognise our community obligations extend to those who share a history of colonization. Though experiences vary depending on the level of dispossession, our values remain deeply connected to our ontology.

#### 4.4.2 Ethical Considerations

The methodology of TIRT, like all research dealing with Indigenous Peoples, needs to be undertaken with the highest ethical standards, taking into consideration the particular requirements of Indigenous communities. Following Indigenous protocols and ethical standards is essential to enact the decolonizing intent of the research and to empower Indigenous communities. Within an Australian context, the National Health and Medical Research Council (NHMRC) and Aboriginal Health and Medical Research Council (AHMRC) provide clear guidelines. AHMRC and other Aboriginal research approaches confirm responsibilities to empower and consult with Indigenous communities, as partners to the research rather than the topic of research. The Aboriginality of the researcher does not abrogate these requirements; indeed, Indigeneity places a further onus on the researcher to ensure that research is undertaken in a collaborative and respectful way. Researchers also need to be aware that communities are already operating on limited capacity given the complex issues they face, with few resources or support structures, so their time valuable.

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Guideline for Ethical Research in Australian Indigenous Studies also assert Indigenous rights be recognized as unique and distinct. It requires that processes of negotiation and consultation ensure ‘free, prior and informed consent’ and unencumbered and informed decision-making. It requires that research outcomes ‘respond to the needs and interests of Indigenous peoples’ (AIATSIS, 2012). Protections on the use, storage and access to data are also crucial.

Indeed, Sydney University’s own human ethics approval process demands that all research interviews, particularly those involving Aboriginal/Indigenous People as an identified vulnerable group, meet the ethical guidelines of the AHMRC and AIATSIS. Importantly these principles elaborate on how to ensure research facilitates Indigenous decision making. The research, in this instance, is a tool to counter the marginalization and injustice faced by Aboriginal communities and consciously seeks to challenge the power disparity of the realpolitik, or the practical experiences of politics, through praxis. However, Brown and Strega argue that ‘research cannot challenge relations of dominance and subordination unless it also challenges the hegemony of current research paradigms’ (2005, p.10). This requires that ethical research be judged by those Indigenous communities impacted on whether it aligns with their aspirations.

#### 4.4.3 Limitations

The topic of this thesis, considering international law as it impacts Indigenous Peoples’ rights to self-determination, reviewing both United Nations mechanisms and its implementation at the state level, is by nature broad. Research on several settler-states has been undertaken to highlight specific lessons, examples or experiences, rather than providing a full case-study analysis. Undertaking a case study of each of these regions was not feasible within this study, however, this is an area

identified for potential further research. Equally there were also limitations on the number of interviewees due to distance and time constraints, so I chose to limit interviews to a minimum of two Indigenous experts per regions. While the study has sought to review relevant areas of international law, it has been unable to provide a detailed analysis of all areas of Indigenous related international jurisprudence. In addition, the United Nations is comprised of numerous mechanisms that may be required to interpret or draw on Indigenous rights as part of their broader role. However, this thesis has been unable to undertake a review of all relevant instruments. Rather the thesis has focused on the Indigenous specific mechanisms of the Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples and the potential for emerging areas with an Indigenous focus. A more comprehensive review of all United Nations mechanisms is also identified as a potential focus for further study.

## 4.5 Conclusion

This chapter has outlined how the thesis implements the methodological approach determined through Transformative Indigenous Rights Theory (TIRT). The chapter highlighted that the transformative onus of this research requires a decolonising intent through the asseveration of self-determination for Aboriginal People. This approach requires that the research responds to the perspectives of the Aboriginal community, that Indigenous Peoples benefit from the research, that it be an empowering and collegial process for the Indigenous participants and be premised on the assertion of Indigenous self-determination and social justice for indigenous Peoples.

I also explained how a praxis approach is fundamental to TIRT, incorporating an onus to implement collaborative strategic praxis-actions to respond to identified political objectives or needs of the Indigenous People reflected in the research. It highlighted that TIRT seeks to align the averment of

rights from a theoretical framework to an action focus that promotes Indigenous agency. These praxes provided a further analysis than interviews and participatory observations alone. This additional data set provided an examination of how local and global actions seek to draw on international law and global frameworks to strengthen the assertion of Indigenous rights.

The key methods used to implement TIRT methodology were selected as a means to triangulate and further strengthen the validity of the overall analysis and research findings. The methods used sought to privilege Indigenous Peoples' political aspirations against settler-states strategies of assimilation and suppression that are used to maintain authority over Aboriginal and Torres Strait Islander Peoples.

The chapter confirms why this methodological framework, based on Transformative Indigenous Rights Theory demands specific attention be applied to Indigenous constructs and details why praxes are a critical element of this research. This chapter confirms TIRT praxes must champion communal agency, aligning the assertion of rights from a solely theoretical framework to a practical outcome focus.

The following three chapters incorporate the results of implementing the TIRT methodology. The next chapter provides an analysis of international law, Indigenous relevant mechanisms at the United Nations and what Indigenous Peoples seek to achieve through their engagement. Chapter 6 then examines recent developments that have been secured in the recognition of Indigenous rights to self-determination. The final results chapter sets out the findings of this analysis and points to untapped opportunities to further facilitate Indigenous rights advocacy through the United Nations and how the domestic implementation of UNDRIP may be enhanced.

## CHAPTER 5

### A PERSISTENT TRICKLE ON RESISTANT ROCK

## Proem: Delusions of Grandeur

*My mother's father Roderick (Dick), moved to Brisbane in the 1930s, after two brothers had died and two were jailed for protesting, and he felt the family was being targeted by police in Sydney. He built a small house in Redcliffe, at that stage some distance from the city that would later engulf it.*

*He married a wild Scottish girl who 'rode the rattlers', hanging on to the bottom of train carriages as a means to travel without a fare during the 1930s depression. That willingness to break the rules also saw her marry an Aboriginal man. They had five girls before a boy.*

*One of the stories my mother spoke of was of a family picnic on Morton Island, they had caught a ferry and were on the island when a tropical cyclone hit. They managed to weather the storm, but the ferry was cancelled due to rough seas, and it was a further week before the ferry resumed. With no food other than their lunch, it was their father who found water, and caught bush food, turtles, snakes and lizards to keep the family fed.*

*With the arrival of WW2 Dick went to enlist, expecting to be shipped to some far-off destination. But with his dark complexion, they refused him an overseas posting. Rather, with the threat of Japanese coming from the lightly settled North Queensland and having no accurate maps of the hundreds of miles of thick rainforest and crocodile infested mangroves across the Cape, they had determined only a Blackfella could get into that country to survey it. Dick was trained as a surveyor and spent the war mapping the previously uncharted North (Eatock, 2003).*

*It was only after the war that this caused any concern. When asked what he did for work he would respond that he was a surveyor. But the racism of the time couldn't meld an Aboriginal man with the skilled job of a surveyor. But Dick was insistent. It got him into trouble and eventually into a psychiatric hospital, diagnosed with 'delusions of grandeur' (Eatock, 2003).*

*He underwent repeated sessions of electro convulsive shock therapy, but it didn't break his resolve. He knew what he'd done. That couldn't be taken from him, unlike his freedom. He remained locked up for over 20 years (Eatock, 2003). The hard-earned lesson drawn from this is, don't let others try to define who you are.*

## 5.1 Introduction

United Nations mechanisms, derived within a state-based framework, historically excluded Indigenous Peoples, many of which remain oppressed by settler-societies. However, through the relentless assertion of Indigenous self-determination, capacity for Indigenous advocacy within international fora has incrementally increased. As Margaret Mutu mused, “it’s like water, water can be strong with persistence. It’s always there and it’s going to keep dripping and it will eventually wear!”

This is the first of three results chapters, the fifth chapter introduces key themes addressed throughout the thesis, the sixth considers developments that have been secured and why these are insufficient, with the seventh setting out proposals for further areas to be addressed. This chapter considers the motivations behind Indigenous Peoples’ engagement with the United Nations, in a bid to address the power disparities with settler-states and to counter the violation of Indigenous rights. Indigenous assertion of their self-determination, with treaties an expression of Indigenous sovereignty is one of the themes raised in the data which is addressed across this dissertation. I provide a brief assessment of the different political contexts and impacts of colonization before considering the impetus of global Indigenous advocacy, which emerged from a shared history of resistance against the impunity of settler-states.

The potential benefits of United Nations advocacy is examined through the overturning of discriminatory legislation in Canada in the Lovelace Case, where a First Nations woman and her offspring lost their state-endorsed Indigenous status when marrying a non-Indigenous man. In Australia, the establishment of the Royal Commission into Aboriginal Deaths in Custody was also attributed to a combined local and global political campaign.

The subsequent endorsement of the Declaration on the Rights of Indigenous Peoples (UNDRIP) and the reasons for initial CANZUS state resistance to its adoption are investigated before I assess its influence in setting global standards. The impact of UNDRIP on United Nations mechanisms and its contribution to customary international law is examined. The significance of UNDRIP in the domestic sphere is assessed before exploring the experiences of Bolivia, which incorporates UNDRIP in its Constitution and provides an example of state implementation of UNDRIP.

Finally, I examine the challenges of advocating within the United Nations bureaucracy, which replicates domestic power imbalances. This marginalization is compounded for economically disadvantaged Indigenous Peoples who bear significant expense to engage in United Nations processes. Though outcomes have been achieved, these have been notoriously slow with the Declaration taking decades to negotiate. While Indigenous specific mechanisms have been useful for raising breaches of Indigenous rights, there is recognition of the limitations of these processes, which rely on moral persuasion. This lack of monitoring of UNDRIP or enforceability mars its effectiveness. However, in the context of domestic justice systems, Indigenous Peoples who engage with the United Nations recognize it as one of the few opportunities that may hold settler-states to account.

The next chapter provides a deeper analysis of developments that have been secured in the United Nations and within states domestically. Chapter seven then examines opportunities to further augment Indigenous claims within United Nations frameworks and how these may foster more responsive approaches from settler-states to influence compliance.

## 5.2 Why the United Nations

### 5.2.1 Asserting Self Determination

In reviewing the themes in the data, the assertion of Indigenous rights and self-determination was the overarching motivation for Indigenous Peoples' engagement within United Nations processes. According to Kenneth Deer, "you can't just go around asking for your rights. You have to assert them. That's really what self-determination's about" (Deer). Reflecting on why Indigenous Peoples engage, Deer, surmised "we are sovereign people, we have a right to self-determination, and we have nation to nation relationships with governments called treaties" (Deer).

For Grand Chief Wilton Littlechild, treaties are evidence of Indigenous rights to self-determination, "we couldn't have signed a treaty if we were not a self-determining nation" (Littlechild). The original treaties with the British Crown were international agreements to share the country peacefully, but they do not cede sovereignty. Littlechild explains the treaty was recorded in oral history through the generations, "the treaty is carried in song, its a very detailed and elaborate sacred ceremony that takes four days and four nights to transfer that story" (Littlechild).

Deer explained the Mohawk history of treaties recorded in the Haudenosaunee Hiawatha Wampun Belt, made of white and purple shell beads, documented a peace agreement between five nations prior to the Europeans' arrival. A further treaty, the Gaswéñdah Two Row Wampun Belt, documented an agreement with the Dutch prior to 1635. "One purple row represents the ship with sails, with the Europeans people and laws. And the other row is our people in the canoe, we have our constitution and our religion. The white represents the river of life, with the two vessels travelling in parallel down the river, not interfering with each other's navigation" (Deer).

Littlechild explains there are three types of treaties in Canada, the historical Crown treaties, the numbered treaties between Indigenous nations and the Crown, and then contemporary treaties with the Crown, asserting that “the breach of treaties is the foundation of all other disputes” (Littlechild). The reason First Nations seek access to the United Nations was to address violations of Indigenous rights and treaties (Littlechild). Though First Nations People recognized Europeans were here to stay, “we are two sovereigns now living in the same territory, in the same land” (Deer).

Deer asserts Indigenous rights to a dual sovereignty, where compensation is paid rather than welfare. “We had a land-based economy before the land was taken, now they’ve got to share the economy from that land. And with that we will run our schools and our governance in our community. And of course we would like to get more land back, because our communities are too small...where we can develop our own revenue as well” (Deer). Deer explains that the relationship would be like Canada and the United States, side by side, recognizing each other’s sovereign rights (Deer).

However, the gross violation of those treaties couldn’t be resolved domestically, so “we had no alternative but to come to the international arena” (Littlechild). The United Nations has been used to assert Indigenous ancestral rights but also Indigenous self-determination as Peoples. The data highlighted interviewees sought to draw on the United Nations as a means to adjudicate contested sovereignties, even though the sovereignty of Indigenous Peoples is currently outside of the mandate of the United Nations. “There’s such a thing as creating a new space, creating a new legal space that recognises .., that there’s Indigenous sovereignty, so they can all coexist” (Littlechild).

Margaret Mutu also grounded her engagement on the Treaty of Waitangi as Aotearoa/New Zealand’s ‘primary constitutional document’. The ‘sovereignty of this country lies in the Rangatira or

heads of Hapu tribes throughout this country'(Mutu). Māori Rangatira had signed the Treaty to allow the British to control the lawlessness of British colonists, who 'wouldn't abide by the laws of this land'(Mutu). Māori had originally travelled to meet the British Monarch and signed the Treaty with Queen Victoria in 1835. However, 'they would never cede that authority, that sovereignty, those law-making powers to anyone else' (Mutu). The Māori version of the Treaty called on the British Crown to "recognise that we were the sovereign authority in this country", though the English version claimed Rangatira "had ceded their sovereignty to the British and that was quite fraudulent" (Mutu).

However, the British did not abide by the Treaty, "they wiped out huge numbers of Māori, I would estimate [the population was] upwards of a million of us down to about 41,000 within 60 years" (Mutu). Māori had unsuccessfully sought to raise the Treaty of Waitangi at the League of Nations, the precursor to the United Nations, and then the United Nations, in an attempt to hold the British Crown to adhere to their treaty. "So, if Britain wasn't going to honour its own treaties, we would look to other countries to do that", (Mutu). However, given that the United Nations is a state-based body, Indigenous People were previously excluded from it.

Though historical treaties were inequitable, secured under duress, and frequently not honoured, treaties recognized the sovereignty and nation status of Indigenous Peoples (Deer). According to Chief Ed John, "treaties serve to reconcile pre-existent sovereignty with the Crown's assumed sovereignty" (John). Treaties are high level constitutional arrangements, "they are instruments of self-determination" (John). Even modern treaties, "aren't just mere agreements that the government can ignore or violate, there's a level of accountability now" (John). I return to the issue of treaties in the findings in Chapter 7.

Unlike other former British colonies, Australia is distinct in not having secured any treaty with its Indigenous People and, as a result, remains disadvantaged domestically, lacking a national Indigenous representative body. As such, Aboriginal and Torres Strait Islander People remain more dependent on international legal frameworks to recognise their rights. Despite calls for a treaty in 1979 (Harris, 1979) and the Hawke Labor Government's commitment to a treaty in 1988, Aboriginal aspirations for a treaty remained thwarted. Rather, promises for a treaty were diluted to a reconciliation process, with the Council for Aboriginal Reconciliation established in 1991, to develop a process for reconciliation by the Centenary of Federation in 2001. However, the change of government in 1996 brought a more adversarial approach by then Prime Minister John Howard.

Though the Roadmap for Reconciliation Report in 2000 proposed a treaty, it also called for constitutional reform to recognise the status of the first Australians. The Report's recommendations were rejected by the Howard Government (Davis, 2021, p85). Rather, the Australian Government's recognition and reconciliation processes distracted from more substantive treaty calls, as Glen Coulthard, Taiaiake Alfred, Jeff Corntassel and Audra Simpson warned, in chapter 2. A lengthy process to establish a Referendum on a constitutionally enshrined Indigenous Voice to Parliament followed. Thirteen consultations undertaken to inform the Referendum Council's Report faced persistent calls for a treaty, "our ancestors never ceded their sovereign rights" (Referendum Council, 2017). However, the Referendum Council Report failed to recommend a treaty. Aboriginal pursuit of a treaty and its correlation with global advocacy is further examined in a praxis component of this study, outlined in Chapter 6.

Engagement with the United Nations was set out by the interviewees as a key strategy to establish and enact nation-to-nation status between settler-states and Indigenous Peoples. Though similar in objectives to those pursuing a separatist resurgent approach, in seeking autonomy for their

communities, those I interviewed chose to engage with states and international mechanisms strategically as a means to secure those outcomes. Each of the interviewees was dedicated to engaging with United Nations mechanisms, though they recognised its limitations, they also saw opportunity for further reform that could support domestic objectives. They each considered the leveraging of United Nations mechanisms as a means to strengthen domestic claims and challenge the impunity of the state. The recent adoption of legislation by the Canadian state to implement UNDRIP, which I outline in chapter six, provides evidence of the impact of developments in international law on domestic jurisdictions.

### 5.2.2 Activism & Global Solidarity

It is important in this study to understand that United Nations advocacy is built on a correlation of local and global activism. Indigenous Peoples' local agency networked and linked with other First Nations Peoples' shared experiences of violent dispossession and confinement to missions and reserves. In response to legislation to assimilate Indigenous Peoples in Canada, Chief George Manuel, from Shuswap, British Columbia, Canada, sought support from other Indigenous Peoples globally. Chief Manuel is credited with founding the World Council of Indigenous Peoples in 1975. Manuel termed "the original Nations throughout the world [as] (are) the fourth world" (Manuel). At the 2<sup>nd</sup> World Council of Indigenous Peoples Manuel called for a Universal Declaration on the Rights of Indigenous Peoples in 1977, the precursor to UNDRIP. United Nations mechanisms were considered a means to leverage international pressure to counter the disparate power dynamics between Settler-States and Indigenous Peoples.

Protest and advocacy have been used by Indigenous Peoples, who have previously been marginalized and silenced, to give voice to local concerns by leveraging the United Nations. In

reviewing the empirical data, interviewees raised their shared histories of invasion, colonization and frequent dispossession, where ongoing structural marginalization and violence continue to feed the grievances of the 476.6 million Indigenous People, that form 9% of the world's population (United Nations Global Compact). Kenneth Deer spoke of the decimation of Indigenous communities and the claims to racial superiority by colonisers in north American that resulted in contemporary institutionalised racism (Deer). Grand Chief Ed John acknowledged this violent past, "there's a dark history, with...the so-called development of the Americas, Indigenous People became slaves, were murdered by the millions and killed indiscriminately" (John). While Solonec suggested Aboriginal populations in Australia had dropped to 40,000 people by the turn of the 19<sup>th</sup> century (Solonec), with analysis of the 260 languages and 500 dialects indicating a population of 3 to 6 million people at the time of Colonisation (Bradshaw, 2021).

Margaret Mutu also provided a historical context, how the Treaty of Waitangi Tribunal was established in 1975 following domestic protests, that led to Māori engagement in the United Nations and the development of UNDRIP, to pressure the New Zealand Government to honour its treaty obligations (Mutu). The United Nations Working Group of Indigenous Peoples (WGIP) established in 1982, as result of the study by José R. Martinez Cobo (Cobo, 1983), completed the first Draft Declaration on the Rights of Indigenous Peoples in 1993. UNDRIP confirmed international law also applied to Indigenous Peoples and set a benchmark in minimum standards in the recognition of Indigenous rights. According to Mutu, Māori need to draw on the United Nations given the New Zealand Government wasn't responsive to Indigenous Peoples (Mutu).

Although very different from the other settler-states under review, Bolivia also drew on a history of activism in their engagement in the United Nations. Against a history of forced colonization, there was no recognition of Indigenous rights until protests in the 1980s that called for land reform,

(Choque). Q'apaj Conde Choque an Aymaran lawyer from Bolivia, outlined how Elders had previously approached the United Nations and international community to have a role in settling disputes, as arbitrators between Indigenous Peoples and settler-states (Choque). While Indigenous Peoples form the majority population in Bolivia it was the election of Evo Morales as the first Indigenous President, in December 2005, following a period of economic and political crisis and widespread Indigenous protests that ushered in a period of radical change (Choque). Morales responded to Indigenous calls with a new Constitution. Bolivia has now established laws that empower Indigenous Peoples, however, there is still a gap in the implementation of legislation (Choque). "Indigenous peoples don't have military power, or economic power, to push them to adopt the Declaration" (Choque). The framework of Indigenous rights provided useful leverage in the domestic sphere and international advocacy was critical in supporting that.

The data also indicated that Indigenous Peoples often felt empowered through the global solidarity with other Indigenous Peoples. "In our respective countries, generally we are oppressed minorities, but when we come together at the United Nations we are a very strong force, it's about having that global solidarity" (Solonec). Yingiya Guyula spoke of his experience attending the United Nations, "I wasn't sure how things were going to work out for me, but when I listened to the rest of the world talk about their issues on their country, I thought, that sounds like my country. We are struggling for treaty, we are struggling for recognition, we are struggling for self-determination all around the world. And that gave me a kind of confidence and a comfort that I could stand and speak with my brothers and sisters from around the world on issues of treaty and issues of self-determination" (Guyula). The potential benefit in raising local issues globally is further examined through a praxis, or proactive politically driven research, that supported Mr Yingiya to attend the United Nations Permanent Forum on Indigenous Issues (UNPFII).

### *5.2.2.1 Local to Global: Putting Praxis into Practice*

I have incorporated praxis components throughout this thesis to highlight the correlation between local and global advocacy. The praxis approach is outlined in Chapter 3 and 4, where I outline my transformative Indigenous rights theoretical approach, which incorporates praxis elements. An analysis of the effectiveness of these political actions enriches the data and findings of this dissertation. These praxes provide a further level of analysis to assess how international Indigenous experiences seeking to assert Indigenous rights can inform this examination of the United Nations capacity to respond to Indigenous rights to self-determination. The praxes are politically driven initiatives that sought to respond to community needs to promote Indigenous access and capacity within United Nations mechanisms and their influence on domestic approaches. This praxis-based data provided an additional level of analysis on the usefulness for Indigenous Peoples in drawing on United Nations mechanisms. This approach aligns with Adam Gaudry, a Métis academic's recognition that, 'scholars can act simultaneously as researchers, community organisers and political leaders' (Gaudry, 2015, p.258). Additionally, this research seeks to contribute to social justice, political engagement and social change, as espoused by Strega and Brown (Strega, 2015, p.17).

In Australia, like other regions, Indigenous self-determination has been tied to the concept of treaty, as an agreement between two sovereign bodies. The topic of treaty as a praxis element of this study, was determined in response to the interview data and my own engagement in the Aboriginal community, where the promotion of a treaty in Australia as a means to implement self-determination was a central concern. Indigenous domestic treaty debates informed global advocacy and countered public discourse that limit Indigenous rights to recognition and reconciliation processes, reflecting the global debate outlined in Chapter 2. As Linda Tuhiwai Smith recognises,

Indigenous research and political action tie local issues impacting First Nations communities to international concerns, contributing to a global network of Indigenous activists.

In response to Indigenous community concerns that treaty aspirations may be dropped from public discourse, amidst a well-funded campaign for a Referendum on an Indigenous Voice to Parliament, I sought to promote treaty as a core element of the Uluru Statement from the Heart. The Uluru Statement was developed in 2017 following a series of thirteen community consultations on an 'Indigenous Voice to Parliament' in the Australian constitution. The Uluru Statement called for the establishment of a Makarrata Commission to negotiate a treaty and undertake a truth-telling process, in addition to proposing a referendum on an Indigenous Voice. 'Makarrata' is a Yolgnu term for coming together after a struggle. However, the Referendum Council's Report, which drew on the Uluru Statement, did not recommend a treaty. I address the Referendum process as a means to implement self-determination in Australia, in chapter six.

This praxis sought to promote discussion on a national treaty through the hosting of the Treaty Talks Workshop, building on commitments by state-governments to undertake state-based treaties in Australia. I established a national Elders Advisory Committee to provide oversight and support national Indigenous participation and the hosting of the workshop. The University of Sydney facilities provided a venue for the conference and \$62,000 was raised through the student union, Indigenous Unit and civil society to support travel, accommodation and catering. More than 100 people attended the three-day conference, held from 22-25 January 2018, with 21 First Nation presenters.

However, though there was broad national support across the Aboriginal community, a non-Indigenous Trotskyist group called 'Solidarity' sought to undermine both the Workshop and the following Justice Through Treaty march. The Trotskyist Group were politically opposed to Aboriginal

calls for a treaty and claimed Aboriginal determined political campaigns amounted to 'identity politics'. One of their speakers who they had funded from interstate physically disrupted the Workshop seeking to prevent the event from occurring, carrying an implement they threatened violence to key participants, including myself and Jackie Huggins, then Chair of the National Congress of Australia's First Peoples, the then national Indigenous representative body. Texted threats that referenced the Trotskyist group members confirmed their connection and the interloper was subsequently charged and found guilty.

The interventions by this Trotskyist group, raised the spectre of external forces seeking to hijack Indigenous political actions for their own political objectives. Rather than support Indigenous rights, as they publicly claimed, they hosted a concurrent alternative march, seeking to be the vanguard of events on Invasion Day/Australia Day, the date of the Justice Through Treaty march, which confused participants with many in the Trotskyist march carrying treaty banners. The Trotskyist group's efforts were hugely disruptive and personally disturbing. These experiences reinforced the fundamental principle of the need for Aboriginal/Indigenous control over Aboriginal/Indigenous events, particularly those related to the assertion of Indigenous rights. It also emphasised that contemporary colonialism is expressed in diverse ways, it is not just against the settler-state and exploitative industries that Indigenous Peoples must assert their sovereignty.

Despite these efforts to prevent these praxis events, both the Treaty Talks Workshop and the Justice Through Treaty march were highly successful events. The hosting of the Treaty Talks Workshop received broad national engagement from the Aboriginal and Torres Strait Islander community and 21 presenters addressed the forum. The three-day event provided opportunity for participants to consider possible outcomes of a treaty, with a national representative body a priority, and reparations to fund Aboriginal and Torres Strait Islander services, infrastructure and aspirations also

raised. Importantly it also enabled concerns, as to whether a treaty may cede Indigenous sovereignty, being resolved noting a treaty reflects an agreement between two parties, so sovereignty would not be threatened unless specifically agreed, an unlikely scenario given the strength of views in asserting Indigenous sovereignty.

A 'Justice Through Treaty' March followed the Workshop on Invasion Day/Australia Day on 26 January 2018, with more than 3000 participants. Prominent Aboriginal and non-Indigenous speakers addressed the crowd, included Indigenous federal Member of Parliament, the Hon. Linda Burney, and Mr Yingiya Guyula, an Independent NT Parliamentary Member. Other Aboriginal representatives included Josie Crawshaw, Co-Chair of the Working Group of the Statement from the Heart and Aboriginal Elders, including Paul Coe. Non-Indigenous speakers included Professor Gillian Triggs, former President of the Human Rights Commission 2012-2017, Sally McManus, Secretary *Australian Council of Trade Unions*, Jamie Parker, NSW Greens Member of Parliament, Jeff McMullen, a journalist and 60 Minutes host and Eva Cox, noted feminist and academic. The Workshop received two interviews on ABC National Radio AM Program, while the Justice Through Treaty march received positive television coverage on each of Australia's free to air television broadcasters (Brennan, 2018) (Wahlquist, 2018). In addition, feature articles were also published in the Australian Newspaper, with Gillian Triggs' suggesting 'there was nothing to fear from treaty' (Triggs, 2018) and a feature article by Jeff McMullen supporting treaty was published in the Independent (McMullen, 2018).

Following the national campaign, I supported Yingiya Guyula to attend the United Nations Permanent Forum on Indigenous Issues (UNPFII), to further promote the issue of a treaty. Treaty was subsequently raised in interventions by Guyula and myself with Treaty also the topic of a side-event organized on the margins of UNPFII. The objective was to apply pressure on the Australian Labor Opposition to commit to a treaty should they win the upcoming election. As Guyula asserted,

“we stand on the ground of self-determination. We are not people that come from another country. We lived here for over 40,000-60,000 years and our law and culture is still alive” (Guyula). Guyula outlined why he attended UNPFII, “we need to talk to the government, talk to the other side of the world, talk to non-Indigenous political parties and to governments to say, stop, enough is enough. It’s time for us to take back, so we can steer the boat back into the journey where we need to go” (Guyula).

However, the failure of the Labor party to secure government at the 2019 election highlighted the limitations of seeking justice reliant on domestic avenues. Though both political parties had proved resistant to change in Indigenous policy approaches, the Conservative LNP Government was ideologically opposed to Indigenous rights, having wound up the National Congress of Australia’s First Peoples in 2018, the national Indigenous representative body, following the Liberal-National-Party’s (LNP’s) cuts of \$534 million from Indigenous funding in 2014. As a result, the issue of treaty remained sidelined in domestic political discourse. The capacity of the United Nations to address treaty aspirations and respond to breaches is further considered in the findings in Chapter 7.

This praxis responded to both the theoretical approach and the associated TIRT informed methodology in providing a strategic response, under the direction of a national Board of Elders. The action sought to influence the domestic recognition of Aboriginal and Torres Strait Islander sovereignty, with treaty considered the most effective way to recognise Indigenous sovereignty, and self-determination through the subsequent establishment of a national Indigenous representative body and reparations to facilitate that decision making. This praxis also drew on a long history within Australia of calling for justice through a treaty. Though there are clearly historical failures to honour treaties and challenges associated with their implementation in other jurisdictions, within an Australian context a treaty provides a necessary structural framework to assert our sovereignty,

secure a representative body and provide the reparations and land redistribution required to secure justice.

In challenging oppressive power structures, this praxis also directly challenged patriarchal decision making in having women Elders driving the national Elders Advisory Committee which ensured a strong representation of women across Indigenous and non-Indigenous speakers. The presentations drew on the international legal framework of UNDRIP, linking this local action with the national proposal for a treaty and global standards around self-determination. It also focused on what may be possible; rather than limiting itself to the current political climate, it sought to expand the sense of the politically possible. The Workshop format enabled participants to break into group discussions that addressed concerns, such as a fear of losing sovereignty by moving into an agreement with the settler-state, as well as considering possible outcomes and the march itself. In providing an open flexible discussion format, the workshops became an empowering experience for the Aboriginal and Torres Strait Islander participants.

The praxis was successful in influencing public discourse through prominent media coverage and interviews that ensured the issue was raised within public debate. Following this coverage, the leader of the Australian Labor Party made a commitment to pursue a treaty if elected. Although a direct cause and effect cannot be attributed, it was this action that had recently raised the matter in the national discourse. The action also linked this local level initiative through the Treaty Talks Workshop, to a national action in holding a large public protest march that also secured national media coverage.

This engagement was then tied to international advocacy through Praxis Two, the participation of Yingiya Guyula's, a Yolngu Elder and Northern Territory Member of Parliament at the United Nations

Permanent Forum on Indigenous Issues, where he spoke on the need for a treaty with Aboriginal and Torres Strait Islander Peoples. Yingsiya Guyula confirmed he found it an empowering experience, and spoke of the value of hearing of other Indigenous peoples shared aspirations for self-determination and treaties. “I wasn’t sure how things were going to work out for me, but when I heard the rest of the world talk about their issues on their country, and I thought to myself that sounds like my country. We are struggling for treaty, struggling for recognition. We are struggling for self-determination all around the world. And that gave me a kind of confidence and a comfort that I could stand and speak with my brothers and sisters from around the world on issues of treaty and issues of self-determination” (Guyula).

### 5.2.3 Limitations of Domestic Avenues

The impunity of States within the domestic realm was highlighted in the data as a central reason why Indigenous Peoples seek to raise violations at the United Nations. The analysis also emphasised that the United Nations should play a role in resolving conflicts between Indigenous Peoples and settler-states. Solonec and Deer both spoke of the economic and political marginalization maintained through institutional racism, that was reflected in high rates of poverty, incarceration, child removals and suicides. Structural discrimination was ingrained in settler judicial systems, with Deer noting, “Canada still uses the Doctrine of Discovery in land litigation with Indigenous Peoples, and the United States has the Marshall decision that says because we weren’t Christian the governments of Europe could claim our territory” (Deer).

Though First Nations, Metis and Inuit, have established their national bodies, with the Assembly of First Nations securing Canadian Government funding, and the United States has the self-funded National Congress of American Indians, these bodies were unable to prevent state breaches of

Indigenous rights (Deer). According to Deer, “Indigenous People are the most legislated people in the world” (Deer). Under the Indian Act in Canada the Government is responsible for the provision of services, with reserves coming under federal jurisdiction, while the provincial government is responsible for policing and criminal matters. The Indian Act controls Indigenous communities in Canada and imposes a foreign political system that disregards traditional decision-making processes (Deer).

Democratic electoral processes, where the majority determines policy approaches, do not work for Indigenous People who have become a minority in their lands. New Zealand remains the only settler-state that has Indigenous designated seats in Parliament through the establishment of the Māori Party. Yet, despite initial success in raising concerns, with only five Māori seats among 120, Margaret Mutu contends, they are marginalized in the New Zealand Parliament. Rather, she asserts Māori need their own representative Parliamentary decision-making body, “this is about walking the talk of self-determination and how you actually do that” (Mutu).

Legislation and policy approaches lack continuity, flipping with electoral cycles, according to Tammy Solonec, (Solonec). Ministers responsible for Indigenous affairs who determine legislative approaches, Deer argues, are usually not Indigenous themselves and the Standing Committee on Indigenous Peoples is “basically government reviewing itself”, with Government decisions based on budgetary considerations rather than community priorities or well-being.

Structural discrimination was also reflected in the judicial system where the courts decide what rights will be recognised, “that is a problem because you won’t see any Indigenous People on the bench of the courts” (Deer). An inherent bias of the courts was reinforced through a legal system that draws its decisions from legal precedents that promoted the race-based injustices of the past

(Deer). Though Canada had, at the time of interviews, committed to implement UNDRIP with a Working Group of Ministers reviewing 10,000 pieces of legislation to assess if they complied, Indigenous People had little input (Deer).

Limitations of domestic avenues was a significant factor informing global advocacy for Solonec, who considers “the Australian government has a really poor understanding of Indigenous Peoples’ rights” (Solonec). However, it is the lack of a national Indigenous governance body and the Government’s hand-picking of Indigenous representatives to its Indigenous Advisory Committee that Solonec listed as the most significant concern for Aboriginal People. When dealing with the stark power disparities between Indigenous Peoples and settler-states, Indigenous Peoples have found it necessary to go beyond the dominance and impunity of domestic jurisdictions.

### 5.3 leveraging International Mechanisms

In addition to providing an avenue to respond to the limitations of domestic avenues, interviewees spoke of direct benefits engaging with international law through United Nations mechanisms. Indigenous Peoples globally have drawn on mechanisms and instruments of the United Nations to counter the immense power differential between Indigenous Peoples and settler-states. First Nation People have sought to attend United Nations processes in a bid to influence the domestic sphere and prevent the ongoing violations of Indigenous rights. As Wilton Littlechild pondered, “it’s a shame that we have to come here to the international arena to change something at home,...it’s a means to address that huge power disparity and at least bring on that pressure” (Littlechild).

Though settler-states vary in their sensitivity to global scrutiny, most states wish to be viewed as a human rights compliant power, with negative assessments depleting states’ global credibility and

soft power. Additionally, gross human rights breaches can potentially have domestic implications on democratically elected governments.

Interviewees also referenced positive impacts of United Nations advocacy. Littlechild and Deer both raised the Lovelace case as a positive outcome. The case related to a First Nations woman from Canada, Ms Sandra Lovelace, a registered Maliseet Indian, who claimed the Canadian Indian Act discriminated against her when she lost status as a First Nations woman by marrying a non-Indigenous man. According to the Indian Act, First Nations women lost status as an Indian, their right to live on Indian reserves in mixed marriages, and their children lost legal claim to their Indian heritage. Lovelace argued in the Supreme Court of Canada that this law was discriminatory based on gender because male Indians who married a non-Indigenous person did not lose their Indian status, however, she lost that case. Having exhausted domestic remedies, the matter was raised at the Human Rights Committee in 1977, albeit following lengthy delays, where the Committee determined the Indian Act was discriminatory. According to Deer, “that pushed Canada to change. However, they didn’t go far enough and there’s still problems, but it has had a tremendous impact across Canada in communities” (Deer).

In Australia Solonec, highlighted the Royal Commission into Aboriginal Deaths in Custody which was called by the Hawke Labor Government in July 1987. “We have had some incredible results come out of the United Nations, and probably the best example is the Royal Commission into Aboriginal Deaths in Custody” (Solonec). The Royal Commission was established following a national political campaign and the issue being raised at the United Nations Working Group on Indigenous Peoples (WGIP) by Helen Corbett, Chair of the National Committee to Defend Black Rights. Within weeks, following a further death, the Royal Commission called on 10 August 1997. The Commission was significant in reviewing Indigenous disadvantage. It investigated 99 deaths over ten years and made

339 recommendations, including setting out the right of Aboriginal and Torres Strait Islander Peoples to self-determination at recommendation 188 (RCIADIC Report, 1991).

Solonec also outlined the proposed closure of remote Aboriginal communities as a critical issue raised at the United Nations. The Western Australian Government announced in 2014 it would close 100 to 150 of 274 remote communities and move Aboriginal People to designated hub-towns. “Our spirituality, our connection, it’s all connected to our land, the animals, the rivers and all those things are very important to our spirituality and cultural identity...That’s the best way to take our land is to take people off of their traditional country so we’re not there to defend it” (Solonec). It was within a political climate when then Prime Minister Tony Abbott had referred to Aboriginal People living in remote communities as making lifestyle choices. “The right to live on your ancestral homelands is not a lifestyle choice. For those people it is a cultural obligation to look after their land and live on it” (Solonec). However, in response to a widespread political campaign, which included advocacy at the United Nations Permanent Forum on Indigenous Issues (UNPFII), this position was reversed.

### 5.3.1 UNDRIP

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is the most significant instrument in the United Nations to assert Indigenous rights to self-determination. Developed in conjunction with Indigenous Peoples, Grand Chief Ed John explained “we worked together as Indigenous Peoples around the world to pursue the development of an instrument that would reflect international human rights standards that would pertain to Indigenous People. It took a long time because there was a lot of resistance” (John). Though UNDRIP took over two decades to be endorsed, it provides an example of how Indigenous Peoples proactively secured a tangible

outcome. Though UNDRIP, as with most United Nations instruments, is limited to moral persuasion rather than a capacity to impose penalties.

According to John, the significance of UNDRIP was in setting out “minimum standards for the survival, dignity and well-being of the world’s Indigenous Peoples”, confirming existing human rights standards are applicable to Indigenous Peoples (John). While Deer emphasised its impact would increase over time, “the Declaration, passed in 2007, it is gradually going to have impacts on the community everywhere, it’s going to affect every Indigenous person in Canada” (Deer). According to Deer, future court cases would draw on the UNDRIP in determinations, “you’ll see it impact as time goes on. You know things that happen in the United Nation it doesn’t affect the community overnight, it takes time but all those rights in the Declaration will have to be recognised by states sooner or later” (Deer).

Though UNDRIP was broadly endorsed by members of the General Assembly in 2007, with 143 states in favour, 4 settler-states rejected it, Canada, Australia, New Zealand and the United States, with 11 abstentions. Australia’s reason for rejecting endorsement was outlined by the Hon. Robert Hill, Australia’s Ambassador to the United Nations, who acknowledged the limitations of the proposed UNDRIP, stating ‘it is the clear intention of all States that it be an aspirational Declaration with political and moral force, but not legal force’, clarifying it ‘did not provide a proper basis for legal actions, complaints, or other claims in any international, domestic or other proceedings’ (Hill, 2007). However, Australia remained concerned at implications of articles related to self-determination, so Australia could ‘not support a concept that could be construed as encouraging action that would impair, even in part, the territorial and political integrity of a state’ (Hill, 2007).

Further, Hill argued, it could be interpreted as requiring the recognition of Indigenous lands, it provided for Indigenous rights to 'free, prior and informed consent' and it may impinge the right of 'third parties to access Indigenous land, heritage and cultural objects' (Hill, 2007). Though the Declaration would not be binding, Australia recognised UNDRIP's influence in setting standards, stating, 'we are aware that its aspirational contents will be relied on in setting standards by which states will be judged in their relations with Indigenous Peoples' (Hill, 2007), confirming the force of broadly endorsed international law.

Mutu contends that Australia, Canada and New Zealand had sought to undermine the Declaration throughout its development (Mutu). "I think that was a very good outing of those countries for the way they treated it" (Mutu). Mutu explained that Pacific Nations had informed her they couldn't endorse the Declaration because the New Zealand government would withdraw aid if they ratified it (Mutu). Though only one of the 11 nations who abstained was from the Pacific, 10 of the 34 absent during that session were from the Pacific region, with Timor-Leste the only Pacific State to endorse the Declaration in 2007, which according to Mutu, was as a result of the regional dominance and pressure applied by New Zealand and Australia.

However, between 2009-2010 each of the four CANZUS States subsequently endorsed UNDRIP. Australia formally changed its position in 2009, with Jenny Macklin, then Australia's Minister for Families, Housing, Community Services and Indigenous Affairs, continuing to assert the Declaration was aspirational, stating, 'while it is non-binding and does not affect existing Australian law, it sets important international principles for nations to aspire to' (Macklin, 2009). Since endorsement Australia has failed to develop an Action Plan, as recommended by EMRIP (A/HRC/48/75, p.19), to develop national Action Plans and enact relevant legislation and means to monitor its

implementation. These were matters raised in the Universal Periodic Review which was a further praxis element of this study outlined in the next chapter.

### 5.3.2 Influencing Global Standards

The influence of UNDRIP on the assertion of Indigenous rights in international law was a key theme raised in the data. According to John, UNDRIP is “as important as the Universal Declaration of Human Rights that was adopted in 1948” (John). UNDRIP was recognised as an instrument of reconciliation between Indigenous Peoples and settler-states. John highlighted Articles 18 and 19 require states to engage with Indigenous Peoples, with Article 18 setting out the right to participate in decision-making through representatives and institutions chosen by themselves. While Article 19 confirms states shall consult in good faith to obtain their free, prior and informed consent before adopting legislative or administrative measures that may affect them.

UNDRIP set “minimum standards for the survival, dignity and well-being of the world’s Indigenous Peoples” (John). UNDRIP broke new ground in engaging with Indigenous Peoples in its development and in setting global benchmarks for the recognition of Indigenous rights. UNDRIP establishes 46 articles that are now being imbedded across the United Nations. Kenneth Deer witnessed the change UNDRIP brought, “yeah those global norms they’ve really shifted, I mean they’re not implementing them but there is the expectation for them to be implemented. It’s not going to be easy because there will be some pushback by states who think the Declaration is too strong, however, we know a lot about pushback” (Deer). According to Kristen Carpenter, though UNDRIP is not a binding treaty or covenant the Declaration was an important standard setting document that 147 states have endorsed, “it’s deeply important, both technically and as an interpretive device, a

guidance document for states to use in implementing rights that are articulated in other instruments” (Carpenter).

The need for Indigenous Peoples themselves to define the interpretation and application of the Declaration was stressed by Carpenter, “like any good legal formative document, like any constitution, it’s a living document, and needs to be interpreted and applied consistent both with the original intent and the evolving viewpoints of its constituencies, which in this case includes Indigenous Peoples” (Carpenter). This agency applied to international mechanisms and instruments, where Indigenous Peoples are also active participants in the interpretation of relevant instruments. “This is one of the incredible contributions of the Declaration. It elucidates those rights that all people are entitled to mean and how they may be effectuated in the Indigenous Peoples’ context” (Carpenter).

When explaining the status of the Declaration, Carpenter contends the Declaration has authority through its endorsement by 147 Member States of the General Assembly, which as a result of that broad endorsement, can be “considered customary international law” (Carpenter). James Anaya, former Special Rapporteur on the Rights of Indigenous Peoples, confirms ‘a norm of customary international law arises when a preponderance of states converge on a common understanding of the norm’s content and generally expect compliance with a shared sense of obligation to the norm’ (Anaya, 2013, para 64). Though the Declaration is not legally binding in the same way a treaty is, it reflects existing legal commitments related to the United Nations Charter, other widely ratified treaty commitments and customary international law.

Though the Declaration is not legally binding in the same way a treaty is, it reflects existing legal commitments related to the United Nations Charter, other widely ratified treaty commitments and

customary international law. This was affirmed by Ed John who asserts, “the Declaration finds its source in other UN instruments, the Covenant on Civil and Political Rights for example, so this is part of customary international law and it should be applied as such in this country” (John). According to the International Law Association Committee (ILAC), the Declaration meets the requirement of customary international law in having a substantial number of states agree to the norm as standard setting (PFII, 2014, p.9).

Indeed, the Declaration ‘also reflects jus cogens, or peremptory norms of international Law, ...universal norms from which no derogation is permitted’ (PFII, 2014, p.10). Carpenter provided a recent example of the use of UNDRIP as customary law, “in the Belize Supreme Court's 2007 decision on the rights of Maya people to their traditional lands and territories, the Belize Court looked at international covenants and treaties...and its source was the Declaration. It recognized that the Declaration has articles that extend recognition to the traditional territories of Indigenous peoples” (Carpenter). Though the legal council had argued the Declaration is not a binding instrument, the court confirmed that given its endorsement by the then 143 members of the United Nations, including Belize, “the state should not disregard it” (Carpenter).

However, though the Declaration has a ‘legal imperative without qualification’, according to Anaya, it is undermined by states questioning its status, where ‘debilitating to the Declaration are repeated assertions that the Declaration is non-binding’ (Anaya, 2013, para 87, 88). This failure of duty bearers to respect the weight and legitimacy of UNDRIP in international law informs the proceeding chapters.

### 5.3.3 Analysis of United Nations Mechanisms

John underscored the importance of the three Indigenous specific mechanisms as critical forums for Indigenous Peoples in promoting UNDRIP's standards. These are the United Nations Permanent Forum on Indigenous Issues (UNPFII), the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and the Special Rapporteur on Indigenous Peoples. UNPFII was established in July 2000, commencing in 2002, as a dedicated Indigenous body under the Economic and Social Council. It has 16 Members, with states and Indigenous bodies nominating eight each. It meets for two weeks annually in New York and is mandated to address six themes; economic and social development, culture, the environment, education, health and human rights and the implementation of UNDRIP.

EMRIP was established in 2007 and sits under the United Nations Human Rights Council (HRC) and conducts studies on issues relevant to Indigenous Peoples. It has seven Indigenous expert members, selected by the HRC from the seven geo-cultural regions and meets over five days annually in Geneva, Switzerland. Representatives from Indigenous Peoples, states, civil society, inter-governmental organisations, academics and the Special Rapporteur can attend both UNPFII and EMRIP.

The Special Rapporteur on the Rights of Indigenous Peoples was established in 2001 to promote good practices, new laws, programs, and constructive agreements between Indigenous Peoples and states. Additionally, the Special Rapporteur has the mandate to '(a) gather, request, receive and exchange information... on violations of their human rights and fundamental freedoms; (b) to formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations...' (E/CN.4/2002/97, p.5). In addition to the Indigenous specific mechanisms,

Solonec emphasized “we should not forget about all the other core treaties and processes” (Solonec). UNDRIPs adoption and contribution to developing global norms is reflected in other treaties, with treaty committees now progressively referencing UNDRIP in their deliberations, as outlined in the Office of the United Nations High Commissioner for Human Rights: Stocktaking Report (United Nations, 2024).

The United Nations Permanent Forum on Indigenous Issues (UNPFII) has strong attendance, with in excess of 2000 people regularly registering for its two-week session. However, it was perceived as structurally less effective than EMRIP, despite its longer duration. John outlined these concerns, “some of the weaknesses that may be inherent in the system is that the Permanent Forum is mandated to make recommendations but how are the recommendations dealt with, who oversees them, who enforces them? That’s important” (John). The UNPFII reports annually to the Economic and Social Council (ECOSOC), but there is no oversight of their implementation (John).

Limitations of UNPFII as a subsidiary body of ECOSOC, were also raised by Kenneth Deer, who compared it to EMRIP, which reports to the Human Rights Council. Deer noted the Human Rights Council had established an Indigenous specific session. “We have at the Human Rights Council a session on Indigenous Issues, that’s a window to be able to bring our issues to the Human Rights Council. We need another window like that at ECOSOC in New York, so that we have a specific agenda where Indigenous issues can be brought to those levels” (Deer).

Participation within UNPFII also provided insights into its operation. Though engagement with UNPFII enabled Indigenous Peoples to raise domestic violations, the relative responsiveness of settler-states is dependent on the government, their ideological view of human rights, their sensitivity of global perceptions and their level of engagement with the United Nations system. At

the 16<sup>th</sup> session of UNPFII, the Chairperson, Ms. Mariam Wallet Aboubakrine, spoke of the need to provide protections to Indigenous rights defenders amid a growing number of killings defending the Amazonian Rainforests, (DOCIP, UNPFII, 2017, p5). However, while the forum proved to be a sought-after venue for the airing of grievances, the outcome was less clear.

The limited opportunity to present interventions was noted in the data and through my own observations, which documented restrictions on Indigenous participants' capacity to raise violations of Indigenous rights. This resulted in my intervention on behalf of the Indigenous Peoples' Organisation-Australia combining concerns at the 17<sup>th</sup> Session of UNPFII all being summarised within one three-minute intervention. This intervention called on States to defend the mandate of the Special Rapporteur, who had been designated a terrorist by the Philippines Government, along with other Indigenous Peoples. The limited opportunity to present also required including Aboriginal calls for self-determination through a treaty, funding cuts to Aboriginal services, the withdrawal of Aboriginal governance, combined with a proposal for legislation to close remote Aboriginal communities, within the three-minutes allocated.

Nevertheless, interventions documented violations, such as the intervention by Brenda White Bull, the great-great granddaughter of Sitting Bull and a 20-year-veteran of the Marine Corps, who now defended the waters and lands of her homelands. Bull spoke of the threat of the Dakota Access Pipeline, which transports tar sands oil from Canada to the United States, cutting "through the Sioux Nation's unceded territory of the Fort Laramie Treaties" (Bull, 2017). She spoke powerfully of how water defenders had been shot by rubber bullets, harming a woman's arm and blinding another in one eye. The police used water cannons and tear gas on protesters in below freezing temperatures. "We are more powerful, than their militarized police forces and guns, because we were armed with prayer" (Bull, 2017). Speaking on the implementation of the Declaration Bull

asserted, “if states will not implement the Declaration, we will do it ourselves” (Bull, 2017). She called for States to cease the militarization of Indigenous lands and called on the Forum to “initiate a study on violence of any form directed against Indigenous Peoples,.. particularly those who defend their rights under the Declaration” (Bull, 2017).

Interventions given at UNPFII also highlighted the capacity to pre-emptively raise proposed legislation to pressure governments to retreat from policy approaches with negative impacts. This was reflected in the Western Australian Government’s proposal to close between 100-150 remote Aboriginal communities, which was raised at UNPFII, in conjunction with a strong domestic campaign, which resulted in this policy approach being reversed. Consideration of these concerns and deficiencies contributes to my findings outlined in Chapter 7.

## 5.4 UNDRIPs Domestic Impact

Though there are consistent experiences of colonization among Indigenous Peoples under the ongoing occupation of these settler-states, the varying domestic conditions also warrant a brief appraisal before progressing to further analysis. The potential for tangible benefits through Canada’s planned adoption of the Declaration in domestic legislation were raised by both Deer and John. However, the need for Canada to adopt a national action plan and ensure legislation was consistent continued to be an issue of concern (Deer).

The importance of the Declaration for Māori was also emphasized “UNDRIP is the most important for Māori after our treaty because now you can start talking about our rights. You could introduce your rights in the courts” (Mutu). According to Margaret Mutu, the articles of UNDRIP are critical in defining Indigenous rights and acceptable treatment. Though the Treaty of Waitangi Tribunal

highlighted gross human rights violations perpetrated against Māori, power disparities continue in its determinations, “when they do the so-called negotiations, they’re not really negotiations, the Crown dictates, when they write up the legislation and buried in every single one of the settlement legislations is the clawing back of those legal rights” (Mutu). The Minister has oversight of the negotiations, claims and settlement of the Tribunal determinations. The ‘Doctrine of Discovery mentality is still deeply ingrained’, though there have been some outcomes Mutu claims the Tribunal is ‘toothless’(Mutu). UNDRIP provides valuable guidance on the “principles on how Māori should be treated in this country” (Mutu). Like each of the other interviewees, Mutu also emphasised the need for a greater domestic focus on implementation and a National Action Plan (Mutu).

Tammy Solonec highlighted the difficulty for Indigenous Peoples in asserting their rights when they have become minorities in their own lands, with Aboriginal People only 3% of the population in Australia, their capacity to hold governments to account through electoral processes is extremely limited (Solonec). For Solonec, Aboriginal People are not listened to, and this was reflected in Indigenous over representation across every negative social statistic, while the criminal justice system continues to incarcerate children as young as 10 years of age, well below global norms of 14-16 years as the minimum age of criminal responsibility. The importance of drawing on international standards to pressure the Australian Government to amend legislation that criminalises children were stressed by Solonec (Solonec).

Australia lacks formal avenues to raise Indigenous concerns, though there is the Racial Discrimination Act, this was suspended by the Australian Government to enable punitive and racially targeted legislation directed at Aboriginal People through the Northern Territory Intervention, from 2007-2022. Yingiya Guyula asserted the need for local decision-making and the authority of Elders to be respected. “We want a space where we can think for ourselves, instead of being treated by a

foreign power, where they think what is best for us...It's destroying our culture and the knowledge of our Senior Elders. So enough is enough, we're telling the Australian Government, please step back and let's negotiate on a treaty, some kind of treaty that will work for our nation" (Guyula). According to Solonec, "it is critical for Aboriginal People to engage with the United Nations. It trains people on our rights, provides capacity to compare local conditions and implementation strategies, as well as informing issues such as treaties and constitutional recognition, as means to recognizing self-determination" (Solonec).

#### 5.4.1 Domestic Implementation: Experiences of Bolivia

In contrast, Q'apaj Conde Choque outlined the Plurinational State of Bolivia is the the first settler-state to secure the Constitutional enshrinement of UNDRIP and enactment in domestic law. As such, Bolivia provides a unique case study to examine lessons that may be drawn for the broader operationalising of rights to self-determination as affirmed in UNDRIP. The revised Constitution in 2009 drew on UNDRIP as its legal framework and reshaped Bolivia's social and political environment (Choque). The term Plurinational State of Bolivia reflects the unique capacity within Bolivia to establish internal autonomous regions. Article 2 of Bolivia's Constitution provides for Indigenous rights to autonomy, with the Constitution allowing for four separate forms of autonomy; any one of the nine regions can apply for autonomy, municipalities within regions can apply for autonomy, or municipalities can join together as an autonomous region. The fourth type of autonomy is Indigenous autonomy, with eleven Indigenous nations currently seeking autonomy, with three having achieved autonomous status (Choque). Each autonomous region still pays tax to the federal government which it distributes with additional finance raised from taxing the exploitation of oil, with autonomous regions determining how those funds are allocated. According to Choque, "autonomy recognizes

more power than a municipality and this is a huge advantage” (Choque). I examine Indigenous autonomy more fully in chapter seven.

Choque noted UNDRIP’s inclusion in the Constitution had impacted the government, “it’s very unique in Bolivia we have an Indigenous President, thanks to this, a good part of the government is very open to Indigenous issues” (Choque). In Bolivia more than 60% of the population is Indigenous with rural regions dominated by Indigenous Peoples. Choque contends, “because of the number we have good decision-making processes in these areas” (Choque). However, Indigenous decision making is not based on voting but is grounded on consensus decision-making. The Constitution also sets out a series of Indigenous rights under Article 30, including rights to cultural identity, their worldview, self-determination and territoriality, collective land ownership, rights to a healthy environment, management and exploitation of their traditional lands. Additionally, Article 31, provides protections for Indigenous Peoples in voluntary isolation.

In addition, the government developed the ‘Plan de Derechos Humanos’, the Human Rights Plan for Bolivia, commencing in 2008-2015 and revised in 2015-2025, with specific chapters on UNDRIP, including Indigenous Peoples participation in decision-making (Choque). A Ministry of Decolonisation was established which passed legislation against discrimination, and a Unit on Depatriarchalisation was established in 2010, to address entrenched patriarchy in government and the broader society (Farthing, 2014, p.58). The Constitution assured Indigenous Parliamentary representation through seven designated Indigenous positions in each region, to ensure lowland Indigenous Peoples, with lower populations have representation (Choque). Indigenous representation grew from 17% in the first Plurinational Legislative Assembly to 25% in the second Morales Government, with 56% of the Constituent Assembly in 2006-7 identifying as Indigenous (Farthing, 2014, p.65).

Legislative approaches, based on UNDRIP, were assessed against 'Vivir Bien' or 'Living Well', a quality-of-life index (Choque). 'The 'Vivir Bien' indicators gauged economic, housing, education and health outcomes, recognising basic services, health care and housing as a human right' (Farthing, 2014, p.99). According to Linda Farthing, Vivir Bien was largely conceptualized by Aymara intellectuals, it renounced capitalism, war, imperialism, and colonialism, while incorporating Indigenous values of harmony, good governance, anti-discrimination, wealth redistribution, mutual respect and the valuing of the natural environment (Farthing, 2014, p.100).

Vivir Bien implemented conditional welfare programs, including payment for mothers who undertook neo-natal and post-natal checks, which cut maternal mortality by more than half in four years (Farthing, 2014, p.102). Additionally, a payment for families where children attended school and an aged pension of \$29US a month covered staples, with a reduced pension age to 58 by 2010, decreased rates of poverty (Farthing, 2014, p.102). According to Farthing 'for the poorest, these social policies, taken together, have often been life changing' (Farthing, 2014, p.103). The minimum wage was also raised from Bs\$500 a month to Bs\$1200, a 60% increase after adjusting for inflation (Farthing, 2014, p.69).

Government employees were required to learn an Indigenous language and the education curriculum sought to decolonize, teaching Indigenous languages and placing Indigenous knowledge equal with western knowledge. Community literacy campaigns reduced illiteracy levels from 40% in rural regions, eradicating illiteracy by 2009 (Farthing, 2014, p.105). Scholarships were funded through a tax on natural gas, with health certificates for traditional healers and scholarships were provided to 5000 students to study medicine in Cuba (Farthing, 2014, p.110-111). While nine hundred Cuban doctors fortified the rural health sector, with 20 new hospitals and sixty rural health posts.

With nearly 90 percent of the country's arable land held by 10 per cent of owners', Land Reform transferred 157 million acres to one million Indigenous people, a third of these communal titles. Land reform also focused on women, with 46% of titles provided to women by 2013, where women were not previously landowners (Farthing, 2014, p.121). The representation of women in government increased from none in 2001 to half of Cabinet Ministers by 2011, and 43% of Municipal Council Members, with Morales calling the appointment of women 'a tribute to my mother, my sister and my daughter' (Farthing, 2014, p.66).

According to Choque, "when we say hayaya, we put two fists in the air, it reflects balance, the collective and individualism and a complementarity between man and woman, light and dark. Indianismo is not from the right and its not from the left, we are Indigenous. And what we want is to have a government that is able to get the balance between all different perspectives and this is what we see as well-being, *vivir bien, suma qamana*" (Choque).

## 5.5. Challenges

Despite decades of advocacy securing UNDRIP and recognition of the need for the United Nations to better engage with Indigenous Peoples, there remain challenges related to Indigenous participation. The distances and prohibitive costs of travel to attend United Nations fora for economically marginalized Indigenous communities remains a significant barrier to participation. According to Littlechild, "It's always 'can we afford to work at the international level when we've got needs at home?'" (Littlechild).

Additionally, the size and complexity of the United Nations required Indigenous Peoples to negotiate a huge bureaucracy. However, the importance of providing Indigenous perspectives was emphasized

with bodies such as UNESCO that protects cultural sites, the World Intellectual Property Organization (WIPO) which considers collective rights, the Biodiversity Convention and the United Nations Framework Convention on Climate Change (UNFCCC), are areas of particular relevance for Indigenous Peoples (Deer).

Moreover, the slow pace to secure change were further limitations. The formation of the United Nations as a state-based body was a significant impediment to Indigenous participation. Though the need for Indigenous Peoples' participation has been recognised, critical areas of decision-making remain with Member-States. Additionally, resistance to Indigenous participation by some states, that designate their Indigenous Peoples as ethnic minorities, strip Indigenous rights (Deer). Deer contends "It's getting to the point where states are fearful of dual sovereignty, there seems to be a real fear of recognizing that, they see it as a threat" (Deer).

Further, the lack of monitoring or enforcement mechanisms associated with UNDRIP was raised as a fundamental deficit, with a dire need for follow up where rights are violated, or treaties are breached. John highlighted that the American Declaration on the Rights of Indigenous Peoples, adopted by the Organization of Inter-American States, on June 15, 2016, provides "access to an independent mechanism that would help resolve and clarify disputes" (John). The Human Rights Council and treaty bodies have a duty to monitor compliance, particularly given conflicts result in violence. "Indigenous activists are still being persecuted, in some cases even murdered, where they're protecting their lands or territories or resources" (John).

John clarified "every year there are countless recommendations which are made by the Permanent Forum to the UN General Assembly, through ECOSOC, and some of these are directed towards UN agencies, some towards Indigenous Peoples, many of them are directed to States" (John). However,

the United Nations has no enforcement mechanism, other than moral persuasion, grounded on international benchmarks (John). States often disregarded recommendations, requiring arbitration and adjudication processes by an independent United Nations body (Deer). “These bodies have to stand up to countries that have extensive violations against Indigenous Peoples. The United Nations has to follow up on these decisions...Because a lot of States just ignore the recommendations of treaty bodies” (Deer).

Significantly, the data also highlighted that barriers extended beyond the United Nations to a gap between commitments undertaken by settler-states and an understanding of the obligations they confer on States. John also emphasised the importance of establishing national action plans to ensure is consistent with UNDRIP (John). None of the States reviewed had, at the time of interviews, established domestic implementation plans or independent monitoring bodies. John also spoke of the need to educate the judiciary and educators on the rights and obligations associated with UNDRIP to comply with international obligations (John). According to John, “you have to be able to tell your story somewhere and secondly, whoever’s responsible there can then take measures to hold the state accountable” (John).

Additionally, the difficulty of securing outcomes at the United Nations was raised by Conde, it was difficult for Indigenous Peoples on the ground to see the direct impact of changes or interpretations of international law. “It is really hard to go to the international arena, get a positive outcome for Indigenous Peoples and then return home and use it” (Conde). This was exemplified by the failure of states to establish implementation plans or draw on UNDRIP in their domestic realm. Though Bolivia was proactively incorporating UNDRIP in the constitution and legislation, implementation remained challenging, however, “states had a duty and obligation to implement the Declaration” (Conde). This was a consistent issue raised across the data from the various regions. In the following

chapter, I outline developments currently being implemented globally and domestically, before I address unmet opportunities in chapter seven.

## 5.6. Conclusion

This Chapter has addressed the reasons Indigenous Peoples seek to draw on the United Nations in the assertion of their rights to self-determination. I commenced considering the historical significance of treaties as a structural means to enact Indigenous self-determination. As Grand Chief Littlechild confirmed, treaties are international agreements, “the treaty itself is actually evidence of our right to self-determination”, with the breach of treaties the “underlying foundation to all other disputes” (Littlechild).

I also explored the history of activism and its correlation with global Indigenous advocacy. This section introduced the concept of praxis, grounded on a foundation of activism, which is interwoven throughout this dissertation. The praxis provided further insights to the data but also proactively promoted the voices and aspirations of Indigenous Peoples, adapting its strategy as it shifted from local to global requirements. The limitations of domestic avenues, where settler-states’ impunity is built on a precedence of appropriation and exploitation of Indigenous lands and the oppression of Indigenous Peoples were also canvassed.

The second half of the chapter interrogated Indigenous leveraging of international mechanisms and examined the United Nations Declaration on the Rights of Indigenous People (UNDRIP) as a core instrument to implement self-determination. An analysis of the UNPFII and EMRIP assessed their effectiveness and informed means for enhancing the monitoring and implementation of the Declaration, which is further scrutinised in chapter seven.

Additionally, I have outlined benefits of Indigenous engagement, how UNDRIP has substantially transformed expectations and obligations on duty bearers, with its broad endorsement claiming space in customary international law. This chapter also appraised the domestic implementation of the Declaration. Yet UNDRIP's implementation remains a challenge, which frames the following chapter and the findings in chapter seven.

Bolivia is introduced as a case study of a nation that has recognised UNDRIP in its constitution which is investigated across the subsequent chapters for insights it may provide. This chapter informs an interrogation of national implementation strategies which are explored in Chapter 6.

Finally, I reviewed the challenges associated with Indigenous advocacy at the United Nations and identified deficiencies that may be addressed to better facilitate the implementation of the Declaration. Consideration of these difficulties and gaps further informs the findings of this thesis. Despite these challenges the global recognition of Indigenous rights has provided a platform to support the assertion of Indigenous self-determination and counter the limitations and impunity that states exert at a domestic level.

In the face of overwhelming power disparities, the United Nations has been used to assert Indigenous ancestral rights but also Indigenous self-determination as Peoples. As Deer contends, there is a role for the United Nations in facilitating a peaceful coexistence, "we understand that we have a shared relationship' it's two sovereigns occupying the same space. And we have to find a way to co-exist without destroying each other" (Deer).

## CHAPTER 6

THE STREAM FLOWS TO A RIVER:

A SHIFTING GLOBAL CONTEXT

## Proem: The Aboriginal Tent Embassy

*As a young child, it was my mother, Pat Eatock's involvement with the Aboriginal Tent Embassy that introduced me to Aboriginal politics. The Embassy had been established in response to Prime Minister McMahon's rejection of land rights in his announcement of 50-year leases. However, the Embassy also protested broader Aboriginal issues, with the then Minister for Aboriginal Affairs, Peter Howson, recognising the term 'Embassy' also implied recognition of a sovereign Aboriginal people (Foley, 2014, p.24).*

*The Embassy had exploited a loophole in Federal Law that didn't prohibit camping on the lawns in front of the Australian Parliament. The success of the Aboriginal Embassy was reliant on the unity of mob from across the continent, with women and men coming together to defend the Embassy and assert Aboriginal rights to land and sovereignty.*

*It was Pat who, on 20 July 1972, had forewarned the Embassy protesters and student supporters that the police were about to move on them. Having secured an administrative position in Aboriginal affairs she had been transferred to the less politically sensitive Government Printing Office, after writing an article on the forced relocation of the Wallaga Lake Aboriginal Mission. It was there she had overheard that the police were waiting on the printing of the amended Section 12 of the Trespass on Commonwealth Lands Ordinance, which would make camping illegal and allow the police to remove the Embassy.*

*Despite the possibility of charges and a potentially lengthy jail sentence, Pat feigned ill health to leave work, find a phone booth, and warn the students at the University to fortify the Embassy tents (Jordens, 2005, Tape 4). Their numbers swelled from five or six to around 70 people.*

*They were met by a 'paramilitary force' of hundreds of police who marched in tight unison and broke through the interlinked arms defending the fragile canvas frame. As the tent was taken, Pat grabbed the Embassy sign and held it defiantly aloft overhead, confirming that though the tent may go, Aboriginal sovereignty could not be taken (Robinson, 1994, p.12).*

*The violent images of police beating their way through the protesters, sent shock waves through the peaceful Australian community and reverberated globally. Pat recalled how they had been met by a 'gestapo squad' of hundreds of police, how she'd been trampled in the ensuing melee. The police brutality was responsible for nine protesters requiring medical treatment, including a cracked rib, eight were arrested, and five police required treatment for abrasions ((Robinson, 1994, p.13). The tents were re-erected and violently pulled down by hundreds of police on two more occasions following this, with supporters growing to 2000 (Robinson, 1994, p.18).*

*The Aboriginal Tent Embassy helped mark a political shift that resonated across the country. The federal election on 2 December 1972 brought a change of government after 23 years of conservative rule and a major shift in policy direction. The first Department of Aboriginal affairs was established, the Northern Territory Land Rights Legislation was instigated, along with a policy change to Aboriginal self-determination (Dow, 2011). These changes reflected the strength of collaborative political action.*

## 6.1 Introduction

Indigenous Peoples' relentless assertion of our rights at the United Nations has over time secured some outcomes. No longer a trickle, it has worn resistance and is gaining momentum, building to a stream of those who seek to address violations of Indigenous rights before United Nations fora. This chapter focuses on key themes raised in the data on developments that have been secured since the endorsement of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (A/RES/61/295), before I progress in the next chapter onto further opportunities that may yet be addressed.

I commence considering developments within the United Nations instigated through the World Conference on Indigenous People (WCIP), held in September 2014. The achievements secured by the WCIP are assessed against the Alta Outcome Document, the preceding global Indigenous gathering held in Alta, Norway, in March 2014, to inform the World Conference. The impact of the Alta Outcome Document on resolutions of the WCIP, its adequacies and outcomes is examined, while those recommendations not implemented inform the proceeding chapter.

The recommendation from the WCIP to develop a System-Wide Action Plan for the United Nations to enhance engagement with Indigenous Peoples is assessed. Additionally, the resolutions to expand the mandate of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) are also reviewed to assess their effectiveness.

The need for a United Nations Indigenous oversight body of the Declaration on the Rights of Indigenous Peoples, a key concern raised in the data, is investigated before assessing a proposal for an Optional Protocol to the Declaration. I explore the potential for the optional nature of the

proposed instrument to inadvertently weaken the Declaration, if it were perceived as an opportunity to walk back from endorsements already secured.

The domestic implementation of the Declaration, a core theme raised in the interview data, is investigated through a comparative analysis. Canada's efforts to recognise the Declaration in legislation, Aotearoa/New Zealand's proposal to incorporate the Declaration in its constitution, and Australia's attempts to amend its Constitution, are each examined against the vagaries of electoral cycles. The Plurinational State of Bolivia provides a counterpoint on the implementation of UNDRIP through the Constitutional Tribunal and judicial processes. Yet significantly, each State highlights the necessity of a dedicated review mechanism within the United Nations system.

I then review procedures within the United Nations framework to hold settler-states accountable as duty bearers. I consider the usefulness of the Universal Periodic Review (UPR) for Indigenous Peoples to hold settler-states responsible for breaches of Indigenous rights. This section examines the UPR as a praxis-based component of this thesis, as outlined in previous chapters. The examination of the UPR provides useful insights into the capacity of Indigenous Peoples to raise violations. Importantly, it assesses whether UPR can effectively respond to the accountability gap of the United Nations highlighted throughout this chapter. Despite raising violations, the failure of the UPR to substantially address violations affirms its limitations.

Finally, I evaluate judicial mechanisms within the United Nations and their applicability for Indigenous Peoples. This investigation found that though treaty bodies can make recommendations to settler-states in relation to breaches of Indigenous rights, there lacked sufficient follow-up of these recommendations. Additionally, though Indigenous cases had come before the International Criminal Court (ICC), the requirement for both the ICC and International Court of Justice to have matters raised

by other states in order to consider them seriously curtails Indigenous Peoples' capacity to raise human rights violations.

These deficiencies attest to the need for further structural change at the United Nations and as a result, in the international system of states and international law more generally, to facilitate the recognition of Indigenous rights. Whether the United Nations has capacity to respond to its inherent weaknesses as a state-based body, to address the ongoing ravages of colonialism on Indigenous Peoples, as outlined in Chapter 2 by Coulthard, Taiaiake, Corntassel, Watson, Simpson and others, is taken up in the proceeding chapter.

## 6.2 World Conference of Indigenous Peoples

A World Conference on Indigenous Peoples (WCIP) was first proposed by Evo Morales, President of Bolivia, in 2007 at the United Nations General Assembly, as a means to support the implementation of the Declaration (United Nations, 2007). The resolution adopted on 21 December 2010 determined: 'to organize a high-level plenary meeting of the General Assembly, to be known as the World Conference on Indigenous Peoples, to be held in 2014' (A/RES/65/198). From my observations, Indigenous Peoples were supportive of a World Conference, though there were concerns a high-level-plenary would not provide the time or resources of a World Conference, such as the Beijing World Conference on Women, which was allocated 12 days (A/CONF.177/20/Rev.1), rather than the two days provided to the WCIP, from 22-23 September 2014 (A/RES/66/296).

The General Assembly resolution in 2012 determined that an 'action-oriented outcome document be developed and that it considers input from regional and thematic conferences (A/RES/66/296). Indigenous peoples met at a Preparatory Conference held in Alta, Norway, from 8-13 June 2013

(A/67/994), to coordinate outcomes sought from the WCIP. The Alta Outcome Document addressed four themes. Theme 1 on Indigenous Peoples lands, territories, resources, oceans and waters, directed its recommendations to State Members.

Theme 2 focused on United Nations systemic actions to facilitate the rights of Indigenous Peoples. Theme 2, Point 1 recommended the creation of a United Nations body to promote, protect, monitor, review and report on the implementation of the rights of Indigenous peoples, (A/67/994, p.6). Significantly, this recommendation was not adopted by the WCIP. Theme 2, Point 2 called for the General Assembly to establish a mechanism to 'provide oversight, redress, restitution and the implementation of treaties, agreements and other constructive arrangements between Indigenous Peoples or nations and states' (A/67/994, p.6). Though the data suggested this was fundamental, it was not adopted by the General Assembly. Importantly, it also called for permanent Observer Status for Indigenous Peoples at the United Nations General Assembly (A/67/994, p.7). I address the relative merits of these proposals in the following chapter.

Theme 3 focused on the domestic Implementation of the Rights of Indigenous Peoples, with the Alta Outcome Document recommending 'that states enter into new treaties, agreements and other constructive arrangements' as a means to resolve conflict and disputes (A/67/994, p.8). Additionally, the Outcome Document recommended settler-states establish independent commissions of inquiry to investigate 'matters of impunity and other human rights concerns of Indigenous peoples' (A/67/994, p.8). Theme 4 on Indigenous Peoples' priorities for Development with free, prior and informed consent, had its recommendations directed to Member States.

Though the United Nations General Assembly called on states to review the Alta Outcome Document, the World Conference recommendations fell well short of the Alta aspirations. Several

recommendations recognised existing commitments by states but failed to call on them to enact these commitments. These included commitments by state members, 'to obtain the free prior and informed consent of Indigenous Peoples prior to the approval of any project affecting their lands or territories and other resources' (A/Res/69/2, p.4). It also recognised settler-states commitment to establish 'fair, independent, impartial open and transparent processes to acknowledge, advance and adjudicate the rights of Indigenous Peoples pertaining to lands, territories and resources' (A/Res/69/2, p.4). However, where states had not enacted these commitments, they failed to recommend they do so, seriously curtailing their potential impact.

The Alta Document also proposed extending EMRIP's mandate to incorporate a formal role as an oversight monitoring body of UNDRIP. However, it was acknowledged that if the mandate were to be extended, EMRIP's capacity would need to be commensurate with the significant additional role it would be fulfilling and would require additional dedicated sessions for this purpose. Though the mandate was extended as an outcome of the WCIP, it did not include a mandate to monitor the implementation of UNDRIP. Kenneth Deer noted the importance of monitoring state human rights compliance for Indigenous Peoples and the role of WCIP in progressing those aspirations, asserting: 'If Indigenous Peoples cannot get justice in the UN, where else can they turn? What value is the UN to them? This so-called conference is a golden opportunity be more than a private club of nation-states. It can seize the opportunity to include Indigenous Peoples and make itself more representative of humankind' (Deer, 2014).

However, there were outcomes: Paragraph 28 called on the Human Rights Council to review the mandate of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), considering the views of Indigenous Peoples, to 'more effectively promote respect for the Declaration, including by better assisting member states to monitor, evaluate and improve the achievement of the ends of the

Declaration’ (A/Res/69/2, p.5). At Paragraph 29, it invited the ‘treaty bodies to consider the Declaration in accordance with their respective mandates’ and encouraged member states to include ‘measures taken to pursue the objectives of the Declaration in reports to those bodies and during the Universal Periodic Review (A/Res/69/2, p.5). Further, at paragraph 31, it called on the Secretary General to develop a United Nations System-Wide Action Plan to better facilitate Indigenous engagement with the United Nations (A/Res/69/2, p.5). This chapter reviews these recommendations to assess if they are sufficient in facilitating the implementation of UNDRIP and addressing violations of Indigenous rights.

### 6.2.1 System Wide Action Plan

The United Nations System-Wide Action Plan (SWAP) was a key outcome of the World Conference on Indigenous People (SWAP, 2015). The Action Plan was to increase coherence across the United Nations and to enhance Indigenous participation and the implementation of the Declaration. The establishment of SWAP recognised ‘the need for concerted action to implement the Declaration, especially at the country level’ (SWAP, 2015). Chief Ed John acknowledged the significance of SWAP, “now we have a System Wide Action for UN agencies, programs and funds to take the Declaration and include it as part of their mandate” (John).

The Under-Secretary-General for Economic and Social Affairs undertook consultations to inform SWAP, which sought to 1) raise awareness on the Declaration, 2) Support the implementation of the Declaration, particularly at the national level, 3) support the incorporation of Indigenous peoples across the 2030 Agenda for Sustainable Development, 4) conduct a mapping of existing policies across the United Nations to identify opportunities and gaps, 5) develop the capacities of states, Indigenous Peoples, United Nations staff and civil society bodies and 6) support the participation of

Indigenous People in processes that impact them. The priorities of SWAP open opportunities for further reform, addressed in the following chapter.

SWAP identified state implementation of the Declaration may be supported, through ‘the UN system’s capacity to facilitate a dialogue and cooperation between state actors and Indigenous People, promoting Indigenous participation in global, regional and national processes’ (SWAP, 2015, p.6). The Plan focused on duty-bearers meeting their obligations and rights holders asserting their rights. It also recognised that Indigenous women and girls experienced an intersectionality of discrimination. It also sought to support member-states to reform legal frameworks, policies and strategies at the national level to implement the Declaration. Significantly, it committed to ‘promote the establishment or strengthening of consultative mechanisms and platforms of dialogue’ (SWAP, 2015, p.22). According to John, following the 10<sup>th</sup> anniversary of the Declaration “we worked diligently to embed the Declaration and its standards into the mandates of UN agencies through the System-Wide Action Plan” (John).

As Co-Chair of EMRIP, Kristen Carpenter highlighted how EMRIP was working with other United Nations agencies to implement SWAP, asserting, “the issue of Indigenous people's participation in the United Nations and the Human Rights Council is a front burner issue... And we have in our recent proposal to the Council advanced the idea that Indigenous Peoples need enhanced participation throughout the UN system, possibly through the designation of a special status, to recognize the fact that they are not NGOs, they're not states, they're Indigenous People” (Carpenter). The new mandate of EMRIP also provided opportunity to better support states and Indigenous Peoples, “we also importantly have in our new mandate, the opportunity and requirement to coordinate with UN agencies who confront Indigenous People's issues” (Carpenter).

### 6.2.2. Expanded EMRIP Mandate

According to Kristen Carpenter, then Chair of the Expert Mechanism on the Rights of Indigenous People (EMRIP), the expanded mandate adopted in 2016 as an outcome of WCIP, where “Indigenous People articulated their view that after around a decade since the General Assembly adopted the Declaration, it was really time to focus on implementation” (Carpenter). The extended mandate of EMRIP drew on consultations with Indigenous Peoples held in April 2016. Crucially, the amended mechanism provided more independence from the Human Rights Council to determine the areas of its studies and its methods of work, though it was still not able to adopt resolutions or decisions. The revised mandate would provide an annual study on the status of the rights of Indigenous Peoples to the Human Rights Council, with the theme drawn from suggestions received from Indigenous Peoples and member states. EMRIP was also directed to identify, and promote good practices and lessons learnt on achieving the Declaration. Claire Charters contended the revised mandate provided greater capacity to oversee the Declaration, “the great potential with the Expert Mechanism in the 2016 resolution, is expanding the mandate to what I see as a quasi-oversight of state’s compliance with the Declaration” (Charters).

Though not a formal oversight body of the Declaration, Carpenter contended EMRIP acted as an informal oversight of body, “our mandate is to help states and Indigenous Peoples realize the aims of the Declaration” (Carpenter). The expansion of the mandate reflected the greater focus on implementation. “We provide technical advice... We also report to the Human Rights Council on issues that have been brought to our attention, and we can also undertake thematic studies” (Carpenter). Recommendations may be directed to the Human Rights Council, to member states, or through thematic studies or country engagements.

As a result of WCIP, the membership of EMRIP was increased from five experts to seven, representing each of the seven Indigenous sociocultural regions and staggered 3-year-terms, with capacity to serve two consecutive terms, were introduced. EMRIP was directed to avoid duplication of work by attending and coordinating its work with the Permanent Forum on Indigenous Issues, the Special Rapporteur on the Rights of Indigenous Peoples, the UN Voluntary Fund for Indigenous Peoples and other UN processes and bodies. The revised mandate also provided opportunity for EMRIP members to meet intersessionally and sought alignment with the special procedures of the Human Rights Council.

Significantly, if requested by member states or Indigenous Peoples, EMRIP could undertake country investigations and studies, providing ‘technical advice on the development of domestic legislation and policies’ impacting Indigenous Peoples and their rights. Further, EMRIP could provide advice to member states on recommendations of the Universal Periodic Review and other relevant mechanisms (A/HRC/RES/33/25). Additionally, it could intervene in matters involving the corporate/private sector, ‘by facilitating dialogues, when agreeable to all parties, in order to achieve the ends of the Declaration’ (A/HRC/RES/33/25). Carpenter emphasised the importance of EMRIP in enabling Indigenous Peoples to raise concerns, “we are not as restricted as the Human Rights Council. We don't require Indigenous Peoples to have a certain status to come to sessions... they are bearing witness to the human rights violations occurring in their communities” (Carpenter).

Margaret Mutu contends EMRIP is more effective in raising issues within the United Nations compared to the Permanent Forum, noting that the numbers attending EMRIP is lower than UNPFII, “but the fact is that it can actually get the information in there, if you’ve got Members of the Permanent Forum who do good research it is brought back to the Permanent Forum, but the Expert

Mechanism feeds directly into the system. It's still water on stone but at least the information is getting in there" (Mutu).

However, where there is a current violation of human rights occurring, Carpenter explained the best course is to raise the matter with the Special Rapporteur. EMRIP's mandate is focused on longer term processes, facilitating dialogues between states and Indigenous Peoples and providing technical advice. "A number of our current requests have to do with Indigenous Peoples whose land rights haven't been recognized, and as a result, they've been threatened with or actually evicted from their homelands. Now we're not able to request that a state immediately return them to their homelands, but we are able to say, okay, the state has an obligation to recognize Indigenous People's rights to land that they have traditionally occupied. Let's have a dialogue between the state and the Indigenous Peoples about how to implement the articles of the Declaration" (Carpenter).

Carpenter elaborated on the EMRIP study on Self-Determination in 2021 as an example of responding to Indigenous Peoples' priorities. "This is a huge topic that we have bitten off, but one that we think is deeply important...And this right of self-determination is of course, in some ways the right on which all of the other rights hinge" (Carpenter). It provided an analysis of Indigenous assertions of self-determination and an assessment of best practices for achieving self-determination (A/HRC/48/75). However, its extensive list of recommendations was principally directed to states, omitting recommendations that may strengthen capacity of the United Nations to hold states to account for violations of Indigenous rights. These untapped opportunities for the United Nations to more effectively facilitate Indigenous rights and self-determination are examined in the next chapter.

### 6.2.2.1 EMRIP Country Engagements

The expanded mandate also enables EMRIP to respond to requests for country engagements, to establish dialogues between Indigenous Peoples and Governments on issues of concerns. A useful example is the study in 2019 called by the Māori Peoples of Aotearoa/New Zealand to seek advice on the implementation of the Declaration. “The Māori people wanted to have a self-determining role in articulating the process and the substance of a national action plan. And we were very pleased to receive a request for assistance to come to New Zealand and facilitate a dialogue with the state about exactly that” (Carpenter).

This Country Engagement dealt with Māori rights to participate in decision making, rights to free prior and informed consent, and be represented through their own institutions. Margaret Mutu explained ‘we have been reporting to the EMRIP since 2015 in an attempt to get successive governments to implement the Declaration. Implementing the Declaration provides us with opportunities to improve outcomes for whānau Māori and all New Zealanders’(NPM, 2024). The EMRIP Advisory Note following the Country Engagement suggested the Government establish processes to ensure relevant legislation and the Treaty of Waitangi Tribunal were consistent with the Declaration. It suggested ‘the Government consider enhancing the role of the Waitangi Tribunal and include: binding rather than recommendatory decisions; the power to assess policies against the Treaty; and the provision of additional human and financial resources’ (EMRIP, 2019). It also recommended pursuing constitutional reform and provided advice on a national action plan with monitoring processes that are maintained across political cycles (EMRIP, 2019). Mutu spoke of the potential benefits, ‘through implementing the Declaration, we have an opportunity to give effect to Te Tiriti and provide constitutional certainty about the rights and responsibilities of all New Zealanders; a real opportunity to unite all New Zealanders’ (NPM, 2024).

However, though significant steps were instigated, following a change of Government in 2023, there has been a substantial shift in policy and legislative approaches, outlined more fully later in this chapter. In response to the changes wrought following the election, Mutu surmised, “it is ironic that, while Māori expertise and leadership are acknowledged on the international stage, the New Zealand coalition Government and political climate has taken our relationship with the state and progress on Indigenous, human and climate rights back more than 40 years” (TA OA, 2024). As one of the few investigative options available for Indigenous Peoples, Mutu is seeking for EMRIP to undertake a follow-up country visit, with Māori academic Valmaine Toki, at the time of writing, the EMRIP Chair (Giles, 2024).

The new conservative Government in New Zealand brought an abrupt change of approach, espousing an ideological approach antithetical to the recognition of Indigenous rights. The force of this change demonstrates that EMRIP’s Country Engagement was insufficient in protecting Māori rights from an adversarial government. Further, it confirms that strong international review and monitoring processes are necessary to secure the rights of Indigenous Peoples. It also highlights that United Nations monitoring and adjudication processes, which I outline in chapter 7, are necessary, if they have sufficient teeth, to hold rights violations accountable in the international fora.

### 6.2.3 Optional Protocol

This lack of structural monitoring within the United Nations led to a debate amongst Indigenous peoples on whether a convention or optional protocol should be pursued on the back of UNDRIP. Declarations adopted by the UN General Assembly can make recommendations on international law but are not as binding as conventions or optional protocols (E/C.19/2014/7, p.8). If acceded, an optional protocol is binding on parties that ratify it and provides mechanisms and procedures to

monitor, hear complaints or undertake investigations (E/C.19/2014/7, p.4). Conventions and optional protocols require ratifying states to bring their national legislation into line with ratified treaties.

Whether Indigenous Peoples should seek an optional protocol in a bid to establish a monitoring and complaints body associated with UNDRIP was addressed in the Study by the Permanent Forum on an Optional Protocol to the Declaration on the Rights of Indigenous Peoples (E/C.19/2014/7). The study was prompted by the recognition that states had failed to implement UNDRIP and that the existing Indigenous mechanisms of UNPFII and EMRIP did not have the mandate or capacity to act as a monitoring body or hear complaints regarding breaches of Indigenous rights (E/C.19/2014/7I, p2). An Optional Protocol was 'intended to establish a specific complaint mechanism and procedure for protecting human rights and enforcing the original treaty' (E/C.19/2014/7, p4). The study recommended an Optional Protocol be developed in partnership with state parties, to encourage compliance and mutually accepted standards.

However, the proposal for an Optional Protocol didn't progress beyond this study. I share concerns that an Optional Protocol or seeking to develop UNDRIP to a Convention may inadvertently undermine commitments previously secured. The voluntary nature of an Optional Protocol provides state parties that had endorsed UNDRIP with the further opportunity to decline to ratify an Optional Protocol. This opened potential for an Optional Protocol to be used as a means to step back from commitments undertaken when endorsing UNDRIP. Chief Ed John warned the Declaration of Human Rights would likely not secure broad endorsement now. Equally, ILO Convention 169 on Indigenous and Tribal Peoples had only been ratified by 22 states, with most of those from Latin America (John).

Rather, John argues that since its broad endorsement, "UNDRIP has come to reflect customary international law, with its own obligations on state members to enact it. UNDRIP is part of customary

international law and it should be applied as such in this country” (John). I addressed UNDRIP’s status as customary international law in detail in Chapter 5. Though some settler-states, such as Australia, had claimed UNDRIP was aspirational in nature, John asserted “It is not merely an aspirational document and it’s not simply a Declaration that can’t be taken into account, it’s as important as the Declaration of Human Rights, that was adopted in 1948. It’s really important to understand the standards and the Declaration are part of what’s now international law” (John).

### 6.3 Domestic Implementation Strategies

The lack of formal monitoring and reporting structures within the United Nations was also reflected in the domestic sphere, even though “Article 38 of the Declaration commits state authorities to enact legislation to pursue the objectives of the Declaration” (John). If implemented domestically, the Declaration’s right to self-determination affirmed in Article 3 and 4, would substantially increase the empowerment of Indigenous Peoples. According to Carpenter, the Declaration is “very important for the textural promises that it makes as a result of the advocacy of Indigenous Peoples for at least 25 years” (Carpenter).

Though UNDRIP affirms the right to Indigenous decision-making and the obligation to enact national measures to implement UNDRIP, the majority of the Indigenous leaders interviewed confirmed that despite the endorsement in 2007 there had been little implementation domestically. The need to enact the Declaration was echoed by Kristen Carpenter, “so, we’re at this moment in the implementation of the Declaration, where it’s a very important instrument, that needs to be made real in the lives of Indigenous Peoples. And that’s true with every one of the 46 articles in the Declaration” (Carpenter). Carpenter spoke at length on the importance Indigenous Peoples’ role in

its implementation, “I’ll just say that this idea of bringing Indigenous laws, customs and traditions to bear on interpretation and application is important across all terms of the Declaration” (Carpenter).

The correlative data compiled from the semi-structured interviews outlined various domestic implementation strategies from the settler-states of Canada, Aotearoa/New Zealand, Australia and the Plurinational State of Bolivia. The comparative analysis of this data reflected differing levels of implementation and highlighted respective challenges. This analysis contributed to the justification of further avenues to facilitate the recognition of Indigenous rights to self-determination outlined in this chapter and informs the next chapter on initiatives to further enhance the recognition of Indigenous rights.

### 6.3.1 Legislative Implementation

At the time of the interviews, between 2017-19, Canada had instigated a review to consider the legislative implementation of UNDRIP. Canada had committed to its implementation in response to the Call to Action from the Truth and Reconciliation Commission, which had reviewed the Residential Schools program that forcibly removed First Nation children. The Government of Canada committed to a renewed nation-to-nation relationship with Indigenous Peoples based on the recognition of rights, respect, co-operation, partnership and the implementation of UNDRIP (Littlechild). Additionally, Canada also established an Independent Claims Tribunal, developed in conjunction with Indigenous Peoples, to adjudicate First Nations claims (Littlechild, p20). However, Littlechild also noted its limitations, with unilateral decision-making and being confined to adjudicating government approaches, with “some of the big violations in the modern sense by private industry, ...but we’re not really there yet” (Littlechild).

Canada sought to enact the Declaration through the development of legislation that adopted the Declaration as federal law (John, p6). This legislation was subsequently enacted through the United Nations Declaration on the Rights of Indigenous Peoples Act, which became law on 21 June 2021. The Act requires Canadian federal legislation and laws comply with UNDRIP and provides a legal framework to implement the Declaration. The Act requires the Federal Government to develop an Action Plan within two years, engage with Indigenous Peoples in its development and requires the government reports to parliament annually on its progress (S.C. 2021, c.14).

The Government of Canada committed to reject colonialism and respect the inherent rights of Indigenous peoples (Canada, 2021, p.2). It committed to implement legislative, policy and administrative processes across national and international jurisdictions. Significantly, it also includes 'monitoring, oversight, recourse or remedy or other accountability measures' (Canada, 2021, p.2). Domestically, the UN Declaration Act stipulates that Indigenous treaty rights are protected, recognising those rights are not frozen but that they can significantly evolve. The Act also confirms that UNDRIP should be used as an interpretive document Canadian law (Canada, 2021, p.3). The Act specifically recognised Indigenous rights to self-determination and self-government, including 'their jurisdictions, law, governing bodies, institutions and political, economic and social structures related to Indigenous communities' with dedicated funding to fulfill these governance roles (Canada, 2023, p.31). Under the Act laws that impinge these rights are to be repealed, including dismantling the Indian Act (Canada, 2023, p.30). Significantly, it also committed to the honouring of all historic and modern treaties.

The Act confirms Indigenous rights to self-determination and that 'Indigenous rights are carefully considered in reviewing and updating federal laws that effect those rights' (S.C. 2021, c.14). It also requires the Action Plan take measures to address injustices, discrimination, prejudice and violence

directed against Indigenous Peoples. Further, it must establish means to engage Indigenous Peoples in decision-making with Government and industry on the management of natural resources and conservation of waterways and marine environments.

The Act incorporates the principles of 'free, prior and informed consent' (FPIC) into the legislation to ensure processes are 'free of manipulation or coercion, informed by adequate and timely information, and occurs sufficiently prior to a decision that Indigenous rights and interests can be incorporated or addressed effectively as part of the decision making process – all as part of meaningfully aiming to secure the consent of affected Indigenous Peoples'(Dept of Justice, 2021, p.3). Though it specifies FPIC does not provide a veto to Indigenous Peoples, the Act seeks to work respectfully, in partnership with Indigenous Peoples and seeks consensus decision-making. Significantly, FPIC goes beyond Canada's legal obligation to consult, requiring the active engagement of Indigenous Peoples in decision-making on issues that impact them.

The UNDRIP Act informs Canada on enacting its constitutional duty to consult with Indigenous Peoples on decision-making that may adversely impact them, their treaty rights or potential rights. It also specifies that obligations to engage with Indigenous Peoples includes national and regional Indigenous bodies, treaty holders, nations, women's, youth, urban Indigenous Peoples and those 2SLGBTQIA+ and other Indigenous groups. Importantly, the Action Plan also includes measures to monitor, review and amend the implementation of the Plan.

The UN Declaration Action Plan was released in June 2023, setting out 181 measures to be implemented across government. These included specific measures to advance self-determination, implement treaties, agreements and other constructive arrangements, ensure the participation of Indigenous peoples in decision making and revitalise Indigenous cultures, languages and legal

systems. (Dept of Justice Press Release, p.2). The Action Plan was developed over five themed chapters, 1) Shared Priorities, 2) First Nations Priorities, 3) Inuit Priorities, 4) Metis Priorities and 5) Indigenous Modern Treaty Partner Priorities, with each being a living document to encourage responsiveness (Canada, 2023, p.20). The Action Plan establishes principles that includes co-development, that it be progressive and transformative and ensures outcomes are measurable and accountable (Canada, 2023, p.23). The plan included the establishment of an Independent Action Plan Advisory Committee (APAC) in March 2025, comprising of ten First Nations, Inuit, Metis and representatives of historic and modern treaties, to advise the Minister on the implementation of the Act and agreed priorities (APAC, 2025).

The Plan seeks to ensure laws are consistent with the UN Declaration Act (UNDA) and that legislation and policies reflect the inherent rights of Indigenous peoples and that processes impacting Indigenous peoples incorporate their consultation and cooperation (Dept of Justice, 2021, p.1). It also seeks to develop new Indigenous informed approaches across the range of areas addressed by UNDRIP with funding attached for community implementation of strategies such as the anti-racism initiatives and violence prevention strategies. Funded partnerships were developed with 35 Indigenous bodies over the preceding 12 months to June 2025 (Dept of Justice, 2025, p.20).

Critically, it also included the establishment of ‘an independent Indigenous rights monitoring, oversight, recourse or remedy mechanisms’ for dispute and conflict resolution on the implementation of the Act and required that the mechanism be Indigenous led (Dept of Justice, 2023, p.29). This endorsement of Indigenous self-determination was also reflected in Canada’s engagement internationally, supporting the recommendations of the WCIP and promoting the Human Rights Council’s meetings on the Enhanced Participation of Indigenous Peoples at the United Nations, with

Canada co-facilitating one meeting and continuing its engagement on these issues throughout 2025-2026 (Dept of Justice, 2025, p.63).

However, there are also critiques of the process to date, with Sara Mainville and Christina Joynt claiming the implementation process has largely been unilaterally enacted by the Canadian government (Mainville, 2025, p.132). Where legislation has been implemented federally in Canada, and the provinces of British Columbia and the Northwest Territories, it is inconsistent. In British Columbia, Minister Fraser asserted, in the Legislative Assembly Committee debates, '[The Bill] does not give the UN Declaration on the Rights of Indigenous Peoples legal force and effect' (Mainville, 2025, p.133). Additionally, the British Columbia Supreme Court determined in *Gitxaala v British Columbia*, that the British Columbian legislation on the Declaration on the Rights of Indigenous Peoples Act (DRIPA) 'did not implement UNDRIP in the provinces domestic law.' (Mainville, 2025, p.134). With both the federal UNDA and DRIPA requiring implementation via Action Plans that report annually to Parliament.

The Action Plan's vague language, its lack of tangible goals for each federal department (Mainville, 2025, p.141), its failure to refer to specific UNDRIP articles, a lack of accountable timelines and Ministerial discretion that relies on Ministerial good will, have according to Mainville and Joynt, undermined implementation and accountability efforts (Mainville, 2025, p.134). Though confirmation that UNDRIP provides an interpretative lens to Action Plans and legislation within Canadian federal law has been affirmed in *Kebaowek First Nation v. Canadian Nuclear Laboratories* (Mainville, 2025, p.133). Additionally, targeted legislation has also been developed confirming First Nation, Inuit and Metis children's rights, Indigenous languages and water rights, which implement UNDRIP (Mainville, 2025, p.135). Nevertheless, criticisms remain, with the wording limiting water

rights to within reserve lands, failing to include protection of source water upstream from pollution or damming (Mainville, 2025, p.137).

Federally, the Interpretations Act has been amended to include 'a non-derogation clause to uphold s 35 Aboriginal and treaty rights' to 'uphold and not diminish the rights of First Nations, Inuit and Metis', though Mainville and Joynt consider it a lost opportunity in not requiring laws be consistent with UNDRIP (Mainville, 2025, p.138). Limited participation of Indigenous peoples in the development of amendments to laws highlighted differing interpretations, with the Government considering compliance when Indigenous Peoples felt Acts such as the Impact Assessment Act didn't comply with UNDRIP (Mainville, 2025, p.139). Additionally, the discretionary framing left compliance to the goodwill of the Minister at that time (Mainville, 2025, p.140). Though \$37 million had been allocated to Indigenous peoples over five years to respond to the monitoring of the Action Plan, the time limited nature of this funding did not facilitate the required development of core capacity and the longer-term self-determination of Indigenous peoples (Mainville, 2025, p.141). However, a number of these concerns were raised in the Fourth Annual Progress Report (Dept of Justice, 2025, pp.58-61), and may be addressed in the longer term, as the UNDA has been established as an iterative process, incorporating engagement with Indigenous communities and the Advisory Committee to continue to improve these processes.

Importantly, for Australia, Canada's initiatives to incorporate UNDRIP within its domestic legislation and policy approach provides a valuable example in how it may move to a partnership approach that seeks to work collaboratively with Aboriginal and Torres Strait Islander Peoples in meeting its obligations in international law to recognise the self-determination and rights of indigenous peoples, as confirmed in UNDRIP. However, as the example of New Zealand highlights, electoral cycles can dramatically change the domestic environment of settler-states, with legislation vulnerable to

amendment by subsequent governments. The additional challenge of requiring domestic constitutional changes, emphasise the need for international monitoring and adjudication mechanisms for breaches of Indigenous rights.

### 6.3.2 Constitutional Transformation

For Māori in Aotearoa/New Zealand, the Tribunal of the Treaty of Waitangi has a history of referencing the Draft Declaration and then UNDRIP in its determinations and the courts were also drawing on UNDRIP and its standard setting norms (Mutu). “So, for us, the United Nations Declaration on the Rights of Indigenous Peoples allowed us to not just rely on our Treaty, we could look further overseas and say, look this is what the rest of the world recognises. And this is a cut down version of the Convention on Human Rights, that has been accepted throughout the world. Even though it’s violated, know what your rights are, stand up for your rights” (Mutu).

Māori also established their own process for reviewing the implementation of UNDRIP, in response at the lack of implementation. Margaret Mutu recalled, “I decided that the Permanent Forum just wasn’t able to deliver. Even though you had Special Rapporteurs and two reports that really supported us, governments just ignored them” (Mutu). Despite other treaty bodies referencing UNDRIP and making recommendations, the government failed to respond to those recommendations. “So all of us, with experience of the Declaration at the international level and dealing with governments here, were running into brick walls all the time and said no, we need to take control of this, so we control this monitoring process” (Mutu). It was determined in 2015 through the IWI Chairs Forum, where 73 heads of the IWI nations meet, to establish a monitoring mechanism and report on the implementation of the Declaration. We “ask the government to tell us what they’re doing to implement the Declaration and then we’ll have a look to see whether it’s true”

(Mutu). The New Zealand Human Rights Commission has allocated a worker to support the IWI Forum in drafting the annual reports which are then submitted to EMRIP (Mutu).

Mutu outlined how the New Zealand Government ignored their first report. But the second coincided with Helen Clark's, former Prime Minister of New Zealand, nomination for Secretary General of the United Nations in 2016. So Māori were able to negotiate and secure a commitment to implement the Declaration through a National Action Plan, with Constitutional Transformation as the framework of the implementation (Mutu). Mutu summarized the process, "the first thing you've got to do is recognise that Māori are sovereign in this country, and you've got to do your Constitutional Transformation and then you've got to implement the United Nations Declaration on the Rights of Indigenous Peoples article by article. And you've got to do it systematically and we'll show you how to do it" (Mutu).

This work was being led by Māori scholars Moana Jackson and Margaret Mutu. According to Jackson, Māori called for transformation rather than amendment or reform, to incorporate the kawa or cultural protocols that recognises Papatūānuku or mother-earth and tino rangatiratanga or self-determination (Potter & Jackson, p6). It sought to underpin the Constitution with Māori values, shifting from an adversarial approach to one of decolonisation, reconciling and mediating differences, based on Māori values or Kaupapa, as the Bolivian Constitution had grounded itself on Pachamama. According to Mutu the revised Constitution would incorporate the establishment of a Māori representative governance body (Mutu). "Its motivating our people to exercise their rights. You can feel the swell of it starting to happen around the country. ...last week when we were briefing the New Zealand Government, we said you have to acknowledge that Māori are sovereign in this country...its empowering our people to speak out more" (Mutu).

However, since these interviews, the New Zealand general election, held on 14 October 2023, resulted in a change of government to the conservative National Party and its minor coalition partners, the Libertarian Act Party and New Zealand First Party. They brought a dramatic change in policy approaches to the 20% Māori population. Prime Minister Christopher Luxon rejected UNDRIP signed by New Zealand in 2010, and stopped work on He Puapua, the UNDRIP implementation strategy that focused on Māori self-determination, contending it promoted race-based legislation (Corlett, 2024). The Government has also developed legislation to revise the interpretation of the Treaty of Waitangi, signed between the British Crown and Māori chiefs in 1840, which guaranteed Māori self-determination. Rather the Government is shifting from a partnership with Māori, to a partnership with all New Zealanders and is reviewing all mentions of the Treaty principles in existing legislation, to repeal or amend these (Corlett, 2024). “What this redefinition... means is...that Māori will assimilate – we would give up entirely being Māori. This is a reversion to the white New Zealand policy that was formal government policy up until the 1960s,” Mutu said (Corlett, 2024).

Prime Minister Luxon determined services should be provided on the basis of need, not race (Corlett, 2024). The Māori Health Authority, established in 2022 to address inequality in healthcare, was abolished in February 2024. The government’s ‘tough on crime’ approach allocated \$1.9bn to increase prison capacity, with an impact on Māori who make up 52% of the prison population. The school lunch program was cut by \$107m, impacting 230,000 students in disadvantaged schools with high Māori and Pacific populations, while the Māori Housing Program had \$60m cut. However, ‘most of the programs have been put in place for Māori to rebalance negative statistics’ (Corlett, 2024). Additionally, a bill has also been proposed to fast-track projects and bypass environmental protections.

These changes have been met with widespread hikoī - peaceful protests-nationally, culminating with 42,000 people protesting at Parliament in Wellington (Armstrong 2024). At the first reading in Parliament, Opposition party MP Hana-Rawhiti Maipi-Clarke undertook a traditional Haka, tearing up the bill in Parliament, which was distributed on social media, receiving an estimated 700 million views (Giles, 2024). The experiences of New Zealand highlight the vulnerability of domestic rights recognition, with gains secured potentially threatened by subsequent governments, further emphasising the need for international protections through dedicated and adequate United Nations mechanisms.

### 6.3.3 Efforts to Establish a Voice to Parliament

In the Australian context, the Referendum to establish an Indigenous Voice to Parliament in the Constitution, in October 2023, was a central proposal to implement the self-determination provisions set out in article 3 of UNDRIP. It also provides a further example of the adversarial targeting of Indigenous Peoples for political objectives, as occurred in Aotearoa/New Zealand. It demonstrates domestic challenges in the recognition of Indigenous rights, where broader public endorsement may be swayed by adversarial political debates. The potential for Indigenous rights to be used in negative political campaigns further underscores the need for international monitoring and mediation processes to assert settler-state obligations to recognise internationally accepted standards of Indigenous rights.

The referendum to recognise Aboriginal People in the Constitution, followed decades of debate, where reconciliation and recognition processes had been promoted by Australian Governments rather than a more substantive treaty, despite the Council for Aboriginal Reconciliation Report in 2000, acknowledging Aboriginal and Torres Strait Islander treaty aspirations. A government

appointed Expert Panel on the Recognition of Indigenous Australians in the Constitution 2010-2012 and the Joint Select Committees on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples 2013-2015, called for constitutional recognition.

By 2015, Prime Minister Malcolm Turnbull had established the Referendum Council which undertook a series of thirteen Aboriginal community consultations, culminating in the Uluru National Convention, from 23-26 May 2017. The Voice to Parliament secured broad support, though some expressed concern it would have insufficient powers as an advisory body. According to records of the Regional Dialogues, each of the consultations also confirmed calls for federal treaty and for truth telling. Additionally, eleven of the consultations called for the implementation of self-determination as set out in UNDRIP. The resulting Uluru Statement from the Heart called for 'the establishment of a First Nations Voice enshrined in the Constitution' and 'a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history' (Uluru Statement, 2017).

The Referendum Council's report noted, 'Treaty was seen as a pathway to recognition of sovereignty and for achieving future meaningful reform. Treaty would be the vehicle to achieve self-determination, autonomy and self-government', with discussions recorded on whether it should be legislated, incorporated or constitutionally enshrined. The report also confirmed universal support for truth-telling during the dialogues. The Report made only two recommendations 'that a Referendum be held to amend the Australian Constitution to provide a representative body to give Aboriginal and Torres Strait Islander First Nations a Voice to the Commonwealth Parliament', and 'that a non-binding Declaration of Recognition be enacted by legislation passed by all Australian Parliaments'. However, the report omitted reference to the establishment of a Makarrata Commission to negotiate a treaty and undertake truth-telling.

Before the Reports release on 29 May 2017, then Deputy Prime Minister, Barnaby Joyce, decried that the Voice would constitute a third Chamber of Parliament. The Referendum Council clarified the 'Voice is a proposal for an external advisory body,...outside of parliament.' They contended it was a 'modest and constitutionally conservative proposal' providing Indigenous Peoples advisory input on the policies and legislation that impacts them. Constitutional enshrinement would prevent it being wound up by future governments, as occurred with two former Indigenous representative bodies, the Aboriginal and Torres Strait Islander Commission (ATSIC) 1990-2005 and the National Congress of Australia's First Peoples 2010-2018.

Prime Minister Turnbull rejected the Statement from the Heart and the Referendum Council's Report stating, an Indigenous elected body failed to reflect the democratic foundations where 'citizens have equal civic rights' (Wahlquist, 2017). However, Joyce had reversed his position by 2019, publicly apologising and acknowledging 'he got it wrong', confirming the Voice was not a third Chamber of Parliament. But by then it had become a rallying call for the LNP. Initially repeated by Turnbull and the following LNP Prime Minister Scott Morrison, and echoed by the Opposition Leader, Peter Dutton. Turnbull has also since changed his position following his replacement as Prime Minister.

The federal election in May 2022 highlighted differing approaches between the two main political parties, with the Albanese Labor Government committed to implementing each of the Uluru Statement's recommendations for a Voice, Treaty and Truth at the start of his acceptance speech. Surveys in 2017 suggested 61% supported a Constitutional Voice to Parliament and 58% supported a treaty with the Australian Government. Significantly, 55% of LNP supporters endorsed the Voice proposal. By 2022 support for the Voice had increased to 73% in the ABC Vote Compass Survey, a rise from 64% in the previous survey in 2019. The Survey confirmed the tantalizing possibility, that with an informative education campaign the constitutional enshrinement of the Voice may be possible, if

a no-campaign was effectively countered, as had occurred with Australia's 2017 Marriage Equality Plebiscite.

Following the election, Labor Prime Minister Albanese confirmed he would work to lift 'the whole nation up: With a new spirit of partnership between government and First Nation people, through the work of Makarrata, treaty-making and truth-telling and by enshrining a Voice to Parliament in the Constitution'. Albanese clarified 'it's not a matter of special treatment'. It's about consulting Aboriginal and Torres Strait Islander peoples on the decisions that affect [them] (you). He asserted, it was a 'broken system' that needed to overcome 'the torment of powerlessness'.

However, Peter Dutton, then LNP Opposition Leader, rejected the referendum claiming the voice may consider 'every element of public policy'. Additionally, former PM Tony Abbott argued a body that 'entrenches race in the constitution drives us further apart', ignoring existing race powers in the Constitution were directed against Aboriginal People. Former PM, John Howard, contended the Voice could exercise 'coercive influence on the government'. In response, Julian Leeser resigned as Shadow Attorney General and moved to the back bench, and former Minister for Indigenous Affairs, Ken Wyatt resigned from the Liberal Party. Further division in the LNP was reflected in a number of back benches and three State Liberal leaders supporting the Referendum.

Prior to the Referendum in early 2023 a Newspoll confirmed the Voice enjoyed 54% support, with 38% rejecting it, while also securing the majority of states, a further requirement for Australian referendums. However, by October the Referendum failed, with only 39.9% voting yes and failing to secure any of the six states. A survey of 4,219 people in the weeks following the Referendum indicated those who voted 'No' was due to concern about dividing the country, raised by 66.1% of

No voters, and the view that the Voice would create rights for a minority not given to others (Biddle, 2023).

This reflected a significant shift in views over the last six months of the campaign, with 42.0% of those who would vote yes in January 2023, voting no by October 2023. The yes vote amongst Coalition voters was roughly one-quarter of its January 2023 count. An analysis of No voters confirmed low-income households were more likely to vote no, males over females and older over younger voters were more likely to vote no. Further, politicised online information about the referendum was sourced by 58.8% of voters.

The poll also found 82.4% of people had little or no personal engagement with Aboriginal people. Though surprisingly, 79.1% stated they felt proud of First Nations cultures, and 87.0% agreed 'it is important for First Nations peoples to have a voice/say in matters that affect them'(Biddle, 2023). The change in voting intentions further emphasises the vulnerability of Indigenous rights against an antagonistic opposition and further corroborates need for international monitoring and adjudication avenues for Indigenous Peoples. Though constitutional enshrinement of Indigenous rights provides longer term certainty over legislative measures, the higher bar for securing constitutional reform, confirms constitutional enshrinement is difficult to achieve. Opportunities for the United Nations to foster and better support domestic initiatives are explored further in the next chapter.

#### 6.3.4 Impact of Constitutional Recognition of Judiciary in Bolivia

The inclusion of the Plurinational State of Bolivia in this study provided opportunity to consider a State Member that was proactively seeking to recognize the rights of Indigenous Peoples. The previous chapter introduced the constitutional reforms enacted by the former President Evo

Morales, while this chapter provides a deeper analysis of how UNDRIP is being structurally implemented, through an examination of the Constitutional Tribunal and its role in the judicial system. The next chapter will provide a deeper analysis of Indigenous autonomy as a key outcome of the recognition of UNDRIP in the constitution, through case studies of two communities establishing themselves as autonomous regions, as a means to implement self-determination.

In interviews, Teodoro Blanco Mollo, the Technical and Decolonization Secretary of the Constitutional Tribunal (CT), reflected a different approach from the outset. Our meeting commenced with a small cultural ceremony centred around a pile of coca leaves, woven cloth and cultural items on the table. He explained, “we have done a little ritual here, this is our office, it is a space where there has to be good energies. ...formed by the mountains and coca, which allows us to invoke that, so that all activities in the secretariat and in the Constitutional Tribunal are always constructive and serve the people” (Mollo). Mollo explained there are two units within the Tribunal, the Indigenous Justice Native Farmer Unit and the Decolonisation Unit.

The Constitutional Tribunal was established to implement the pluri-nationality, decolonization interculturality and legal pluralism within the court process. Court Magistrates are elected and oversee legal cases but their findings are informed by reports from an interdisciplinary team that investigates each case. This interdisciplinary team includes a lawyer, an indigenous justice specialist, historians, anthropologists, sociologists, political scientists and linguists, a team of 12 who compile specialized technical reports. This multidisciplinary team undertake on-site investigations and their anthropological expert report informs the magistrate and the judgement. “Plurinationalism is not just about formal positive law, it's created as a form of a plural justice system at the national level. And this [office] is established to fulfil this idea of decolonisation” (Mollo).

The Native Indigenous Justice Unit also provided an outreach program to Indigenous people, even in isolated regions, to inform them how to access constitutional justice. “So they know what resources they have as Indigenous Peoples to guarantee their fundamental rights” (Mollo). These rights include the collective rights of Indigenous Peoples to their territory, rights to a healthy space, environmental rights, and rights to be heard, which are enshrined in the Constitution. The Constitutional Tribunal also provides advice on how to undertake legal action where there is a conflict. “There aren’t a lot of legal cases but where there are conflicts the most common action are environmental issues” (Mollo).

Additionally, the Unit documents all of the information obtained on the legal systems of Indigenous Peoples, “then we elaborate texts oriented towards how to understand legal pluralism, how to understand decolonization in justice, what tools are required to be able to decolonize law. They are philosophical theoretical tools for the magistrates and functionaries to use to understand these concepts” (Mollo). Mollo explained that Indigenous values, spirituality and worldview also inform the court’s normative processes. “When a person in a community goes astray, the issue is how do we make them come back to the good path” (Mollo). It is grounded on a jurisprudence built on legal pluralism, the decolonization of justice, plural principles and values such as living well, “ñandereko, ivi maerei, qhapaj ñan, or the ethical and moral principle of the plural society, the 'noble path or life', that has been constitutionally enshrined by Bolivia.

For example, when thievery occurs, they don’t rely on positive law, but systems and norms, that are restorative, not resolved by a lawyer and judge, but an open system. The community meets, establishes a procedure and then determines a sanction, so the community is a witness and the deeds are not repeated. “They aren't punitive, like prison, but bring them back to the path within the community and what to live well is, it is harmony and reciprocity” (Mollo).

Domestic violence was a further example, where “the process of colonization has imposed a culture of patriarchy, where the man has a lot of power over the woman, the wife. While in the worldview of the people there is a principle of complementarity, the chachawarmi, but that has been broken with the colonial invasion” (Mollo). The response is to strengthen their traditional principles “that women compliment men but are even more than that because they reproduce life, generate life, so there must be a greater respect for women” (Mollo). These principles, rather than norms of prohibition of violence, help to change colonial attitudes back to the traditional values that respect women’s equality and their deeper value, “to restrengthen the principle of complementarity, because through that value they are going to actually liberate women” (Mollo).

According to Mollo this is a form of restorative justice based on ancestral practices. It enacts “a preventative justice based on three principles, ama qhilla, do not be lazy, ama llulla, do not lie, and ama suwa, do not steal, so you do not have conflict. Indigenous, spiritual justice must return [them] to the path so that every community is living well, in harmony, in reciprocity, its a restorative type of justice, that’s in balance”. (Mollo). Q’apaj Conde Choque explained, “It is a different approach in which the ethical responsibility is heavily imposed on their members. This is something quite different from the western system of law” (Choque).

“The creation of the interdisciplinary form of plural justice to implement decolonisation and collective Indigenous rights is unique. It’s a different kind of thinking that is not positivist, its a process of decolonisation, through rethinking what fundamental rights are” (Mollo). According to Mollo, “We always look at the cosmos, it is very orderly, in harmony, the sun rises on time, if man acted according to the harmony of nature, there would not be so many problems. We can create a society based on these principles, to activate a worldview that is not anthropocentric, but puts the cosmos before men, returns to a more balanced justice, not a justice, that until now, has always been in favour of

the most powerful and has not been for the weak, but a justice that reflects the harmony of nature” (Mollo).

Choque also confirmed that other policies and laws could also be reviewed at the Constitutional Tribunal to ensure they align with the Constitution. “I think Bolivia has a really good body of law for Indigenous Peoples rights. What we need now is implementation of that. We need a more progressive proactive approach to empower the people” (Choque). Though Choque recognised implementation was challenging he reaffirmed, “many of these outcomes are human rights, and human rights are obligations of the state...we should also recognise that these are the challenges of the state, this is the duty of the state to implement these outcomes” (Choque). Further, he contended it was Indigenous Peoples themselves that needed to drive UNDRIPs implementation, both nationally and internationally, “I think this is a door which shouldn’t close, this is something that Indigenous Peoples will be the ones who make the Declaration a reality” (Choque).

## 6.4 Usefulness of the Universal Periodic Review

The Universal Periodic Review (UPR) is a United Nations review of each State Member’s human rights compliance, coordinated through the Human Council every 4.5 years. The inclusion of Indigenous violations in UPRs was a recommendation of the World Conference on Indigenous Peoples (WCIP). Though the review is undertaken by the Human Rights Council, other Member states make recommendations to the state under review. They rely on the report provided by the state member under review and also Shadow Reports provided by civil society organizations. The need to draw on the UPR was also emphasized by Grand Chief Wilton Littlechild, “we can’t pigeonhole ourselves into just an Indigenous process, because we need the Human Rights Committee. We need to be able to

go to the UPR, we need to be able to go to the existing mechanisms, the treaty bodies...[or] the danger is that isolates us from the mainstream process” (Littlechild).

Claire Charters suggested the UPR is more effective than treaty processes in raising human rights concerns because member states tend to be more sensitive to recommendations by other member states, with the level of engagement by other states providing a greater impact on the country’s human rights reputation and international standing than treaty bodies. “The UPR is really useful because states pay attention to the UPR because states are reviewing other states” (Charters). All member states can review the state reports and shadow reports by civil society bodies prior to a dedicated session of the Human Rights Council. State members can question the state under review, “based on reports and information provided by civil society, they can make recommendations to that state about how to better implement human rights or comply with their human rights obligations” (Charter). Though Margaret Mutu questioned the outcomes achieved, she saw value in informing Māori of their rights and the opportunity to raise concerns. “That’s the biggest thing, that’s been so influential, is making sure our people knew what their rights were...Now you have a Race Relations Commissioner who’s run a campaign on racism against Māori” (Mutu).

The need for Indigenous Peoples to use the UPR process and other treaty bodies was also asserted by Kenneth Deer, “Indigenous Peoples have to take more advantage of those existing complaints mechanisms and make them more effective, like the Universal Periodic Review. States have to stand up to countries that have extensive violations going on against Indigenous People. And the United Nations has to follow up on those decisions” (Deer). While Ed John agreed on the potential of the UPR, he warned “we need to have accountability mechanisms, whether it’s the Permanent Forum or the Universal Periodic Review process or through a third body, where there’s an urgent warning, early action, procedure in place” (John).

### 6.4.1 Enacting Praxis through the UPR

Providing Indigenous input into the Australian UPR Shadow report was adopted as a praxis approach, as a means of enacting the Transformative Indigenous Rights Theory, outlined in chapter three, and its associated methodological approach set out in chapter four. This praxis was selected because of its opportunity to raise human rights breaches and assess its potential impact on Indigenous communities in Australia. I was invited to contribute to the Shadow Report as Co-Chair of the Indigenous Peoples' Organisation-Australia (IPOA), which I drew on to respond to the needs of the Indigenous community, while also compiling data on the relative effectiveness of these praxes.

The 2020 Australian Civil Society Report, coordinated by three non-Indigenous human rights/law centres, offered the IPOA a dedicated page to address Indigenous rights concerns as a core stakeholder group. I coordinated the Indigenous input and negotiated for Indigenous content to be included across all relevant topics of the report. Under legislative recommendations we called for a referendum on an Indigenous Voice to the Australian Parliament and incorporation of the Declaration 'into domestic law, establish an independent body to oversee its implementation and include UNDRIP in the Human Rights (Parliamentary Scrutiny) Act' (NGO, 2020). In addition, the Civil Society Report called for Australia to implement a Charter of Human Rights, which would include Indigenous Peoples, and called for the compensation of members of the Stolen Generation. I also called for the ratification ILO 169 on Indigenous and Tribal Peoples and the removal of reservations on the Convention on the Rights of the Child Article 37 c) which requires incarcerated children be separated from adults. Additionally, the NGO Report called for Australia to establish an 'institutional mechanism for investigating and prosecuting international crimes committed by and against Australians' and for adequate funding for human rights advocacy bodies.

The Indigenous section addressed the Cashless Debit Card and the Community Development Program which targeted remote Aboriginal communities with punitive welfare reforms that imposed racially targeted, onerous and disproportionate financial penalties on Aboriginal people. Further, land and environmental management concerns were raised, following the demolition of the 46,000-year-old Juukan Gorge sacred-site by Rio Tinto mining corporation in May 2020, reflecting Australia's weak cultural heritage protection laws and limitations of the Native Title Act. I also called for the establishment of a Makarrata Commission to develop a national treaty with Aboriginal and Torres Strait Islander Peoples. I promoted Indigenous issues through virtual presentations to 50 Embassy staff and produced an Indigenous Factsheet, which provided a summary of the issues which was translated to Spanish and French, and distributed to Embassies globally. In addition, I presented on these issues during the Human Rights Committee session on Australia's UPR.

As a result, of the 344 recommendations, 73 related directly to Indigenous People, with 10 recommendations on an Indigenous Voice to Parliament, 6 on implementing UNDRIP and 6 on ratifying ILO 169. In addition, 159 recommendations related to areas of significant interest to Indigenous Peoples, with 31 recommendations on 'raising the age of criminal responsibility from 10 to 14 years'. There were 232, more than two-thirds, of recommendations that had a significant impact on Indigenous People.

Though successful in securing recommendations related to Indigenous Peoples' priorities, the translation of recommendations to outcomes was limited. In response to calls for the Australian Government to incorporate UNDRIP in domestic law and establish a National Action Plan or endorse ILO 169, Australia responded 'notes but will not consider further at this time'. Since the UPR, the Northern Territory has lowered the age of criminal responsibility from 12 years to 10 years of age in 2024, after the previous Labor Government raised it to 12 in 2023 and Queensland has enacted 'adult

time for adult crime' legislation impacting children from 10 years old, with Victoria reversing its previous commitments to raise the age to 14 by 2027. It is apparent State Governments are criminalizing children, disproportionately impacting Indigenous children, as electoral strategies rather than address these issues as welfare concerns, in violation of international human rights standards. This failure of the UPR to respond to the United Nations accountability gap substantiates the need for dedicated international monitoring mechanisms and capacity to bring violations of Indigenous rights before international judicial mechanisms.

Though EMRIP was authorised to support UPR processes, through its extended mandate, Aboriginal efforts in Australia to engage EMRIP were rebuffed by the Australian Government. EMRIP can only be invited by the government to support the Australian UPR process. I approached the Australian Government, requesting they invite EMRIP to support Indigenous input to the 2025 NGO Coalition report and possible voluntary commitments by the Australian Government. They rejected that request. The response noted, 'EMRIP's mandate is focused on assisting member states - such as Australia - in the implementation of the Universal Periodic Review recommendations. This mandate does not extend to supporting non-government organisations or Indigenous Peoples in other aspects of the Universal Periodic Review process' (McCarthy, 2025). This highlights a significant weakness, as it is Indigenous Peoples themselves that will be motivated to engage EMRIP rather than the relevant state-member under review, however, Indigenous Peoples are not empowered to trigger the engagement of EMRIP.

The UPR provided an important opportunity to raise Aboriginal and Torres Strait Islander input into a United Nations mechanism dedicated to reviewing Australia's human rights compliance. It facilitated the engagement and consultation with Aboriginal and Torres Strait Islander communities on the issues to be raised. The report didn't just document human rights abuses, but importantly

proposed means to address those concerns and sought concrete recommendations from other states on how Australia may respond to meet its international obligations.

This UPR provided opportunity to raise policy concerns but significantly also legislation to address structural impediments to Indigenous decision making and self-determination. With more than two thirds of the 344 recommendations related to areas of Indigenous concern, the UPR gave a voice to Indigenous violations and significantly secured recommendations from state members of the United Nations on how Australia could address the disparity and the structural repression experienced by Aboriginal and Torres Strait Islander peoples.

However, though the UPR was effective in raising human rights abuses, the Australian government has failed to effectively respond to these violations. As a result, a number of concerns, such as the need for a national representative body, calls for a national treaty and the incarceration of children as young as 10 years, continue to dominate the Indigenous rights abuses raised at the subsequent UPR session for Australia, held in January 2026. Though these failings highlight the limitations of the UPR, they also provide critical direction on the need to establish judicial processes that can review persistent breaches within the United Nations framework.

Though this praxis was proactive in advancing Aboriginal and Torres Strait Islander peoples' engagement within United Nations mechanisms and played a significant role in raising rights violations by the Aboriginal and Torres Strait Islander community, the effectiveness of that engagement is questioned with few outcomes secured. Even though this is disappointing for the Aboriginal and Torres Strait Islander community, this analysis is useful in highlighting limitations of the UPR process and making recommendations in this study to address this shortfall.

## 6.5 International Judicial Mechanisms

### 6.5.1 Existing Processes

The need for a dedicated international mechanism for the mediation and arbitration of human rights abuses for Indigenous Peoples is apparent when reviewing Indigenous access of existing mechanisms. Though there is capacity to raise Indigenous human rights violation within existing International human rights treaties, where determinations were made against settler-states these were frequently ignored (Deer). The International Covenant on Civil and Political Rights (ICCPR) requires States to protect people that belong to minorities (Article 27). Article 2(2) requires States to 'provide remedies where ICCPR rights and freedoms are breached,' while Article 2(3) requires states to ensure people 'whose rights and freedoms...are violated shall have effective remedy'; 'determined by competent judicial, administrative or legislative authority or competent legal authority'(CERD). However, according to Kenneth Deer, there is little capacity for follow-up or to ensure implementation.

The Committee on the Elimination of Racial Discrimination (CERD) Article 6 requires States to provide remedies through appropriate institutions, for damages resulting from racial discrimination' and provides early warning and urgent action procedures. CERD also has a specific General Recommendation that references Indigenous Peoples and provides for historical grievances, 'it requires states to take steps to return territories traditionally owned or otherwise inhabited or used where Indigenous Peoples have been deprived of them 'without their free, prior and informed consent' (CERD). However, despite CERD having 'repeatedly commented on the need to provide restitution to Indigenous People where they have lost their lands due to conflict and or resource development' the actual return of lands has been limited (Charter, 2009, p.183).

Though United Nations mechanisms to monitor state compliance on the implementation of UNDRIP and Indigenous human rights have not developed legal frameworks, the Organisation of American States has made progress. The Inter-American Court of Human Rights is a regional body that according to Lenzerini has ‘the competence and the power to force the governments concerned to give effective realization to Indigenous Peoples rights and to grant reparation when such rights are infringed’ (Lenzerini, 2008, p.606). According to Kristen Carpenter, the inter-American Court provides an example for the United Nations on adjudication and reparation frameworks (Carpenter).

However, determinations through existing mechanisms at the United Nations have reflected an inability of many international mechanisms to make binding rulings, and a reluctance among member-states to interfere in the domestic affairs of other states. Additionally, United Nations mechanisms are established by the same states being monitored, resulting in a reluctance to establish mechanisms where remedies may involve reparations.

### 6.5.2 Relevant Legal Cases

However, there have been recent inroads through a few international legal cases. These include a case brought by Daniel Billy and eight litigants from low lying islands in the Torres Strait of Australia, who petitioned the Human Rights Committee in 2019 (CCPR/C/135/D/3624/2019). The litigants were suffering tidal inundation as a result of global warming and claimed the Australian Government had failed to act against climate change and was violating their rights under article 2, 6, 17 and 27 of the International Covenant on Civil and Political Rights (ICCPR) (A/RES/2200A(XX1)).

Though the Australian Government claimed the matter was inadmissible and outside of the scope of the Covenant, the Committee found it was admissible and that it was a violation ‘by act and

omission of their right to a life with dignity under article 6 of the Covenant, owing to the State's failure to perform its duty to provide adaptation and mitigation measures to address climate change impacts that adversely affect their lives ...The right to life extends to reasonably foreseeable threats and life threatening situations that can result in loss of life' (CCPR/C135/D/3624/2019, p.12). However, despite this adverse determination, there has been a lack of follow-up by the United Nations.

Following the Torres Strait Islander Eight case, Pabai Pabai and Guy Paul Kabai from Boigu and Saibai Islands brought a class action to the Federal Court of Australia, on behalf of Torres Strait Islanders People. They argued the Australian Government had breached its duty of care from the impacts of climate change in *Pabai v Commonwealth of Australia (No 2)* [2025] FCA 796, Fedcourt, 2025).

On 15 July 2025, the Federal Court found 'the Commonwealth of Australia does not owe a novel duty of care to take reasonable steps to protect all Torres Strait Islanders from the current and projected impacts of climate change on the Torres Strait Islands' (Wellauer, 2025). Justice Wigney emphasised that the case failed, not because of the 'factual basis for their claim, but because the law of negligence in Australia does not provide 'a real or effective avenue' for obtaining relief in relation to government action or inaction' (White, 2025).

The Australian Human Rights Commission, supported by the Parliamentary Joint Committee on Human Rights, has proposed strengthening human rights protection in legislation through a federal Human Rights Act, (White, 2025) which, if introduced, would then underpin the Commonwealth Government's statutory and policy decisions. Additionally, while the Court rejected a novel duty owed by the Commonwealth in this case, the liability of private entities is a dynamic area of law internationally.

There are also international judicial mechanisms, such as the International Criminal Court (ICC), which considers 'systematic murder, extermination, enslavement, torture, sexual violence, and persecution against any identifiable group on racial, national, ethnic, cultural, religious or gender grounds' (ICC) which may apply to Indigenous People (ICC, 1998). However, to commence criminal proceedings, the ICC requires a member-state to have accepted the jurisdiction of the Court and for a member-state to instigate the proceedings on behalf of Indigenous Peoples or it must be referred by the United Nations Security Council (UNSC). Additionally, the ICC can only consider matters post 1 July 2002. Though the ICC convicted Guatemalan dictator José Efraín Ríos Montt, in 2013, for genocide and crimes against humanity against the Indigenous Mayan population, Indigenous Peoples remain unable to initiate proceedings (Coalitionfortheicc, 2017). A further mechanism is the International Court of Justice (ICJ). However, the ICJ can only consider two types of cases: Contentious cases between states which are parties to the Statute of the Court, or it can make determinations on 'advisory opinions' on legal matters raised by United Nations bodies or specialized agencies. Additionally, Indigenous Peoples cannot raise matters without a state member of the United Nations General Assembly raising the matter on their behalf (ICJ, n.d.).

One of the most significant ICJ cases related to Indigenous Peoples is the Advisory Opinion instigated by law students at the University of the South Pacific in Vanuatu, in March 2019, who secured the support of then Vanuatuan Foreign Minister, Ralph Regenvanu. Vanuatu and Pacific Small Island States subsequently garnered endorsement among members of the United Nations General Assembly to seek an Advisory Opinion from the ICJ (A/RES/77/276, 2023). On 29 March 2023, the General Assembly of the United Nations adopted resolution 77/276 which requested the ICJ give an advisory opinion on: '(a) What are the obligations of States under international law to ensure the

protection of the climate system...for present and future generations? (b) What are the legal consequences under these obligations for States' (A/RES/77/276, 2023, p.3).

On July 23, 2025, the ICJ delivered its advisory opinion on 'the obligations of states with respect to climate change' (ICJ, 2025, No.187). Its 15 judges found that numerous sources of international law provide a legal obligation on states to meet the Paris Agreement target of 1.5 C degrees and that states must act to prevent climate harm and that failing to act could leave nations liable for reparations (IISD, 2025). The United Nations High Commissioner of Human Rights Chief Volker Türk noted, the 'failure of a State to take appropriate action to protect the climate system from greenhouse gas emissions - including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies - may constitute an internationally wrongful act which is attributable to that State' (OHCHR, 2025).

The ICJ decision reflects the evolving nature of international law with associated implications for domestic legislation (Hamilton, 2025), despite existing limitations for Indigenous Peoples. These international judicial mechanisms highlight the limitations of existing international jurisprudence in responding to the needs of Indigenous Peoples. Kenneth Deer confirmed his advocacy for the establishment of a dedicated Indigenous judicial mechanism, 'I think the United Nations could do that, access to a world court might be an avenue that should be explored. Where grievances with states can't be resolved then Indigenous People should be able to go to court and the States should have to recognise the decision of that court' (Deer). The need for Indigenous focused judicial mechanisms is addressed more fully in the next chapter.

## 6.6 Conclusion

This chapter assessed the impact of the World Conference of Indigenous Peoples (WCIP) and provided a comparative analysis against the Alta Outcome Document, where Indigenous Peoples formulated recommendations prior to the World Conference. The System-Wide Action Plan was reviewed as a key outcome of WCIP. However, the circumscribed outcomes from the World Conference highlight the untapped opportunities of areas not addressed, which will be examined in the next chapter.

A further outcome of the World Conference was the expanded mandate of the EMRIP which was appraised before examining its enhanced capacity to undertake Country Engagements through an investigation of the Aotearoa/New Zealand Engagement and its implementation of the Declaration. Though useful in providing a detailed assessment of a country, a lack of follow up or an independent dedicated United Nations monitoring body doesn't translate these findings to solid outcomes.

Indigenous calls for an oversight body to monitor the Declaration and a complaints procedure were explored through a proposal for an Optional Protocol to the Declaration. This examination concluded that the likely ramifications would inadvertently result in a weakening of the Declaration through a diminished endorsement of an Optional Protocol.

More recent domestic strategies to support the implementation of UNDRIP in Canada, Aotearoa/New Zealand and Australia provide a comparative analysis on the recognition of Indigenous rights within the domestic realm of settler-states. In addition, an examination of the implementation of the Declaration in Bolivia, where the Declaration on the Rights of Indigenous Peoples is being implemented through the Constitutional Tribunal is assessed as a domestic strategy

which provides further comparative data. A detailed examination of two Indigenous autonomous regions is provided in the next chapter. However, each of these domestic developments have reaffirmed a significant need for further oversight within the United Nations system.

An analysis of the usefulness of drawing on a mainstream United Nations mechanism to assert Indigenous rights is interrogated through a praxis-based investigation of Australia's engagement with the Universal Periodic Review. Though the capacity for Indigenous Peoples to influence UPR recommendations was confirmed, the ability to secure outcomes in response to Indigenous rights violations raised through the UPR is shown as wanting. The UPR and other processes, while useful in raising concerns, fundamentally fail to assure the change on the ground necessary to address those violations raised.

Finally, an examination of judicial mechanisms investigates the capacity of the United Nations to adjudicate and mediate the violation of Indigenous rights. This analysis, however, found the requirement for member-states to instigate complaints leaves Indigenous Peoples in a precarious position that replicated the asymmetrical power disparities that enabled the original grievance. This Chapter has confirmed, that despite a number of initiatives established over recent years these are insufficient to respond to the current accountability gap within the United Nations, identified in this and the preceding chapter.

As Ed John emphasised, "those conflicts still remain, Indigenous rights activists are still being persecuted, in some cases even murdered where they're protecting their lands, or territories and resources. And that is still a state of affairs that needs to be monitored, and action must be taken by states" (John). The next results chapter will examine opportunities not yet addressed, that may respond to the critical need of Indigenous Peoples, to enable the full and effective assertion of

Indigenous rights within the United Nations system and facilitate the implementation of the Declaration among settler-states. As Chief Littlechild asserted, “we’ve got to give teeth to the Declaration!” (Littlechild).

## CHAPTER 7

### TRIBUTARY TO THE SEA

## Proem: The Aboriginal Deaths In Custody Campaign

*It was my brother Greg that introduced me to the Aboriginal deaths in custody campaign through the Committee to Defend Black Rights (CDBR). It was established following the death of John Pat, a 16-year-old Aboriginal boy who had died after being bashed by off duty police officers and then thrown into the back of a police wagon (Flick, n.d.).*

*This had been followed by other deaths with appalling regularity. The list of victims grew with the devastated families. It was the families that directed the CDBR and set the political campaign, calling for a Royal Commission into Aboriginal Deaths in Custody (Anthony, 2016). It was thought only a royal commission could compel police and prison officers to give evidence.*

*The CDBR met weekly at Tranby Aboriginal College, where Helen Corbett the CDBR Chairperson was working as the Director of Studies (Flick, n.d.), and my brother Greg was a student. We would organize protests to raise the issue and funds through union and church groups, to hold national conferences of the families impacted (CDBR, 1990, p.11). It was Greg, a couple of years older than me, who spoke with passion and responded to the media, as I drafted press releases, organized posters and meetings etc (CDBR, 1990, p.226). We were a close and complementary team, along with a number of Aboriginal members and non-Aboriginal supporters.*

*It was under Greg's guidance that my own political life grew, campaigning for justice, where I learnt that individuals working together could be political players. We held regular marches to raise the profile of the issue, posting notices and painting banners. I recall our fashioning a number of coffins from cardboard boxes which were carried 14 km (8.7 miles) from Long Bay Jail to Hyde Park in the city. It was a long march, over 3 hours, but it made a powerful statement.*

*On one occasion, after attendance dropped to a handful, following too many protests, too close together, it was Greg who adapted our strategy. Arthur and Leila Murray attended, the parents of Eddie Murray, who police claimed had committed suicide in prison after celebrating his selection for a Sydney football team. They agreed that rather than march, we would hold a sit-in at the Department of Aboriginal Affairs. Greg, Arthur and Leila met with the Director of Aboriginal Affairs and secured the sought-after letter of support for the proposed royal commission. With the press notified, our small band had secured media coverage and raised the call for action.*

*On one occasion we organized a band and gained approval to play in the courtyard of Long Bay Jail for the inmates during NAIDOC Week (the National Aborigines and Islanders Day Observance Committee), a week that recognises Australia's Indigenous Peoples.*

*It was Helen's presentations at the United Nations Working Group on Indigenous Peoples, (CDBR, 1990, p.205) in conjunction with an ongoing domestic political campaign, that led to the Royal Commission being announced in 1987. The Royal Commission's eventual 339 recommendations included the recognition of Aboriginal rights to self-determination (RCIADIC, 1991).*

*I learnt through that involvement the importance of empowering those community members most impacted. I learnt that even a small group working together could be effective. Though he has now passed, Greg has continued on this journey with me.*

## 7.1 Introduction

The previous chapter outlined developments that have been secured following the World Conference on Indigenous Peoples (WCIP) through the implementation of the System Wide Action Plan and reviewed domestic initiatives. However, the Outcome Document of the WCIP failed to adopt recommendations from the Indigenous developed Alta Outcome Document. These omissions provide a starting point to consider further means to enhance Indigenous participation at the United Nations. This chapter outlines additional opportunities to strengthen Indigenous engagement in its findings, as we move towards the 20<sup>th</sup> anniversary of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2027.

A resounding theme across the data is the call for a monitoring mechanism of UNDRIP to support the enforcement of the Declaration. The further extension of the mandate of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) as a formal monitoring and reporting mechanisms is proposed as the most efficient and affordable means to formalize a procedure to monitor UNDRIP. Further findings are also addressed at the end of this chapter.

Opportunities to enhance capacity for Indigenous engagement in existing United Nations mechanisms are examined through the Facilitative Working Group (FWG) of the Local Communities and Indigenous Peoples Platform (LCIPP) of the United Nations Framework Convention on Climate Change (UNFCCC). This is a unique body in having equal government and Indigenous Members and provides lessons from a participatory review that contributes to these findings.

The chapter also considers local activism to strengthen Indigenous participation in preparation for the 30<sup>th</sup> session of the Conference of the Parties (COP30) of the UNFCCC, held in Brazil in late 2025,

through an Indigenous Troika. This enacts a praxis-based analysis, which I draw on in my analysis, in addition to interview and participatory data.

Third, the need for an International Mechanism for Mediation and Arbitration is outlined as an example of an Indigenous body to adjudicate violations of Indigenous rights. The chapter examines this initiative, proposed by the Indigenous Nations Justice Advisory Group which is currently being considered for development, in conjunction with Indigenous peoples globally. The need for a venue to facilitate the monitoring of existing treaties and capacity to support the development of contemporary treaties and constructive agreements between settler-states and Indigenous Peoples is also explored.

I then investigate the domestic implementation of self-determination through two case studies of autonomous Indigenous regions within Bolivia. This analysis assesses lessons that may be drawn for other regions implementing domestic self-determination strategies.

Additionally, I appraise the call for permanent Observer Status for Indigenous Peoples at the United Nations General Assembly. Justifications, potential benefits and challenges from processes undertaken in 2017 are drawn on to inform this continuing agenda item for the General Assembly and ongoing priority for Indigenous Peoples.

Finally, I draw these findings together in deliberations on broader structural frameworks of the United Nations that may facilitate implementation. This analysis recognises that effective mechanisms require reporting frameworks to the General Assembly. The current underutilisation of the Decolonisation Committee is examined as a possible location for Indigenous focused post-colonial mechanisms, as outlined in these findings.

Chapter five and six have asserted that substantially more needs to be done to operationalise UNDRIP and Indigenous rights to self-determination, both at the international level and within the domestic sphere. A lack of action domestically underscores the need for Indigenous Peoples to draw on international mechanisms to hold settler-states accountable. As a woomera (a traditional Aboriginal wooden shaft with a hook on the end that fits against the base of a spear and extends the length of the arm to provide greater thrust), propels the reach of a spear, the United Nations extends its influence to pierce the domestic impunity of settler-states.

## 7.2 Enhancing Existing Mechanisms

As outlined in Chapter 6, the System Wide Action Plan (SWAP) adopted several strategies to strengthen the engagement of Indigenous peoples within United Nations mechanisms. However, though SWAP was an outcome of the World Conference on Indigenous People (WCIP), not all the recommendations of the Alta Outcome Document were adopted. The Alta Document was developed by Indigenous Peoples to inform the United Nations General Assembly on potential areas of reform. Those areas not implemented point to opportunities to strengthen the recognition of Indigenous rights within this state-based global forum. A key unfulfilled recommendation of the Alta Outcome Document was a call to establish a United Nations body to promote, monitor, review and report on the implementation of UNDRIP.

### 7.2.1 Oversight Body

A central call raised in the Alta Outcome Document but not included in the WCIP recommendations and which was also emphasized across the data, was the lack of monitoring mechanisms of UNDRIP. The need for a dedicated monitoring body to support the implementation of UNDRIP was repeatedly

articulated during the interviews. The lack of a framework for UNDRIP was questioned by Grand-Chief Wilton Littlechild, “what does implementation actually mean? Does it mean we can enforce it through a court? Does it mean we can bring a violation to a body that’s independent for conflict resolution and enforce that decision? (Littlechild). However, Littlechild clarified, monitoring mechanisms “are not necessarily a punitive measure, but an oversight mechanism helps us effectively implement the Declaration” (Littlechild).

Chief Ed John also espoused the need for accountability mechanisms, whether it’s through the Permanent Forum, EMRIP or a third dedicated body, he asserted there was a pressing need for urgent warning and early action procedures to respond to gross violations of Indigenous rights. Special procedures required the capacity to take action against states, corporations or extractive industries, and hold states accountable. However, existing limitations hindered accountability, “the United Nations has really no enforcement authority except one of strong moral persuasion supported by international standards that are conferred in the conventions or in this case the Declaration on the Rights of Indigenous Peoples” (John).

Without an oversight body, Littlechild argued that relationships between states and Indigenous Peoples could remain framed around conflict, “are they going to implement without an enforcement mechanism?...Because there are some intransigent, resistant states” (Littlechild). However, Littlechild contends there is currently capacity within the Declaration to establish a conflict resolution mechanism under UNDRIP. “I think we can do a standalone conflict resolution mechanisms just by using the Declaration articles,...so I think there’s that possibility that exists right now with the Declaration” (Littlechild). According to Grand Chief Wilton Littlechild, “we’ve got to give teeth to the Declaration” (Littlechild). In explaining the need for an oversight mechanism, “if we

don't have an oversight body, then we can keep spinning wheels and keep staying in conflict...Are they going to implement without an enforcement mechanism?" (Littlechild).

Kenneth Deer recalled that the debates among Member States preceding the WCIP had raised concerns at the financial impact of various proposals, so the issue of an oversight body had been proposed by Indigenous delegates through a further extension of the mandate of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), as a cost-effective means to enact an oversight body. However, this recommendation was not adopted as part of the revised EMRIP mandate, leaving this broadly held Indigenous proposal unimplemented and a focus for further reform.

The establishment of a dedicated oversight body for UNDRIP is one of the more obvious proposals, given Indigenous peoples have been calling for its implementation for many years. The need to provide a framework for Member -States to report on their compliance and for Indigenous Peoples to raise violations of Indigenous rights is a clear deficiency. Additionally, the need to be able to instigate urgent warnings and early actions procedures is fundamental to encouraging compliance. Though matters can be raised through relevant treaties, the Declaration on the Rights of Indigenous Peoples requires a dedicated reporting framework.

### 7.2.2 The UNFCCC Facilitative Working Group

Kenneth Deer raised the issue of climate change as an example of recent achievements for Indigenous Peoples, having attended the Paris Agreement where Indigenous Peoples were recognized within UNFCCC processes. "We finally, for the first time in a binding Declaration, in the preamble it recognizes Indigenous Peoples as peoples with rights, and that was a giant step forward.

The next step is to get that into an operative paragraph. We had to be there, we had to be present. It took a lot of work to get that” (Deer). Deer explained, it was achieved through the support of a number of States and State bodies, including Canada, the European Union, Australia and New Zealand.

Kristen Carpenter also outlined the importance of Indigenous engagement in the global challenges the world is facing, particularly in relation to climate change, “the glaciers are melting, and the seas are rising. Climate change is devastating to Indigenous Peoples and others” (Carpenter). The UNFCCC recognized that Indigenous Peoples are disproportionately impacted by climate change, with Indigenous lands comprising 20 per cent of land mass but holding 80 per cent of the world's biodiversity, but Indigenous Peoples are seven times more likely to be displaced as a result of climate change. However, Indigenous Peoples also have knowledge and solutions to contribute to the climate challenges the world is facing. As Carpenter espoused, “this is not a romantic notion. It’s based on their very close relationship with the earth. And so, when it comes to climate, they often have generations of experience about adaptation, local knowledge of plants and the waters and the lands and territories” (Carpenter).

In this regard, the Facilitative Working Group (FWG) of Local Communities and Indigenous Peoples Platform (LCIPP) of the United Nations Convention on Climate Change (UNFCCC) provides an example of ways to incorporate a greater level of Indigenous engagement across United Nations frameworks. LCIPP was established at COP21 in 2015, and the FWG was established to operationalize LCIPP at COP24, in 2018. However, it is the unique structure of the FWG that provides insights. The FWG memberships is derived from seven State Party representatives and seven Indigenous representatives from each of the seven geo-cultural regions.

As the elected Pacific Indigenous Member to the FWG from 2022-2025, the FWG provided a further avenue for me to contribute a participatory praxis-based analysis of the United Nations capacity to respond to and promote Indigenous engagement, and significantly, decision-making within United Nations fora. The FWG provided insights on ways to enhance decision-making within the United Nations and strengthen outcomes by drawing on Indigenous traditional and contemporary knowledge and value systems to secure results for the global community in response to the existential threat of climate change.

The three roles of the FWG are 1) knowledge promotion and exchange, 2) build capacity and 3) climate change policies and actions. To achieve these objectives a Workplan of 9 priorities was implemented. The most significant of these was the Annual Gathering of Indigenous Knowledge Holders prior to the annual Conference of the Parties (COP).

While FWG has provided opportunity for Indigenous People to participate in its sessions, it doesn't facilitate input into COP sessions with State Parties or within the Subsidiary Body meetings, held mid-year to establish areas for negotiation at the upcoming COP, even though FWG occurs immediately before these events. Though the FWG reports on LCIPP every three years, its recommendations are modest and fail to address the significant structural constraints, resources and power inequities in the process. A greater recognition of the role Indigenous Peoples can play in informing global approaches was, however, confirmed through the extension of the mandate of FWG and LCIPP at COP29 with the adoption of the Baku Workplan, for the FWG (UNFCCC, 2024).

Though Indigenous engagement across the UNFCCC's constituted bodies increased, input into policy approaches through the UNFCCC was limited. The Annual Gathering provided a critical opportunity for Indigenous People to raise concerns from their communities. The Annual Gathering supports 3-

5 Indigenous Knowledge Holders from each of the seven Indigenous geo-cultural regions to contribute to identified themes and provides opportunity for state parties to respond to issues raised. Maasi representatives, for example, spoke eloquently in 2022 of thousands of people being dispossessed from their traditional lands, as the government appropriated 580 square miles/933 square kilometres of their lands to establish a national park, for big game lion hunting, with reports of violence and rape, the firing of teargas and rubber bullets, the burning of villages, confiscation of stock and disappearance of Massai people.

The hosting of Regional Gatherings in each of the seven Indigenous geo-cultural regions also provided a critical opportunity to build capacity across the regions. The Pacific Regional Gathering, held in October 2023, was partially funded by the Australian Government and organized by myself as the Pacific Member. The Gathering provided an example of state parties and Indigenous Peoples constructive collaboration. The Australian Government funding doubled the participants from 25 to 50 Indigenous Peoples. Further, funding secured from the European Union Climate Foundation and Civil Society organisations enabled the inclusion of cultural immersions to commence the week-long Indigenous climate conference and highlight the impact of climate change on traditional fishing and cultural practices.

The Gathering proved useful in engaging with Indigenous Peoples across the region and confirmed among Pacific Island Nations that they also reflected Indigenous populations. However, solid outcomes remained elusive, reflecting the power disparities between the Indigenous body, the United Nations Secretariat and the state party. The organization of the event proved challenging with the Indigenous organization absorbing all the risks involved, with the costs of five that could not attend absorbed by the Indigenous body. However, the Indigenous conference heightened the agency of Indigenous Peoples in responding to climate change. Recommendations for the support

of local initiatives was reflected in the funding of an Indigenous Decision-Making Workshop, in May 2024, to develop local initiatives across 16 Indigenous communities in Australia and the Pacific. Though six community meetings have been undertaken to date, these projects are continuing to be developed.

While the FWG opened opportunities for collaboration between states and Indigenous Peoples there was also an underlying concern among Indigenous participants that the name of the Local Communities and Indigenous Peoples Platform conflated Indigenous Peoples' self-determining rights with local communities. Though Indigenous Peoples reflected a clear constituency with a history of advocacy at the United Nations, the term 'Local Communities' had been inserted by some State Parties, rather than reflecting a constituency. While some local communities live precariously on the margins of society, these are not communities that attend COP. Additionally, there is no definition of local communities that would limit it to 'subsistence' communities. Rather, the inclusion of Local Communities by State Parties was widely viewed by Indigenous Peoples as means to weaken rights claims by Indigenous Peoples as rights holders, as set out in UNDRIP.

### 7.2.3 COP30

The Conference of the Parties (COP) that followed the FWG also provides opportunities for furthering Indigenous engagement and the promotion of Indigenous rights. Previous COPs have had disappointing outcomes, being compared to fossil industry trade shows with 2,456 fossil fuel lobbyists attending COP28 (Lakhani, 2023) curtailing outcomes, such as the weakening of wording from 'phase out' to 'phase down of fossil fuels' (Carrington, 2023). However, COP30 being located in Brazil, where 2.7 million Indigenous people live in the Amazon, reflecting over 350 Indigenous

nations, whose existence is threatened by widespread land clearing and burn offs has provided greater opportunity to campaign for an Indigenous focus at COP30.

The establishment of an Indigenous Troika, a group of three Indigenous leaders, mirrors the COP Troika, where the Presidents of previous, current, and future COPs seek to collaborate across COPs (COIAB, 2024). The Indigenous Troika was launched at COP29 in Baku, Azerbaijan, as a political action, by the Coordination of Indigenous Peoples' Organizations in the Brazilian Amazon (COIAB Press Release) and in conjunction with myself representing the Indigenous Peoples' Organisation-Australia, where it is anticipated COP31 will be hosted. The Indigenous Troika aligns international Indigenous collaboration and highlights the relationship between local political action and the United Nations in seeking transformational change. The Indigenous Troika demands a greater inclusion of Indigenous voices in climate decisions through a global alliance that advocates for ambitious action on climate change and a greater influence of Indigenous Peoples at international, national and local levels. The Troika seeks to pressure wealthy nations to meet their obligations in the Paris Agreement and establish a just transition that incorporates Indigenous led initiatives and solutions to enact an energy transition that affirms Indigenous rights to their 'free, prior, and informed consent' and autonomy over their traditionally occupied territories.

This advocacy led to an announcement by the Brazilian Government to establish an Indigenous focus during COP30. COIAB is working with the Indigenous Senator Sônia Guajajara, the Brazilian Minister for Indigenous Peoples, and the President of Brazil, Luis Inacio Lulu da Silva, to secure outcomes in the organization of COP30. In response, a national Indigenous Committee has been established to inform the preparations for COP30. Additionally, 1000 badges for Indigenous Peoples to access the Blue Negotiation zone, twice the 500 offered at COP29, have been confirmed. A further 5000 badges are being offered to Indigenous Peoples for the Green Zone, where an Indigenous Maloca House, an

ancestral long house built by Indigenous People of the Amazon, and a dedicated Indigenous Peoples' zone will be established. In addition, significantly, the Brazilian Government will provide Indigenous Peoples access to state party negotiations as equal parties for the first time. At previous COPs Indigenous Peoples could only make limited comments as observers. Further, negotiations are ongoing with Senator Guajajara, on whether an Indigenous Co-President may be appointed.

In addition, feeding into this process, Acampamento Terra Livre (ATL) [Free Land Camp] the largest gathering of First Nation people in Brazil, held annually in April in Brasilia, held marches to the Parliament to advocate for Indigenous rights and seek meetings with decision makers. The COP Presidency responded with further initiatives, including the establishment of a global Indigenous Leadership Circle, with two regional representatives from each of the seven Indigenous regions, to engage with the Brazilian Government on the organization of COP30.

The FWG provides an example on how Indigenous peoples can contribute to global challenges through collaborative approaches with state parties. It also highlighted how these processes are scratching the surface of what can be achieved, in shifting from approaches based on exploitation to global well-being. The Troika outlines another avenue for input, one grounded on community advocacy, the defence of the Amazon and assertion of Indigenous rights, in the lead up to COP30. Both espouse the value for the global community on drawing on the wealth of knowledge and worldviews Indigenous peoples can contribute at this critical time, to move from a framework of perpetual and unsustainable growth for profit of a market-based economy, rather than development founded on global benefits. The defence of Indigenous communities, environmental defenders and our environment are crucial to achieving the UNFCCC objectives of a just transition.

This praxis was a political initiative instigated by the Amazonian Indigenous peoples, who strategised on how they could raise the profile of Indigenous concerns and promote the need for Indigenous peoples to be engaged in real negotiations, not just be used to provide an exotic cultural display at COP30. The action directly linked local political action with the global coordination of other Indigenous peoples. The Indigenous Troika drew on the UN structure itself through the concept of COP Presidency Troikas, where Presidents sought to work collaboratively across three COPs, the former, current and future COPs. The praxis challenged the existing power structures and being instigated by women it also emphasised the proactive role of Indigenous women, countering COP's institutionalised patriarchal structures.

COP30 resulted in a significantly increased focus on Indigenous peoples, while it cannot be attributed to the Indigenous Troika, this initiative contributed momentum, with Minister Sônia Guajajara speaking at the troika launch. Indigenous participation at COP30 eclipsed previous COPs with over 5000 Indigenous peoples attending and 900 participating in the Blue Zone, the negotiating zone, with 4000 Indigenous peoples at the Indigenous Village (APIB, 2025). The formal demarcation of lands of 10 Indigenous nations, covering 285,525 hectares in the Amazon region, was announced by the Brazilian Government through the Indigenous Land Protection Program (Brazil, 2025). Additionally, COP commitments were made by the Brazilian government to recognise 59 million hectares for Indigenous Peoples, as part of broader commitments by 15 states to secure 160 million hectares for Indigenous and local communities by 2030 through the Forest and Climate Leaders' Partnership (FCLP) (APIB, 2025).

Negotiated outcomes were also secured, with Indigenous lands and traditional knowledge adopted as climate mitigation policy. Indigenous participation was assured in just transition and climate adaption processes (APIB, 2025). In addition, the protection of Isolated and Recently Contacted

Indigenous Peoples was agreed (APIB, 2025). The Tropical Forest Forever Facility (TFFF) was a key initiative of Brazil at COP30 with 53 state members committing 6.6 US\$ billion to establish a permanent financial mechanism, with recurrent payments to communities that protect their forests, with 20% of these funds allocated to indigenous and local community bodies (APIB, 2025).

In analysing the effectiveness of this praxis, we need to recall that theoretically, individual actions are not anticipated to be transformative but rather seek to contribute to a broader movement of transformation. However, this praxis proved to be an empowering initiative for both the Indigenous peoples involved and for broader Indigenous outcomes. Although it did not secure all outcomes sought, such as appointing a co-Indigenous COP President, Indigenous participation was significantly strengthened beyond previous COPs. It set new standards in securing outcomes and expectations for a greater level of Indigenous engagement. The Indigenous Troika also contributed to the global discourse and further opened direct communications with the government, noting that Minister Guajajara, in being Indigenous herself, was committed to achieving outcomes and strengthening Indigenous engagement. Strategically, it was a well-timed initiative, buoyed by a Brazilian government more receptive to Indigenous initiatives.

### 7.3 Adjudication Mechanisms

A further outstanding recommendation of the Alta Outcome Document was for the establishment of an independent commission of inquiry to investigate ‘matters of impunity and other human rights concerns of Indigenous Peoples’ (A/67/994, p8). Kenneth Deer contends there is a history of negative determinations that acts to impede positive outcomes domestically for Indigenous Peoples. Legal precedence requires judges to overturn previous rulings (Deer). International judicial review processes are sought because of inherent limitations for Indigenous Peoples in securing justice

domestically. Deer argues domestic judicial systems are fundamentally flawed, because it's the State that sets up the system. It's the State that hires the judges and the judges are not going to go against the State. They're not going to go against their own constitution, there is a limit to what judges can do...courts can't comment on sovereignty because that would overturn the sovereignty of the court" (Deer).

UNDRIP sets out several articles confirming Indigenous rights to mediation and arbitration processes. Article 27 UNDRIP also requires States to 'establish and implement ..a fair, independent, impartial, open and transparent process...to recognize and adjudicate the rights of Indigenous Peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used' and requires the participation of Indigenous Peoples (UNDRIP, Art. 27). Additionally, Article 38 requires States 'shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration' (UNDRIP). With article 40 confirming 'Indigenous Peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with states or other parties, as well as to effective remedies' (UNDRIP, Art. 40). However, despite these clauses establishing settler-states' obligations to enact the Declaration and establish domestic arbitration mechanisms, they have to date failed to fully implement UNDRIP or provide effective avenues for arbitration and reparation. Additionally, the United Nations hasn't provided an effective mechanism for the monitoring of violations or the adjudication of redress.

Though international law establishes obligations on states for adjudication and reparations where there are breaches of human rights, the lack of an Indigenous framework to enable formal mediation of violations was raised across the data. United Nations Conventions bring legal requirements, where states are duty bearers, to respond to human rights abuses, including those related to Indigenous

Peoples. According to Kenneth Deer, there is 'a lot more can be done by the United Nations to make sure that when states are found guilty of violating Indigenous rights by the UN, then there should be more effective follow up of those states to make sure those violations are corrected' (Deer).

In addition to UNDRIP, the International Law Commission adopted the Articles on Responsibility of States for Internationally Wrongful Acts, which were noted by the United Nations General Assembly in 2001 (A/56/49, Vol. I). However, these only address international responsibility among state-to-state members. They also don't cover acts which at the time were not considered illegal under international law, this then excludes colonisation, which drew on the doctrine of discovery and terra nullius to justify invasion and appropriation of Indigenous lands, so such claims need to reference the ongoing impact of the historical act. Despite these limitations, even historical acts considered legal at the time often incorporated the breaching of customary international law, such as historical killings, relocation and deprivation of lands and cultural heritage (Lenzerini, 2008 p.28). Historical acts that were not considered criminal when performed, if abhorrent, can warrant reparations. Genocide, for example, was considered a breach of customary international law before codification, with state obligations to protect the life of all human beings (Lenzerini, 2008, p.610).

The burden to act is more pronounced in cases of gross violations, which are defined as either systemic or widespread, or breaching a significant norm, such as the right to life or freedom from torture, and so can apply to both broader human rights violations and individual abuses, with obligations for reparations also applying to successor States, where a violation is historic (Lenzerini, 2008, p.7). Violations can be confirmed through specific actions or through omissions or exclusions. Violations do not require economic compensation, with forms of remedy including reparations, rehabilitation, disclosures of truth, guarantees of non-repetition and measure of assistance, with reparations collectively awarded or individually targeted depending on the circumstances. Though

claims by Peoples 'acquire a stronger political and public law connotation especially in view of the explicit recognition of the right to self-determination in the common Article 1 of the two UN Covenants on Human Rights of 1966' (Lenzerini, 2008, p.28).

Additionally, the Charter of Economic Rights and Duties of States resolution Article 16 1. confirms 'It is the right and duty of all States, individually and collectively, to eliminate colonialism, apartheid, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination... States which practise such coercive policies are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the exploitation and depletion... It is the duty of all States to extend assistance to them.' (A/RES/3281(XXIX), Article16.1)

The Declaration further elaborates on Indigenous rights to redress under Article 28.1-2, where dispossessed from their ancestral lands, 'Indigenous Peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 28.2. Unless otherwise freely agreed...compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress' (UNDRIP, Art. 28.1-2).

According to the Report of the International Law Commission, obligations for reparations form part of jus cogens, or a peremptory norm of general international law that is widely accepted and recognized by the international community of States as a norm from which no derogation is permitted (A/74/10 Conclusion 3). Additionally, Indigenous reparations are 'erga omnes', an

obligation in international law where all States have a legal interest because the matter is of such importance it brings additional responsibility to the global community. *Erga omnes* enables other States, who 'may thus act against the responsible government for obtaining reparations' (Lenzerini, 2008, p.6).

United Nations General Assembly Resolution 3201, the Declaration on the Establishment of a New International Economic Order, from 1974, provides in Article 4 (f) 'The right of all states, territories and peoples under foreign occupation, alien and colonial domination or apartheid to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those states, territories and peoples; (A/RES/3201(S-VI), Art.4(f)). Further, the United Nations General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law in 2005 (A/RES/60/147).

Claire Charters claims UNDRIP can be considered a form of reparation, in responding to the previous neglect of Indigenous Peoples (Charters, 2009, p.168). Several articles of UNDRIP call for remedies, with Article 8.2 (a-e) confirming 'states shall provide effective mechanisms for prevention of, and redress for:... depriving them of their integrity as distinct peoples,...dispossessing them of their lands or resources,...forced population transfer', and forced assimilation or racial discrimination (UNDRIP, Art. 8.2 (a-e). However, the UNDRIP does not prescribe the type of reparations that should result from a Member State's violation of Indigenous rights. Article 11 2. confers 'states shall provide redress through effective mechanisms, which may include restitution' for cultural property taken without consent. While Article 12.2. confirms states shall repatriate ceremonial objects and human remains through mechanisms developed in conjunction with those Indigenous Peoples. However, the lack of compliance leaves it wanting, with only weak preambular paragraphs 'encouraging states

to comply with and effectively implement all their obligations as they apply to Indigenous Peoples under international instruments' (UNDRIP, para19). Though many human rights violations, particularly those related to Indigenous Peoples, have not received reparations, 'justice is not concretely realized until adequate and substantive redress is materially granted to the victim' (Lenzerini, 2008, p.10).

### 7.3.1 International Mechanism for Mediation and Arbitration

The need to establish United Nations mechanisms to arbitrate on human rights violations against Indigenous people was emphasized as a central gap by the interviewees and was further reinforced through my participation within United Nations mechanisms. Its need was starkly asserted when I received footage of a West Papuan man shivering in a drum of water, his back being sliced open with a blade and bashed about the head by Indonesian troops. I heard he later died of his wounds. These violations of Indigenous rights, and loss of lives underline the ongoing need for arbitration and adjudication processes.

Global Witness confirmed 196 land defenders were murdered in 2023 with over 2,106 killed globally since it commenced reporting in 2012 (Global Witness 2024). 43% of people killed in 2023 were Indigenous, despite comprising only 6% of the global population. Women comprised a third of those killed and the use of sexual violence against Indigenous women land defenders was widespread 'often acting to protect the interests of extractive industries' (Global Witness 2024), as has been documented in Papua New Guinea (Frontline Defenders). The level of violence perpetrated against Indigenous Peoples and the continuing appropriation of Indigenous lands with apparent impunity further emphasises the need for international mechanisms to hold settler-states accountable.

In response to this deficit, a proposal for the development of an international adjudication mechanism is being explored by Indigenous peoples outside of traditional United Nations processes. The Indigenous Nations Justice Advisory Group (INJAG) is working with Indigenous global partners to establish an International Mechanism for Mediation and Arbitration (IMMA). According to the INJAG concept note, ‘the purposes of IMMA is to actualize current international Indigenous law, which will have clear global benefits, especially when considering the imperatives demanded for a just transition’ (INJAG, 2025). The proposal is unique in developing a legal code that would be ratified by Indigenous Peoples and member-states as equal parties, with the legal framework then endorsed by non-government bodies and the corporate sector. Indigenous Peoples would also be central to the development and framing of the mechanism.

The project, currently in its developmental phase, sets out a plan of engagement with a global network of Indigenous Peoples, as a first stage of the establishment of IMMA, to develop the framework grounded on Indigenous customary law and communal decision-making processes. As outlined in the implementation plan, a panel of Indigenous experts will work with Indigenous communities to establish best practices, consider current challenges, provide case studies and set out the way forward (IMMA Schedule, 2025). The IMMA Charter will incorporate a focus on the legal principle of ‘free, prior and informed consent’. The draft will be further developed through a co-design process to develop the legal principles and formulate the foundational structure of the mechanism. This work involves incorporating processes within the mechanism that may be capable of facilitating binding determinations, through mediation and arbitration processes, and that considers capacity for their enforcement (INJAG, 2025).

Indigenous Peoples need access to an international mechanism once domestic avenues are exhausted. A key role for the United Nations is to address the power imbalance between Indigenous

Peoples and settler-states. A mediation and arbitration body as outlined in the IMMA Charter could be mandated to also consider treaties and other constructive agreements and would help address the substantial power imbalance between settler-states and Indigenous Peoples and counter the sense of impunity that states have in the domestic realm. Given the facilitation of contemporary treaties and mediation of treaty compliance is a specific role, in addition to the violation of rights, that warrants a dedicated examination, I address this topic separately below.

## 7.4. Domestic Implementation of Self-Determination

### 7.4.1 Facilitating Post Colonial Relations

Throughout this thesis I have linked engagement at the United Nations with Indigenous rights to self-determination, as affirmed in article 3 of UNDRIP, as inherent and inalienable rights. Treaties are a central means of recognizing Indigenous self-determination, ancestral sovereignty and the implementation of UNDRIP. EMRIP drafted a dedicated report on Treaties and Constructive Arrangements, recommending that 'states should take the necessary measures to build real and genuine partnerships with indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith, through the establishment, on equal standing, of treaties, agreements and other constructive arrangements' (A/HRC/51/50, 2022, p.19).

Treaties establish a framework for conflict resolution and remedy for historical for contemporary grievances, providing a post-colonial foundation for peaceful coexistence and self-determination. It also goes further, in asserting there is a role for a dedicated United Nations Indigenous mediation body that can support states and Indigenous Peoples to move beyond conflict and forced occupation to a post-colonial society, that values the contribution both Indigenous and non-Indigenous bring

and can facilitate the establishment of contemporary treaties between Indigenous Peoples and settler-states.

The capacity to facilitate the negotiation of contemporary treaties is particularly relevant for regions such as Australia, which failed to secure historic treaties. For Indigenous Peoples in Australia, the failure of the recent referendum and lack of a federal treaty has left Aboriginal and Torres Strait Islander Peoples with no national elected representative body and a weak negotiation position, within a political environment that has wound-up two previous national Indigenous representative bodies. Rather, I contend that treaties offer longevity through legislative measures, which do not require the bipartisan support of a referendum. Treaties are stronger than legislative measures, where legislated representative bodies can be removed, treaties as bipartisan agreements cannot be unilaterally terminated, they can only be breached, where states retreat from implementation. However, those obligations associated with a treaty remain in international law.

Treaties provide a basis for power-sharing, with Article 37 of UNDRIP confirming 'Indigenous Peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with states or their successors and to have states honour and respect such treaties, agreements and other constructive arrangements' (UNDRIP). Significantly for Australia, the Special Rapporteur confirmed that where Indigenous Peoples haven't undertaken treaties with settler-states, 'it must be presumed that their sovereignty has never been ceded, unless proven otherwise' (Martínez, 1981, para 288).

Though treaties recognise the right to self-determination, it is Indigenous Peoples themselves that must determine the most appropriate way to implement their self-determination domestically, whether through treaties, forms of self-governance, traditional or contemporary forms of decision-

making, or the establishment of autonomous Indigenous regions over their traditional territories. However, given the power disparity between settler-states and Indigenous Peoples, there is a role for the United Nations to provide support to member-states and Indigenous Peoples to facilitate constructive post-colonial agreements. This may be best undertaken through the incorporation of this role in IMMA outlined above and also addressed later in these findings.

There is currently no avenue within the United Nations to facilitate the development of treaties or address breaches of treaties. According to Kenneth Deer, “there is no process for violations of treaties, which are international agreements, there is no process for people to appeal when treaties are being violated” (Deer). This gap was recognised by the Alta Outcome Document which called for the General Assembly to establish a mechanism to ‘provide oversight, redress, restitution and the implementation of treaties, agreements and other constructive arrangements between Indigenous Peoples or nations and states’(A/67/994, p.6).

The historical and ongoing breaches of treaties, where they exist, are a testament to the failure of domestic mechanisms to hold states accountable. Additionally, as outlined in chapter five and six, mechanisms that have been established, such as the Waitangi Tribunal, are vulnerable to the vagaries of subsequent governments in honouring agreements or the determination of domestic mechanisms. This finding suggests the need for mediation and arbitration processes, as outlined above with the IMMA proposal, could also include disputes related to treaties.

#### 7.4.2 Bolivian Experiences of Indigenous Autonomy

The Plurinational State of Bolivia provides an example of Indigenous autonomous regions following the incorporation of UNDRIP in its 2009 Constitution. Q’apaj Conde Choque provided an overview

of Indigenous autonomous approaches prior to my undertaking two site visits to regions reflecting differing stages of implementation. “For Indigenous peoples, autonomy reflects that Indigenous People are nations with full control of their territories, their political systems, their authorities, administrative and judicial. Any Indigenous authority should be as respected as the President, as that level of decision-making” (Choque). Importantly, Choque highlighted that these autonomous processes are grounded on fundamentally different frameworks. “In western countries its very much an economic framework. That economic outcome is the be-all, it is the individual who matters. But for many Indigenous People it’s the inverse, they think well-being, family, community, country is the priority they should make decisions around... it’s always in connection with others...You know that you will be good, as long as all the community is good” (Choque).

Choque explained, in the autonomous regions “Indigenous people have developed a process in which they include non-Indigenous voices in their decision-making. And this is very unique” (Choque). In areas where non-Indigenous peoples were outnumbered by Indigenous Peoples that sought Indigenous autonomy, they would be part of the referendum and could block the autonomy process if they disagreed. As a result, Indigenous People have developed a system in which they share decision-making processes that enables non-Indigenous input.

As part of my on-site interviews undertaken in Bolivia, I also met with two Indigenous communities at different stages of establishing themselves as Indigenous autonomous regions. The Indigenous communities of Charagua formed part of this review. Charagua had undertaken three years of development towards autonomy and was in the first year of transition. The community Guarayos provided an example at an earlier stage of the autonomy process. However, being more remote, Guarayos also maintained a stronger sense of their ongoing traditional autonomy. They also spoke

about their active reassertion of women's traditional role as equal decision makers and holders of senior positions, such as Head of Resource Management.

Prior to the revised Constitution, Guarayo Indigenous Peoples had been subject to dispossession by ranches, where Indigenous Peoples lived in semi-feudal servitude. Additionally, profits from the sale of mahogany, cedar and sandbox trees attracted foreign investors from Brazil and Argentina who illegally secured 400,000 hectares of ancestral lands, with large tracks of land clearing, impacting access to traditional foods and polluted waterways. Land reforms set a limit on lands owned to 5,000 hectares and 2,000 hectares for foreigners, enabling land redistributions, communal ownership and prohibited the sale of lands (Chavez, 2007, p.2).

According to Daniel Yaquirena, President of the Guaraya Nation, historically they were always autonomous but due to the impact of colonisation that autonomy had to be taken back. The process for Indigenous autonomy was driven by the local Guarani People. "We define what Indigenous autonomy is, and it then must be approved nationally in the law, because the law is not erased. The law is respected. We guarantee this law ourselves. We will know, our children will know. Everyone will know. Then it is not deleted" (Yaquirena).

For Estaban Ore who spoke of the Guaroyos community, the municipality is made up of 34 villages where 98% of the population are Indigenous and have striven for self-determination since 1980-82. According to Ore, "centralism was killing our people. They wanted to eliminate our community, our land of origin, our forest reserves and our native villages" (Ore). Ore expressed concern about the impact of foreigners who don't consider the Guarani people a priority. "Guaroyos has commenced the process [of autonomy]. All decisions are taken in the community Assembly, where all seven towns are included and traditional authorities participate. That's how decisions were traditionally

made” (Ore). The process requires all people to vote and agree, including non-Indigenous peoples, who are also represented within the governance structures.

The Assembly approves the autonomy process and elects a President and regional representatives. “We are not asking for favours, we are not asking for a dream, but rather it [autonomy] is part of our inheritance. What use is having a title [of the lands] if we do not manage ourselves with self-government. With our own standards, our own vision” (Ore). Ore acknowledges it is a long process, “because this is more than a proposal, it has to be something of our own, more than a model we want to implement, it must be a model of consciousness” (Ore).

Autonomy processes renounce political parties, with local Indigenous government representatives elected from the Assembly. However, they do still contribute to national elections. “We do not want to cut the wood. We want to keep it. By conserving it, we are the lungs of the world, to breath pure air. But someone has to be responsible for not cutting because people still need work. ...We need someone to recognise the environmental and biodiversity management the Guaraya Nation are doing” (Yaquirena). The community determines all decisions “If we do not understand the worldview of our people, we won’t have a defined horizon to be able to support Indigenous autonomy” (Yaquirena).

Interviewees also spoke about the challenges of establishing Indigenous autonomous regions, with complex processes requiring proof of indigeneity, however, Indigenous communities who don’t have a history of colonization, such as in the Amazon, find it difficult to prove their Indigeneity through documentation, so “a more flexible approach is needed. It also required everyone’s engagement to ensure it was successful. It cannot only be community leaders assume that role, but everyone has to do it” (Yaquirena).

Additionally, securing agreement from non-Indigenous people was challenging, particularly where their power was threatened. Ranchers, miners and private companies felt Indigenous autonomy was a risk to their business and put pressure on the Indigenous leaders. The local Indigenous government would decide on whether there was mining or logging. If a mining company doesn't comply with environmental requirements, they would be expelled, with local Indigenous Peoples requiring a higher level of compliance than a national government.

Challenges also related to a capacity shortfall within the community to implement autonomy. They had to learn how to run hospitals and take over management of the schools, decolonising the curriculum and inserting Indigenous language throughout the curriculum and services, selecting which non-Indigenous content, such as technology, to include. However, the Guarani People endorsed the process "it's our government, we tell them what we want, what we don't want. It is the people who empower each other, who stand up, the town is never forgotten" (Yaquirena).

Each of the interviewees were confident of the longevity of the process, given it was reestablishing traditional ways, "It can't be amended by another president or other councillors. We have a guarantee. We are the witnesses, we ourselves did it" (Yaquirena). Further, if there were moves to amend the Constitution, "the people will enforce the law, if the government changes and has another idea. If anything happens the town will rise-up and the government will regret it" (Yaquirena).

Though Bolivia has facilitated the recognition of Indigenous rights to self-determination through its constitution, it is the lessons learnt from these processes of autonomy that are useful for the global community. The confirmation that Indigenous communities themselves must determine the means of implementing their self-determination, whether through autonomy processes, treaty

negotiations, self-management, constitutional recognition or other means. Additionally, where settler-states are recognising UNDRIP, they must recognise that their wealth came from the exploitation of Indigenous lands and those Indigenous Peoples are entitled to reparation and resources to facilitate independent Indigenous determined processes to implement self-determination and decision-making.

A weakness also highlighted in Bolivia, which is shared among other jurisdictions, is the failure to adequately recognise the impact of colonisation and the needs of Indigenous Peoples who have been dispossessed and who live in rural or city environments. Urban and rural Indigenous Peoples must also have access to self-determination and reparation processes that recognise their ancestral connections, their historical experiences of colonisation and its ongoing impact, though the form that self-determination takes is dependent on and must be driven by those Indigenous communities.

Finally, it is Indigenous values that are the backbone of autonomy and self-determination processes, informed and reflected by the value we place on the Elders of our communities and the wisdom they bring. It is these values, communal obligations and reciprocity, a relational connection with the natural environment, that fundamentally sets Indigenous communities apart from the settler-states imposed on them. It is these world views that define Indigeneity. It is these ontologies that ensure the longevity of Indigenous culture that the global community may benefit from, as it seeks to address the global challenges of climate change, the loss of biodiversity and need to secure global peace.

The recent election in Bolivia, on 17 August 2025, may challenge the social structures that facilitated the Indigenous autonomous regions. The election resulted in centre-right Rodrigo Paz Pereira, winning 32.2% of the vote and right-wing Jorge Quiroga securing 26.9% of the vote, who are now

due to compete in a final presidency run-off vote in October 2025 (Misra, 2025). The election was also marked by a high null and void vote rate of 19.1% (Misra, 2025) following the disqualification of Evo Morales candidacy. Political tensions continued following claims of a previous United States backed coup in the 2019 election that forced Morales to leave the country (Weisbrot, 2020). This change in government will bring a marked divergence in policy approaches irrespective of the Presidential winner. Whether these Indigenous communities and their autonomous status are impacted may further inform processes being considered elsewhere to establish autonomous and self-determining regions and how Indigenous Peoples may ensure longevity of these initiatives.

## 7.5 General Assembly Status

According to the World Bank, there are 476 million Indigenous Peoples globally, who make up 6.2 percent of the global population, with only two countries, China and India, out of 233 nations with larger populations. However, there is no capacity for Indigenous Peoples to contribute to the United Nations General Assembly (UNGA) on the challenges the world currently faces. By contrast, the Holy See, with 501 citizens, and the state of Palestine currently have non-member 'Observer Status'. In addition, 117 regional and global bodies have also been provided a standing invitation to participate as observers in the sessions of the General Assembly. According to Claire Charters, "Indigenous Peoples are self-determining peoples and have been wrongly excluded from recognition" (Charters).

The Alta Outcome Document addressed this shortfall under theme 2: point 10, recommending 'the United Nations recognise Indigenous Peoples and nations based on our original free existence, inherent sovereignty and the right of self-determination in international law; we call for, at a minimum, permanent observer status within the United Nations system' (A/67/994, 2014, p.7). Although this does not enable voting within the General Assembly, observer status could enable

input into the crucial committee structure that facilitates General Assembly decision-making on issues impacting Indigenous Peoples.

UNGA operates with six Committees that advise the 193 Member States. The First Committee focuses on Disarmament and International Security, the second is the Economic and Financial Committee, the Third Committee deals with Social Humanitarian and Cultural Issues, including Indigenous communities. The fourth Committee is the Special Political and Decolonisation Committee and the fifth is the Administrative and Budgetary Committee, with the sixth, the Legal Committee.

In follow up to the World Conference on Indigenous Peoples (WCIP), it was determined at paragraph 33 to consider ‘ways to enable the participation of Indigenous Peoples’ representatives and institutions in meetings of relevant United Nations bodies on issues affecting them’ (A/RES/69/2). In response to the Third Committees report in 2015, the then President of the General Assembly, Mr Mogens Lykketoft, appointed Indigenous experts Professor James Anaya from North America and Dr Claire Charters from the Pacific, with Permanent representatives from Finland and Ghana, H.E. Mr Kai Sauer, and H.E. Mrs. Martha Ama Akyaa Pobee, to support consultations on enhancing the participation of Indigenous Peoples following WCIP. Anaya and Charters led a series of consultations on Indigenous participation at the United Nations General Assembly, garnering substantial support. However, in the drafting phase “we had to go into state only negotiations and that’s when it got really tough not having Indigenous People in the room” (Charters). The phrase ‘nothing about us without us’ echoed among Indigenous Peoples.

In response, Anaya and Charters proposed a series of virtual consultations among global Indigenous Peoples, which I facilitated, in conjunction with Professor Anaya, who chaired the meetings, to seek

feedback from Indigenous Peoples on the various drafts as they developed. Those Indigenous views were then provided to the Australian Government, who shared them among self-identified 'Friendly States', which included New Zealand, Norway, Canada and the United States. This informal feedback from Indigenous Peoples informed the Friendly States that sought to align themselves with Indigenous Peoples views on drafts. However, there was resistance to Indigenous participation at the General Assembly from 'like Minded' states, including, Egypt, China, Russia, Indonesia.

Issues under debate included a proposal for an Indigenous status of accreditation, given current registration requires Indigenous Peoples to register as non-government entities within the Economic and Social Council (ECOSOC). However, Indigenous Peoples are nations and Peoples within international law, with recognized rights to self-determination and are not civil society organisations. Some states also sought to identify Indigenous Peoples, with those designated ethnic minorities, without the rights of Indigenous Peoples (Charters). Resistant states were also concerned non-Indigenous groups may seek accreditation for political reasons.

Participation modalities sought to include opportunities to speak and provide written information on Indigenous issues. However, it would not include capacity to vote, raise points of order, move amendments, have right-of-reply, or submit resolutions. Several options for participation were put forward, including by invitation of President of the General Assembly and with approval from Member States on an ad-hoc basis. However, the decision finally agreed by the General Assembly was to 'continue its consideration of possible further measures necessary to enhance the participation of Indigenous Peoples' (A/RES/71/321). "The disappointment is that we didn't get a resolution enabling Indigenous Peoples participation. This was because we could not forge a consensus between those States that did not want to see Indigenous Peoples recognised...those States that opposed it really wanted control over who was let in the door" (Charters).

I am also of the view that a lack of translations during consultations led to insufficient engagement with Indigenous Peoples from Latin America and Africa. Additionally, Indigenous Peoples' lobbying of member states may have been further strengthened to support a positive vote in the General Assembly. Additionally, the targeting of key member states could potentially influence groups, such as the Group of 77, a coalition of developing nations.

However, follow-up processes failed to appoint an Indigenous coordinator, which hindered progress until the 78<sup>th</sup> session in 2023, when the President H.E. Dennis Francis reappointed Dr. Claire Charters, and Mr. Belkacem Lounes, from the African region and two further Permanent Representatives H.E. Mr. Robert Rae, of Canada and H.E. Mr. Víctor García Toma, of Peru, as Co-facilitators. A series of consultations were undertaken throughout 2024, which raised similar issues to the previous round of consultations.

However, the decision of the seventy-ninth Session of UNGA in September 2024 agreed to continue its consideration of further measures necessary to enhance the participation of Indigenous Peoples with further reporting due at its Eightieth Session in 2025, 'with the aim of adopting procedural and institutional steps' (A/79/455, para 55, p.17). Additionally, on 17 September 2024, the General Assembly agreed to host a high-level panel during the week of the Eighty-Second Session of the General Assembly, in 2027, to commemorate the twentieth anniversary of UNDRIP (A/RES/79/159, para 57, p.15) and agreed to maintain in the agenda 'Follow-up to the outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples' (A/RES/79/159 para 59, p.15).

The United Nations Human Rights Council (HRC) has also undertaken concurrent consultations processes over the preceding years as part of the United Nations System-Wide Action Plan. At its

59th session in June-July 2025, it recommended the establishment of a new separate accreditation status for Indigenous Peoples to facilitate Indigenous input into the work of the HRC (/HRC/59/35, para 76, p.14). This recognised that Indigenous Peoples were not non-government bodies and that representatives attending would speak on behalf of Indigenous nations, peoples or representative bodies, chosen by Indigenous Peoples (/HRC/59/35, para 79 (h), p.15). Indigenous representatives would be sought from each of the seven geo-cultural regions (/HRC/59/35, para 78 (d), p.15). with at least equal speaking rights as those granted to national human rights institutions (/HRC/59/35, para 85, p.16). The HRC should create an independent accreditation mechanism to determine the eligibility of Indigenous Peoples (/HRC/59/35, para 81, p.15), with EMRIP undertaking this role as an interim measure, with the necessary financial resources to facilitate this extended role (/HRC/59/35, para 83, p.16).

Article 41 of the Declaration states ‘the organs and specialized agencies of the United Nations system...shall contribute to the full realization of the provisions of this Declaration through... means of ensuring participation of Indigenous Peoples on issues affecting’ (A/RES/61/295). With the 20<sup>th</sup> anniversary of UNDRIP approaching in 2027, the pressure is intensifying for UNGA to include Indigenous Peoples with observer status and enable input into its committees on issues impacting Indigenous Peoples. Though resistance from some states will continue, like the Declaration itself, sufficient support can be garnered to secure UNGA recognition of Indigenous rights to self-determination. Despite its many flaws, the United Nations remains the only structure that Indigenous Peoples can hope to hold State impunity in check.

## 7.6 An Indigenous Framework

This thesis has outlined a case for the establishment of an International Mechanism for Mediation and Arbitration (IMMA), or a similar Indigenous dedicated arbitration body, to hear complaints on the violation of Indigenous rights and contends that this body should also include a mandate to facilitate, mediate and arbitrate historical and contemporary treaties. Further, given the structure of the United Nations, with UNPFII located under ECOSOC and EMRIP reporting to the Human Rights Council, the proposal of any new bodies must be placed within current United Nations frameworks or face the additional burden of requiring the establishment of a reporting framework within the United Nations. Accordingly, it would be remiss to recommend the establishment of an arbitration and mediation body, without considering a structural framework for this initiative. Indeed, the earlier proposal in this chapter for an Independent Monitoring body of UNDRIP, to review and provide urgent warnings on serious breaches of Indigenous rights also requires a dedicated location within the United Nations structure.

It was this conundrum that led me to review the Special Political and Decolonisation Committee (the Fourth Committee, n.d.), established under Article 77 of the United Nations Charter, along with the Trusteeship System, in 1945, as one of the six core bodies of the United Nations. The Trusteeship Council monitors and facilitates progress towards self-determination and addresses issues related to decolonisation through the Fourth Committee (UN Fourth Committee, n.d.). The Special Committee on Decolonisation, which reports to the Fourth Committee, is relevant in that though it is currently underutilised, it has potential to provide a structural framework for decolonising mechanisms for Indigenous Peoples. The decolonisation processes of non-self-governing territories are pertinent for Indigenous Peoples in that they include: 'Emergence of an independent State, free

Association with an Independent State, and significantly, agreed means for integration with an independent state' (UN & Decolonisation, n.d.). There is also a dedicated Decolonisation Unit to support the Committee's work.

Decolonisation in the Trusteeship System applied to Non-Self-Governing Territories. Chapter XI of the Charter designates Non-Self-Governing Territories as "territories whose people have not yet attained a full measure of self-government" (1 UNTS XVI). With the objective 'to promote the political, economic, social and educational advancement of the inhabitants of Trust Territories and their progressive development towards self-government and independence' (1 UNTS XVI). Initially 11 Territories came under Trust Territories, with all gaining independence.

In 1960 the Declaration on the Granting of Independence to Colonial Countries and Peoples was adopted by the General Assembly (Resolution 1514 (XV)). The resolution, 'proclaimed the necessity of bringing colonialism in all its forms and manifestations to a speedy and unconditional end' (Resolution 1514 (XV)), recognising all people had a right to self-determination. The Fourth Committee's role is to respect the distinct cultures, promote the self-governance, political aspirations and the development of administered territories. Since then, more than 80 previous colonies have secured independence. 'With no Territories left in its agenda, the Trusteeship Council suspended its operations on 1 November [1994] ...Today, the Trusteeship Council continues to exist as an organ of the United Nations and meets as and where occasion requires it' (UN & Decolonisation, n.d.).

The Fourth Committee considers agenda items identified for it by the General Assembly and prepares draft resolutions, recommendations and decisions for the consideration of the General Assembly. 'The Trusteeship Council is authorised to examine and discuss reports from the

Administering Authority on the political, economic, social and educational advancement of the people of Trust Territories and, in consultation with the Administering Authority, to examine petitions from and undertake periodic and other special missions to Trust Territories' (UN Trusteeship Council, n.d.).

Indigenous Peoples were historically excluded from the decolonisation movement, which developed following the Second World War and the establishment of the United Nations, with a flurry of new and emerging Third World states. These new states promoted the recognition of a right to self-determination for all Peoples in the UN Declaration on the Granting of Independence to Colonial Countries (United Nations 1960a, Art.2). This was followed by the two International Human Rights Covenants in 1966 (United Nations 1966a, United Nations 1966b), which further affirmed self-determination in their common Article. 1. However, the framing of 'all peoples' was not intended to cover all historically and culturally distinct 'Peoples' within the existing borders of colonial settler-states.

General Assembly Resolution 1541 (XV) limits the beneficiaries of the Declaration to whole Peoples of non-self-governing territories administered by European colonial powers, that meet the 'salt water' or 'blue water' criteria. Principle IV sets out that the right to self-determination belongs to peoples where their 'territory is geographically separate and distinct ethnically and/or culturally from the country administering it', limiting applicability to non-self-governing territories separated from their colonial or imperial oppressors by sea (United Nations 1960b).

This effectively excluded Indigenous Peoples where colonisation had occurred through invasion and subjugation of the local Peoples, that forcibly re-settled a migrant population, imposed management of the territory and claimed a colonial sovereignty. As Rhiannon Morgan argues, 'this construction

of self-determination and decolonization in international law is evidently contradictory at a fundamental level, and reflects the multiple agendas of states in preserving colonial borders intact and in protecting their territorial integrity and resource sovereignty' (Morgan 2016, p.71). It was this contradiction that was highlighted in the establishment of the International Work Group on Indigenous Affairs (IWGIA) in 1968, which grew out of the protest movement against colonisation (Dahl, 2009, p.20), and the United Nations Sub-Commission's Study on the Problem of Discrimination Against Indigenous Populations by Martínez-Cobo in 1972 (E/CN.4/Sub.2/L.566, 1972).

According to Morgan, 'it was opposed by a number of Western states, in particular Belgium, which argued that forms of colonial domination occurring within multi-ethnic states were as pernicious as overseas colonial subjugation, and that self-determination should be made available to all subjugated peoples, not simply the whole populations of overseas colonial territories' (Morgan, 2011, p.95). However, Morgan contends that the 'Belgian thesis' was actually driven by an intention to impede the decolonisation process (Morgan, 2016, p.95). This was further cemented in the text of Resolution 1541 (XV) which states 'any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations' (United Nations 1960a, Art. 6).

Indigenous Peoples are significantly different to Trust Territories, given they are colonised by large populations that claim a sovereignty asserted through historically forced colonisation. However, they are also former colonies where Indigenous Peoples claim their rights to self-determination, as confirmed in Article 1 (2) of the United Nations Charter, with an expressed desire to move to a post-colonial relationship with settler-states. Indigenous Peoples reject the distinction between external decolonisation and Indigenous decolonising struggles, outlined in the Salt-water thesis. Since the decolonisation processes through the Fourth Committee have wound down, Indigenous Peoples

have been recognised in international law as 'Peoples' with rights to self-determination. As a result, the apparent reason for the exclusion of Indigenous Peoples can no longer be justified. The fact that these processes also support Peoples who continue to live in regions integrated within an independent settler-state or may wish to establish a free association with that settler society, or indeed even independence, Indigenous Peoples are now recognised in international law as meeting the criteria in being 'Peoples' entitled to self-determination.

Though settler states have previously expressed concern as possible Indigenous secession, Indigenous decolonisation does not generally necessitate secession but rather often calls for the restructuring of society from one of coloniser and colonised, to one where Indigenous People are self-determining and self-governing, where dual sovereignty is recognised. In the unusual instance where secession is being considered by Indigenous Peoples those aspirations must form part of a negotiated resolution with those sovereign Indigenous Peoples. According to Michelle Fine et al, for Indigenous Peoples 'sovereignty is not a separatist discourse. On the contrary, it is a restorative process' (Fine, 2014, p.21). The assertion of Indigenous sovereignty through processes of decolonisation is, this thesis argues, the only means to address the entrenched structural disadvantage and dispossession which have afflicted and aggrieved Indigenous communities. Fine et al. contends that it is the struggle for 'sovereignty and the self-determined political, cultural, social status that Indigenous Peoples all over the world demand from the governments that have otherwise attempted to absorb or destroy them, through a course eye that reads as separatism' (Fine, 2014, pp.157-180).

The broadening of the mandate would enable the 476.6 million Indigenous Peoples to fit within the criteria of the Special Political and Decolonisation Committee (The Fourth Committee). Extending the mandate of the Decolonisation Committee would require decision making by the General

Assembly, which would involve five stages, debate, negotiation and decision making, implementation and finally reporting at either a pre-determined end stage or at agreed intervals (UN Decisions, n.d.). Decision making through the United Nations requires the 193 members of the General Assembly to agree, via consensus or through a vote. Consensus decision making is preferred because broad endorsement is the best way to facilitate compliance, with 80% of General Assembly resolutions agreed by consensus (UN Decisions, n.d.). However, consensus doesn't require full agreement but rather the disagreement must not be so strong as to warrant a rejection. Where even a single rejection is received, the matter will then go to a vote. A vote only requires a majority of Member States to agree on the text but it can result in less engagement by those Member States. Given most resolutions of the General Assembly are not legally binding, consensus endorsement is the most effective means to ensure implementation, however, in a matter of General Assembly membership or structural changes the decision would be binding, so consensus or substantial endorsement would be sought if moved to a vote.

The General Assembly has proclaimed 2021–2030 the Fourth International Decade for the Eradication of Colonialism (Resolution 75/123), reflecting a history of success with 80 former colonies securing independence. Significantly this decade aligns with the twentieth anniversary of UNDRIP, which provides further opportunity to raise the profile of Indigenous concerns. Transformational change, as is proposed here, often requires an instigator to move resistant Member States and bureaucracies, and that is likely for Indigenous peoples to establish the mechanisms required to support compliance and to assist settler-states to move to a post-colonial relationship of shared sovereignty.

### 7.6.1 Possible Ways Forward

The potential benefits in joining the United Nations General Assembly, as Observer Status, and engaging in United Nations mechanisms is further called into question by repeated failures of the United Nations to effectively deal with gross human rights abuses. This has become more apparent in recent years, with the genocide in Gaza and illegal wars in the Ukraine and Iran. The fundamental breaches of human rights and apparent incapacity of the United Nations to address them have fundamentally undermined the concept of an international rule-based order, on which human rights standards are grounded. However, while the United Nations appears impotent, it is an agent of its Member States not a global government situated above states. It requires states themselves to provide leadership in responding to such flagrant human rights abuses. Though there are United Nations frameworks that may be drawn upon, such as the Responsibility to Protect (R2P) people from genocide, war crimes, crimes against humanity and ethnic cleansing, adopted at the United Nations World Summit Outcome Document in 2005, and setting out an important doctrine, it requires nations to step up when necessary to give it life (A/RES/60/1, 2005, para 138 & 139).

The recent failures have been so comprehensive and catastrophic for not only those peoples impacted but also the global community, that Member States will, I believe review these failures at a more politically receptive time in the near future, when resistant influential states have experienced a change of leadership. Such a review may lead to the necessary revision of the United Nations system, given the option of leaving the global community with no international standards and oversight would leave rogue states to dominate with impunity.

While recent events highlight the failure of the United Nations, they also provide opportunity to refocus the international community on the need to revise the United Nations, to address concerns

such as the veto powers of the Permanent Members of the Security Council. It is during such times of reflection, on whether the United Nations is meeting its mandate and how to improve its responsiveness, that may provide a window of opportunity to respond to the further failures of the international order. This may also provide an opportune time to shine a light on how to effectively address the ongoing oppression and the widespread failure to recognise the rights of the 476.6 million Indigenous peoples globally.

## 7.7 Conclusion

Over this Chapter I have set out clear strategies to strengthen the engagement and capacity of Indigenous Peoples within the United Nations. Though strategies have been adopted and mechanisms developed and amended in response to UNDRIP, the findings and initiatives outlined in this chapter provide guidance on further means to enhance Indigenous access to the United Nations and enact commitments made. States need to move beyond rhetorical platitudes so frequently expressed, to enacting real remedies for the injustices of the past and to prevent ongoing violations.

It is the United Nations that must lead the way for settler-states, establishing monitoring mechanisms to support settler-states to meet their obligations in implementing UNDRIP and establishing processes to provide for the equal participation of Indigenous Peoples. Though undoubtedly there are still significant challenges within the FWG and COP processes, these also emphasise that there is much to gain through more equal, collaborative and respectful partnerships.

I also set out the need to establish judicial boundaries for intransigent States, corporations and individuals, to monitor for violations, with potential penalties, to protect Indigenous land and water defenders. Free, prior and informed consent must be a first step, where legislation, policies or

economic plans may impact Indigenous lands, with meaningful capacity for Indigenous Peoples to also reject proposals. The monitoring and implementation of treaties and facilitation of negotiated contemporary treaties must also be incorporated into the mandate of the proposed judicial mechanism.

The autonomy processes in Bolivia provide insights on the establishment of domestic strategies to implement self-determination, though the means for that establishment will vary tremendously. It will also provide valuable insights on the longevity of the structural processes undertaken and whether they can withstand a change in policy approach with the election of a new government in 2025. It is the empowerment of those Indigenous Peoples involved that must guide and judge its success. It is those Indigenous Peoples who must direct, assess, reevaluate and have capacity to amend those processes and defend gains secured.

I also considered processes to provide Indigenous Peoples' observer status at the United Nations General Assembly. I examined some of the challenges to date and ways they may be overcome in future endeavours. The importance of Indigenous engagement into the various General Assembly Committees cannot be over-stated.

The final recommendation acknowledges the structure of the United Nations, that new mechanisms require a reporting line to the General Assembly. The extension of the currently underutilised Decolonisation Committee provides an appropriate home for these post-colonial strategies. The upcoming 20<sup>th</sup> anniversary of UNDRIP, within the Third Decade of Decolonisation, provides a framework for the adaptation required.

For Indigenous People colonisation is not a historical term; it continues to oppress our people and appropriate our lands. The stark power disparities that enforced occupation, continue to violate Indigenous rights. It is the United Nations that must implement those standards in international law that Indigenous Peoples share. The global community has much to gain from Indigenous contributions to the world's challenges. However, it requires intervention in the asymmetrical relations between settler-states and Indigenous Peoples, to promote a transition from one of conflict and suppression to post-colonial relations. As a woomera propels a spear, the United Nations global force must pierce the domestic political milieu. As Grand Chief Wilton Littlechild surmised, "I think there's a possibility in being creative to create the additional space that's needed to recognize Indigenous People" (Littlechild).

## CHAPTER 8

### USING ALL OUR WEAPONS

## Proem: The Bolt Racial Discrimination Case

*It was my mother, Pat Eatock, who shared much of our family's history and drew out the Aboriginal values and the lessons it brought. So, after a lifetime in Aboriginal politics, she was appalled when a right-wing commentator publicly questioned her Aboriginality and the heritage of other prominent Aboriginal people. Andrew Bolt, a non-Indigenous journalist on the far-right of the political spectrum, published two articles in the Herald & Weekly Times and in the Herald Sun, entitled 'It's so Hip to be Black' and 'White Fellas in the Black', which had alleged Pat and other fair-skinned Aboriginal people had falsely identified as Aboriginal for career advantage and financial gain.*

*It particularly irked my mother given she lived in public housing and had not done well financially, having raised six children and studied late in life as one of the first mature-aged students. Given its inaccuracy and the reputational damage, my mother was determined to take legal action. However, defamation cases require loss of income, rather than consideration of accuracy or impact as determining factors. With Pat in her early 70's and unemployed, the only alternative was through the Australian Racial Discrimination Act (1975) though this was rarely successful. Pat became the lead litigant with eight others (Eatock vs Bolt, FCA, 1103).*

*Though warned not to travel to Melbourne for the hearings because of her heart condition, she was determined to give evidence. But how do you distil a lifetime into a few examples. She spoke of how she had been removed from the school as a young child after the school had been informed of her father's Aboriginality and moved to the separate Aboriginal school. She spoke of the humiliation she felt when her father argued about seating when taking his family to the movies, before leaving the cinema. It was following the war, where he'd enlisted, when he refused to be herded to the front rows designated as the Aboriginal section. My mother later spoke of the guilt, that as a child she blamed her father for causing a stir and not seeing the film. At another white school when older, she explained that she had to fight her way through each year because of the racial slurs. Pat also gave evidence that she had publicly identified as Aboriginal from the age of 14, when she first started work (Eatock v Bolt, FCA, 1103).*

*Judge Bromberg determined that the articles had breached Section 18C of the Racial Discrimination Act, finding the articles 'reasonably likely to offend, insult, humiliate or intimidate' the claimants with the denigration motivated by 'the race, colour or ethnic origin' of the litigants (Eatock v Bolt, FCA 1103). Further, the articles failed to meet the exceptions of Section 18D in being undertaken in 'good faith', given they contained 'erroneous facts, distortions of the truth and inflammatory and provocative language', where Bolt had fabricated the content of his allegations (HRLC, n.d.).*

*While that rare win in a Racial Discrimination case gave my mother some satisfaction in her final years, it resulted in a further public debate, with all the resources of the far-right lobbying against it. They claimed the case was an attack on Bolt's 'freedom of speech', suggesting the determination opened the floodgates of censorship and political correctness. The debate carried such weight that then Prime Minister Tony Abbott personally sought to amend the federal Racial Discrimination Act legislation, not once but twice, though both attempts failed (Stone, 2015).*

*Pat passed in 2015, satisfied that justice had been served against the behemoth might of Andrew Bolt, and Rupert Murdoch's News Corp. Pat's fight for justice remained steadfast until she joined our ancestors and yet she continues to guide me as I navigate this research process, and the assertion of our sovereignty and rights.*

## 8.1 Introduction

Indigenous lands and Peoples are facing increasing pressures from globalisation and the ruthless avarice of market-based economies. The need to defend Indigenous lands and communities means we need to draw on all the tools available in the assertion of Indigenous sovereignty and rights to self-determination, including those avenues available through United Nations engagement. The study has highlighted that despite significant development in international law over recent decades, these acknowledgements of Indigenous rights have, on the whole, failed to secure those rights. Current procedures and mechanisms within international law are inadequate to safeguard the rights of Indigenous Peoples. Accordingly, this thesis sets out clear directions on how United Nations mechanisms may be consolidated to augment Indigenous self-determination, both as valid international actors and domestically as sovereign peoples. As Kenneth Deer asserted, “We're sovereign people and we have a right to control our lives. We have a right to our own land and that's why we'll survive. If we ever give up hope, if we stop struggling, that's when we disappear, that's when we'll assimilate”.

Given the impunity of settler-states in the domestic realm, it is critical for Indigenous Peoples to draw on United Nations mechanisms to assert our sovereign rights. This thesis has examined the extent the United Nations facilitates self-determination and Indigenous rights to participate in decision-making and considered the potential to extend these measures. It has confirmed the need for enhanced Indigenous specific mechanisms at the United Nations, but importantly, has also highlighted substantial untapped potential for existing mechanisms and procedures of the United Nations to better support Indigenous Peoples to defend their rights and support settler-states to meet their obligations in international law in relation to Indigenous Peoples.

Self-determination was selected as a focus of this study given it is the overarching right of peoples, on which all other rights rest. The project has assessed existing mechanisms, and investigated developments secured over the last decade. Additionally, I have examined data collected from interviews with leading international experts in the field and reflected on Indigenous experiences from five settler-states to review the impact of the United Nations on the ground for Indigenous Peoples.

The research emphasizes an urgent imperative for the United Nations to strengthen its capacity to respond to gross human rights breaches related to Indigenous Peoples. Having experienced colonization and the impacts of settler populations, Indigenous Peoples are often vastly outnumbered and face overwhelming power disparities, at a time when globalization and threats to their lands and waterways highlight the exigencies to defend their survival. The legitimacy of the United Nations and settler-states themselves depends on their capacity to respond to the rights of the 476 million Indigenous Peoples, making up 6.2% of the global population, across 90 countries. It is precisely because of the vast power disparities that Indigenous Peoples face, that we need to draw on both international and domestic mechanisms to support our claims - despite the difficulties we face in the enforcement of international law and treaties.

It is not only historical acts of imperial force and plunder that must be addressed. We must also ensure we set standards as a global community to move beyond colonization, to instill post-colonial relations and equity among the world's peoples. This thesis contributes to an emerging field of research and current debates on Indigenous rights in international law and argues that significantly more reform is required to meet international norms, as well as setting out clear strategies to prevent the violation of Indigenous rights. This research also contributes to a growing Indigenous epistemology which ties its theoretical approach, methodology and methods to practical assertions

of Indigenous rights to self-determination. It develops and implements a Transformative Indigenous Rights Theory which privileges Indigenous voices and outlines a distinctive approach to decolonisation.

## 8.2 Context of the Study

As outlined in the introduction, this research was undertaken in response to the dispossession and social, political and economic marginalisation of Indigenous Peoples, that is the ongoing legacy of colonialism. This legacy is not just historic but continues through the breaching of Indigenous rights in contemporary policies and legislation. It is reflected in the fundamental failure of settler-states and corporations to respect Indigenous rights to self-determination and reparative justice.

However, the United Nations provides a framework for Indigenous Peoples to assert our rights as sovereign nations. International law provides a means to recognize the self-determination of Indigenous Peoples and counter the stark power imbalance Indigenous Peoples face domestically. The principle of self-determination is the normative basis for Indigenous decolonisation. Indigenous Peoples seek to extend those processes of decolonization afforded to other colonial territories to include Indigenous Peoples through the realisation of their rights to self-determination. The United Nations has the potential to support Indigenous self-determination and hold settler-states to account.

Though there are clear failures of international law, most recently exhibited through the Gaza conflict with the apparent inability of the United Nations Security Council to respond to a genocide and gross human rights violations, this failure is a reflection of inherent flaws in the Security Council's veto powers of five permanent members which contributes to an international political climate that

is apparently inept at preventing a human rights travesty. Despite its substantial shortcomings, the United Nations and the General Assembly, which reflects more collective decision making, remains the only body independent of settler-states themselves, that can monitor the compliance of Indigenous rights.

This study has also occurred amidst Indigenous debates on the capacity of the United Nations to address concerns of Indigenous People and whether it may be beneficial to engage with United Nations processes. Whether Indigenous engagement with the United Nations may simply reimpose the dominance of settler-states has been posed by some Indigenous academics. While these debates question the premise of this analysis; this thesis argues that international law can provide a valuable tool to progress the assertion of Indigenous self-determination and rights that emanate from Indigenous sovereignty and ancestral connections. I argue that drawing on the United Nations can potentially provide leverage to combat the free reign, appropriation, oppressive and frequently punitive approaches of settler-states – despite the challenges of enforcing international law and treaties.

Critiques of the United Nations have also raised the fact that the state-based body had limited options to raise gross breaches of Indigenous rights, that it lacked a formal monitoring body for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and was inadequate in its responses to violations. Additionally, criticism of its failure to address the underlying causal factors and the slow pace of change are valid complaints. I also share concerns that state-based recognition and reconciliation processes often fail to effect the substantive structural change required to shift the underlying disempowerment and lack of self-determination of Indigenous Peoples.

Still more challenging to my argument were Indigenous scholars, whom I considered politically aligned with my research objectives, if not the approach, who advocated for a complete disengagement of United Nations processes or negotiations with settler-states. Several Indigenous academics advocated for resistant and resurgent approaches framed on the building of Indigenous communities. While I consider strategies to strengthen Indigenous communities as essential to assert our self-determination and for the longevity of our communities, the need to leverage global processes to counter settler-state impunity remained a potent driver of Indigenous engagement within United Nations mechanisms and the subject of this study.

While I empathize with resistant and resurgent political approaches, within the domestic context, in the settler-state of Australia we remain in such a perilous position that to fail to engage with the United Nations and broader state processes leaves us dependent on the benevolence of the settler-state, rather than empowering ourselves through the assertion of our nation status. However, rather than begging for better treatment, this thesis has sought to use research as a further means to assert our sovereign rights as Indigenous Peoples with ancestral connections extending back 80,000 years, beyond the dawn of time.

That this analysis also reflects a dynamic period of change within the United Nations, instigated through the adoption of UNDRIP and its associated developing standards and emerging norms underlines its significance. Though there are broad frustrations with the pace of change, these developments have raised questions about fundamental assumptions in international law, the definition of sovereignty, self-determination and the associated obligations of settler-states. This research coincided with strategies developed by the United Nations in response to these developments to enhance the participation of Indigenous Peoples across the various mechanism of the United Nations.

Though these processes and standards have not instigated a sweeping change on the ground for Indigenous Peoples, many Indigenous Peoples remain invested in strengthening them as a further avenue to assert our rights as sovereign peoples against powerful forces. The upcoming twentieth anniversary of UNDRIP provides opportunity to increase pressure on both the United Nations and on settler-states to meet their obligations in relation to Indigenous rights. That the United Nations is now considering Indigenous participation in the bastion of member-states decision making, the United Nations General Assembly, reflects that the potential for engagement of Indigenous Peoples within the United Nations has not as yet been fully realized.

In addition to the opportune timing of this critical study, I sought to provide an overview of United Nations processes for Indigenous People, to provide a contextual analysis of the terrain of Indigenous rights developments at the United Nations, but also importantly how these standards and norms were impacting settler-states domestically. Undertaking this study and implementing its objectives required the development of a specific and unique theoretical framework.

### 8.3 Enacting a Transformative Indigenous Rights Theory

My research was grounded on an approach I termed Transformative Indigenous Rights Theory (TIRT). Fundamental to TIRT is the objective to decolonize Indigenous settler-state relationships from one of forced occupation to a more equitable post-colonial relationship that recognises the dual sovereignty of settler-states and Indigenous Peoples. TIRT is defined by several principles which are essential to this approach, central of which is ensuring that the political objectives of the research reflected those of the Indigenous participants. In undertaking the research, I sought to empower participants in promoting their views through the information they shared.

This unique theoretical approach recognizes that Indigenous research is undertaken in a highly politicised and contested environment where the research seeks to proactively challenge established power structures. Though Indigenous Peoples face gross power disparities, TIRT seeks to promote Indigenous agency and global Indigenous networks in seeking structural outcomes. TIRT also recognises that Indigenous researchers bring a wealth of experience to their research, both through direct personal experience and through the intergenerational struggles of our forebearers, as documented in the proems preceding each chapter, which provide a further level of insight on the Aboriginal values and aspirations that inform this research.

As outlined, this study drew analysis from several settler-states: Canada, the United States of America, New Zealand and Bolivia, to inform the Australian context. Through this data I assessed settler-states' responsiveness to facilitate the recognition of self-determination and avenues for adjudication, reparation and redress for Indigenous Peoples. Throughout the interviews, there was a strong consistency of views: Whether by highly experienced Indigenous advocates at the United Nations or local communities in Bolivia with little knowledge of United Nations processes, the assertion of Indigenous Peoples' rights to decision making and self-determination was clear.

The desktop phase of research proactively sought to privilege Indigenous authors, though non-Indigenous academics interested in Indigenous rights were also drawn on and informed the frameworks for understanding power and resistance. The genesis of the methodological approach was grounded on the promotion of Indigenous perspectives, given the Indigenous specific focus of the dissertation. This required an acknowledgement of the range of views across Indigenous scholars and that this work may diverge from approaches taken by other authors.

As explained in Chapter 3, I drew on several methods to triangulate the data compiled to strengthen the validity of the qualitative data analysis and research findings. In addition to interviews, which I drew on heavily throughout the thesis to inform the findings, I also undertook participatory observational analysis, both as a participant attending United Nations mechanisms and as a Pacific representative to a United Nations body. This process provided insights on the difficulties of United Nations mechanisms in requiring consensus decision-making and highlighted the challenges of translating Indigenous participation into meaningful influence.

The third method that further reinforced the findings was the use of praxis initiatives, as political strategies. These praxes weren't instigated by the needs of the research, rather they responded specifically to Indigenous identified needs. The analysis of these praxes provided further insights on how Indigenous peoples seek to enhance their agency within structural constraints.

### 8.3.1 Incorporating Praxes

In the context of this thesis, Indigenous agency was fostered through praxis-facilitated political actions. Although the praxes varied substantially in the initiatives instigated, each was framed around the promotion of Indigenous self-determination. These strategic action-based praxes were determined by the needs of Indigenous Peoples rather than instigated as an initiative of the thesis, even when instigated by myself. Each provides important insights on the capacity of Indigenous Peoples to respond to opportunity structures and to carve out opportunities. These praxes were examined and assessed as examples of strategic political actions and targeted engagements to assess the capacity to influence proceedings or outcomes. Additionally, they also highlighted the correlation between local and global advocacy, providing an additional level of analysis on the

usefulness for Indigenous Peoples of drawing on United Nations mechanisms to contribute to social justice, political engagement and the social change objectives of this study.

In response to Aboriginal concerns in Australia that the issue of a national treaty had been removed from the national public discourse, I organized the hosting of the Treaty Talks Workshop for Aboriginal community members as a local praxis. The Workshop was timed to precede the annual Australia Day/Invasion Day event where a Justice Through Treaty march was planned to promote a treaty to the broader community. The march received strong support from non-Indigenous allies and prominent speakers, which secured positive media coverage.

These local efforts to promote a national treaty and an Aboriginal and Torres Strait Islander representative body were then raised at the United Nations through targeted Aboriginal and Torres Strait Islander participation, interventions and side events at Indigenous forums. This participation provided a welcome voice to those seeking to raise their concerns at an international forum and informed the global community of the concerns and aspirations of Aboriginal Peoples. Australian domestic media picked up and reported on this participation. It also highlighted the discrepancy between Australia and other former British colonies where treaties exist, with the lack of a national Indigenous representative body and a failure to recognise Indigenous rights to self-determination linked to the lack of a treaty.

The Universal Periodic Review (UPR) provided a further opportunity for praxis. Though submitting to the UPR on Indigenous Rights may not constitute direct political action, it was undertaken to raise the concerns of Aboriginal and Torres Strait Islander Peoples and to assess if such mechanisms may be useful for Indigenous Peoples. Though it did confirm Indigenous concerns may be highlighted, it also reflected a discrepancy with a failure to enact those recommendations on the ground.

Additionally, the UPR cycle provided opportunity to examine EMRIP's mandate to support UPR processes. The need for EMRIP's engagement in the UPR process to be requested by the settler-state raised a weakness in depending on the state under review, rather than enabling Indigenous Peoples themselves to instigate EMRIPs input. Accordingly, engagement through UPR illuminated critical areas that may benefit from further reform.

Additionally, the launch of the Indigenous Troika at the COP29 Climate Conference, mirroring the COP Presidency Troika, was able to secure outcomes regarding Indigenous participation in COP30. This political strategy facilitated greater engagement with the Brazilian Government agreeing to promote Indigenous Peoples as a focus of COP30. At the same time, the announcement by Brazil of oil exploration leases over key regions of the Amazon calls into question the effectiveness of this engagement. This announcement highlighted the crucial difference between Indigenous engagement in processes and Indigenous capacity to influence decision making. It raises the urgency of ensuring Indigenous participation moves beyond tokenistic acknowledgements, to Indigenous Peoples active contributions to decision making.

Despite these clear limitations, the greater engagement of Indigenous voices across each of these praxes facilitated an enhanced engagement and promotion of Indigenous perspectives. Although further outcomes were less discernible, these praxes provided a stark reminder of the power disparities Indigenous Peoples face in challenging the vested interests of settler-states and global corporations.

From the point of suppression this is the lived experience of Indigenous Peoples, achievements are not always defined as clear outcomes secured, as more powerful sections of society may define them. Rather for Indigenous Peoples success is incremental. Our success may be defined as gaining

limited opportunities to voice concerns or perspectives, or short grabs of media coverage, which may lead to increased support and expand to develop more substantive outcomes. Though these are modest indicators of progress, to not draw on and seek to build on those achievements is to accept that Aboriginal and Torres Strait Islander self-determination will remain limited to an aspiration. That is not something we or our forebears can accept. It's a long and slow struggle but the strength of a Peoples is that the load is shared, the generations will continue, and small wins will gain traction over time.

## 8.4 Assessing Reforms

This investigation highlighted developments within the United Nations since the adoption of UNDRIP, the impact of UNDRIP on international standards and provided a review of the subsequent developments by the United Nations. This analysis provided a framework for identifying shortfalls within United Nations processes that may benefit from further reforms to more effectively facilitate Indigenous rights to self-determination.

The study's analysis on why four settler-states, including Australia, were initially reluctant to endorse UNDRIP and why after endorsement they remained reluctant to implement UNDRIP, exposed shortfalls, as settler-states claimed UNDRIP was aspirational. I argue that UNDRIP's articles, in reflecting existing United Nations charters carry legal obligations to implement them domestically. In addition, I argue UNDRIP can now be considered customary international law given its broad endorsement by 147 nation-states. This analysis also included an examination of a possible optional protocol for UNDRIP. The thesis concluded that, with an Optional Protocol requiring a further level of endorsement, this would inadvertently provide states with an opportunity to step back from commitments previously secured.

Despite UNDRIP raising obligations for compliance there was little opportunity to adjudicate breaches through international judicial mechanisms, other than through occasional treaty body recommendations with little follow-up. Avenues through the International Criminal Court (ICC) and the International Court of Justice (ICJ) are only available to member-states, raising the need for a mechanism that could bring legal action against settler-states and corporations that fail to comply with recommendations of treaty bodies and which could undertake investigations and charges for gross violations of Indigenous human rights.

The World Conference on Indigenous People (WCIP) provided further opportunities to assess strategies that were implemented as a result of the WCIP. This analysis provided a comparison of recommendations by Indigenous Peoples compiled in the Alta Outcome Document, with those recommendations adopted by the WCIP, to identify deficiencies. I interrogated resulting reforms made to the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), assessed their effectiveness and confirmed EMRIP failed to meet the desired criteria for an oversight body. The capacity and limitations of EMRIP undertaking country investigations and contributing to the Universal Periodic Review both also highlighted significant structural shortcomings.

Additionally, I investigated UNDRIP's domestic implementation, including through legislative implementation as adopted in Canada. This examination also incorporated an analysis of constitutional reforms proposed in Aotearoa/New Zealand and evaluated the political impact of a change of government in Aotearoa. Additionally, the proposal for an 'Indigenous Voice to Parliament' to be incorporated in the Australian Constitution through a referendum, which was thwarted by a negative political campaign by the conservative opposition party, provided further evidence of the need for more substantial United Nations mechanisms and frameworks. Bolivia provided a counterpoint to the former British colonial settler-states in having adopted UNDRIP into

it Constitution. The impact of the constitution on Indigenous informed approaches in the judicial system and Indigenous autonomy initiatives in Bolivia were examined as examples of UNDRIPs positive influence on domestic legislation.

Further, the usefulness of the Universal Periodic Review (UPR) of settler-states' human rights compliance was examined through praxis, to assess the capacity for Indigenous Peoples to raise rights violations. This analysis examined the responses of settler-states to those concerns raised to assess if the UPR had assisted in supporting state compliance. This examination of the UPR highlighted the challenges of dealing with a resistant settler-state and exposed structural barriers to current processes that were identified for further reform.

This examination of the capacity of international law to respond to the needs of Indigenous Peoples and address state obligations to remedy breaches of Indigenous human rights confirmed an absence of judicial and other quasi-judicial and adjudication mechanisms to hold settler-states culpable of the dereliction of Indigenous Peoples fundamental rights. This study found continuing resistance among member-states to meet their obligations domestically. Nevertheless, United Nations mechanisms remain the only entity that may, despite clear limitations, assist in holding settler-states liable for their treatment of Indigenous Peoples.

Though these strategies confirmed the United Nations and some settler-states had taken actions to respect and protect the rights of Indigenous Peoples, this analysis clarified that those strategies to date have failed to assure Indigenous Peoples rights to self-determination. It affirmed that both international legal frameworks and settler-states at the domestic level need to move beyond rhetorical acknowledgement of Indigenous rights to fundamentally change their relationship with Indigenous Peoples. This examination of strategies enacted at the United Nations and the capacity

of settler-states to respond informed the final results chapter, which outlined reforms within the United Nations to facilitate the compliance of Indigenous rights and identify further opportunities to assist settler-states to meet their obligations.

Importantly, this study has highlighted a capacity for international institutions and settler-states to enact mechanisms to move to a post-colonial and more equitable society in recognising the sovereign rights of Indigenous Peoples. The investigation confirmed that where there was political will, settler-states and the United Nations have the ability to respond more effectively to the needs of Indigenous Peoples. Crucially, this study identified uncharted potential within the United Nations to meet the structural shortfalls that the research identified. Given international law determines that justice cannot be realized unless there is opportunity for adequate remedy and redress for violations of Indigenous rights (Lenzerini, 2008, p.8), the onus rests with the United Nations to address these deficiencies.

## 8.5 Untapped Opportunity

Most significantly, the findings of this study identified a series of opportunities that could enhance the representation of the 476+ million Indigenous Peoples globally. The preceding chapters outlined how the United Nations had responded to the unique circumstances of the world's Indigenous Peoples, in being 'peoples' with rights to self-determination under occupation by colonising settler-states. It also reviewed reforms that had been instigated over the previous decade to better facilitate settler-state compliance with the emerging standards and norms in international law. This analysis informs chapter seven, which sets out the findings and recommendations on further means to support the compliance of settler-states in meeting the standards documented in UNDRIP, which were firmly endorsed by 147 members of the United Nations General Assembly.

The potential to incorporate Indigenous Peoples within the structures and mechanisms of the United Nations as equal decision makers with states was examined through the Facilitative Working Group (FWG) of Local Communities and Indigenous Peoples Platform (LCIPP) of the United Nations Framework Convention on Climate Change (UNFCCC). Though constrained by processes grounded on consensus decision making, the FWG provided an example of a venue for member-states and Indigenous Peoples to collaborate in meeting the challenges the world faces, drawing on the insights of Indigenous knowledges and worldviews. Reviewing the operation of this body provided opportunity to consider the critical issue of moving beyond facilitating greater Indigenous engagement to Indigenous Peoples actually contributing to decision making within the broader United Nations Framework Convention on Climate Change (UNFCCC).

Additionally, the praxis political strategy through the launch of an Indigenous Troika promoted Indigenous needs prior to the hosting of COP30, adjacent to the Amazon, in Belem, Brazil. The Troika reaffirmed Indigenous Peoples' rights and ancestral connection with the Amazonian rainforest, where both the Amazon and the Indigenous Peoples' survival are threatened by land clearing and burn-offs. The relative success of this action emphasised the need for Indigenous Peoples to maintain politically determined praxis approaches in the assertion of their rights.

The study, having highlighted the need for adjudication processes for violations of Indigenous rights by settler-states and corporate entities, provided a rationale for a dedicated Indigenous International Mechanism for Mediation and Arbitration (IMMA). This proposal was examined as a possible mechanism to adjudicate breaches of international law in relation to Indigenous Peoples. The potential for this body to be developed and framed by Indigenous Peoples and then endorsed by settler-states, seeking to address their legitimacy deficit, provided an innovative example of responding to Indigenous needs for just adjudication. The development of this judicial initiative,

though instigated externally to the United Nations maintains an intention to be recognised and incorporated within international law.

The need to provide an international framework for monitoring compliance with existing and future treaties was further identified as an area that required international oversight, and may fit well within the terms of reference of IMAA, given its proposed capacity to hear and adjudicate cases. Further, an untapped capacity for the United Nations to facilitate the development of domestic treaties and other constructive agreements between settler-states and Indigenous Peoples was explored.

Bolivia's establishment of Indigenous autonomous regions provided a case study of the implementation of the right to self-determination. Although different Indigenous Peoples will themselves determine the form their self-determination takes, these developments were explored as examples of domestic strategies to facilitate and strengthen the enactment of self-determination by Indigenous Peoples.

Within the United Nations, Indigenous exclusion from the United Nations General Assembly (UNGA) had previously been raised at the WCIP and Alta Outcome Document as an area of potential reform. Initial strategies undertaken in 2017 to secure UNGA 'observer status' for Indigenous Peoples failed to secure the required state member support. However, the process wasn't concluded but rather further time was allocated to establish observer status for Indigenous Peoples. The implications of potential Indigenous engagement on the various UNGA Sub Committees confirmed that this reform continues to be a critical priority for Indigenous Peoples.

Though United Nations reforms have moved slowly, over the duration of this study there have been significant developments. The Human Rights Council report, released in June 2025, on ways to enhance the participation of Indigenous Peoples (A/HRC/59/35) has recommended the establishment of a dedicated Indigenous status, given Indigenous Peoples having commensurate rights to self-determination as member-states, that don't apply to civil society bodies. This would mean that Indigenous Peoples would no longer have to participate as non-government organisations alongside the civil society sector.

Finally, I reviewed means that may provide the structural framework at the United Nations required to locate related mechanism on the rights of Indigenous Peoples within the broader United Nations structure. This proposal would provide a mechanism or body within the United Nations architecture where the various bodies that deal with Indigenous rights issues might be co-located, linked and effectively built into decision making structures. These findings were cognisant of the hierarchical nature of the United Nations and the requirement to incorporate reporting lines to the United Nations General Assembly. The study found that the current Decolonisation Committee was underutilised, so could fulfil this role and provide an appropriate home to these additional Indigenous focused mechanisms. These proposals have been identified through this study as further untapped opportunities that may assist to ensure the Declaration is honoured and implemented, as its development and endorsement originally promised recognition of Indigenous ancestral rights. The upcoming twentieth anniversary of UNDRIP in 2027 provides an opportune time to consider the effectiveness of UNDRIP's implementation and how we may further secure real outcomes for the world's Indigenous Peoples.

## 8.6 Further Research

This study has focused on the United Nations' capacity to address the historical failure to recognize and defend the rights of Indigenous People in international law. I have examined a dynamic phase of development of Indigenous standards over recent decades to address this shortfall. This period of change within the global community warrants investigations regarding the effectiveness of developments within the United Nations to address the fundamental and comprehensive injustice experienced by Indigenous Peoples. It has also highlighted the necessity and potential for further reforms. This thesis is timely and raises pertinent findings, but it also confirms the need for ongoing studies to assess the impact of these reforms and to review whether the initiatives instigated were sufficient.

Additionally, while the breadth of this study was necessary to provide an overview of the impact of UNDRIP on the United Nations as a whole, it makes evident the benefits of a more targeted approach. Further in-depth studies would be welcome on each of the developments appraised in this thesis. The operation of each of the Indigenous specific mechanisms of UNPFII and EMRIP could be investigated further to assess how the capacity of each may be further enhanced. Additionally recent developments through the establishment of the FWG as an equal state and Indigenous mechanism warrants further scrutiny on its operation, its achievements and whether these processes may be enhanced to more effectively facilitate Indigenous influence on decision making and whether such approaches may be extended to other global priorities.

Further, each of the settler-states, in their various stages and strategies of implementation of self-determination warrant specific investigation. In particular, there is clear benefit in examining the effectiveness of the recently established legislation to recognise UNDRIP in Canada. Additionally,

the autonomous regions in Bolivia deserve a dedicated investigation, which may also consider if subsequent electoral outcomes have influenced or curtailed these processes on the ground.

Finally, the significance of the proposed amendments to the United Nations General Assembly, and the establishment of a dedicated Indigenous status for registration and engagement in United Nations processes and the subsequent enhanced engagement of Indigenous Peoples are significant and important areas of further investigation. An examination of the relative outcomes and an analysis on whether these initiatives will be adequate to foster change on the ground for Indigenous Peoples under continuing occupation of settler-states would add value to the scholarship, Indigenous Peoples and the United Nations itself.

Further investigations on the capacity of the United Nations to undertake additional reforms would add to debates concerning whether the United Nations and settler-states themselves have done enough to enable Indigenous Peoples to express their right to self-determination, meet the needs of their communities and determine their aspirations. Indeed, these are areas of interest for my own future study and I welcome additional analysis by other academics and emerging scholars interested in contributing to this field of research. It is an academic pursuit that crosses over several schools within the social and political sciences and given the richness and dynamism of the field, can only benefit from a multi-pronged and collaborative approach, drawing from experiences and knowledge built from a multi-disciplinary practice.

## 8.7 Conclusion

In contemplating how this research might impact Aboriginal people in Australia, I am obliged to first reconsider the broader political climate in which we live. The attempts to close up to 150 remote

Aboriginal communities in Western Australia in recent years have highlighted a renewed attack against Aboriginal communities. These policies of removal sought to instigate a renewed phase of colonialism, through the regulation, enforced assimilation and dispossession of remote Aboriginal communities. The political and policy environment has set the state against Aboriginal People, driven by a neo-liberal ideological agenda that promotes powerful corporate interests, while implementing a highly paternalistic and managerial approach that strives to eradicate welfare dependency, denigrating Aboriginal people in remote communities for their deprivation.

In the development of the United Nations, states have defended their claims to colonised territories and the legitimacy of their claims to full sovereignty, as reflected in a lack of enforceable processes for Indigenous complaints to be fairly adjudicated. While this history has constrained the effectiveness of international treaties and mechanisms, limiting potential outcomes for Indigenous Peoples, the United Nations remains a key means of defence for Indigenous Peoples. Without recourse to international institutions and norms, state impunity can threaten the very survival of Indigenous Peoples as they derogate and deny Indigenous Peoples unique claims as sovereign nations.

This thesis argues that the abuse of Indigenous Peoples and apparent disregard for Indigenous rights within an Australian policy context requires international pressure to address the state's intransigence and its failure to comply with its international obligations. Internal reviews within the United Nations that recognise the need to address the power disparity between Indigenous Peoples and settler-states are considering processes to increase Indigenous capacity through strengthened mechanisms, to encourage state compliance. However, the force of international law is premised on international expectations for compliance, and an engaged global public that may be marshalled through coordinated political campaigns in response to flagrant breaches. It is principally through

the United Nations' exposure of domestic abuses to broader scrutiny that the domination of powerful interests may be curbed.

While I recognise the very real limitations of international law and the United Nations in protecting Indigenous Peoples and others, to not seek to strengthen those mechanisms and the assertion of Indigenous ancestral rights leaves Indigenous Peoples exposed and fundamentally unarmed to the travesties of a remorseless and exploitative global order. The settler-state has been built on the oppression, silencing and erasure of Indigenous Peoples. As a result of colonisation and the ongoing occupation, Indigenous Peoples remain vulnerable to hegemonic powers driven by a neo-liberal economic order that profits from the denial of Indigenous rights.

The United Nations brings opportunities to further pressure settler-states to change their approach domestically. It provides standards and norms to better inform settler populations. It is only through the leveraging of a global international order through the United Nations that Indigenous Peoples can seek to counteract the immense asymmetric power disparities.

Indigenous Peoples have only secured gains previously through their political activism, and international advocacy is an extension of that activism. Global collaboration amongst Indigenous Peoples intensifies and reinforces our shared claims. Where United Nations mechanisms are found to be deficient it is more strategic to strengthen and augment those processes and promote further reforms than withdraw completely.

Indigenous Peoples need to draw on all the tools and weapons available, given this is a fight for our longer-term survival. In that struggle, rather than facing overwhelming odds unarmed, we need to draw on the United Nations and international law to leverage a frame of equal human rights. Like a

woomera propels a spear further and faster, we need to draw on those norms and standards to pierce the domestic jurisdictions of settler-states to assert our Indigenous rights as Peoples, with rights to self-determination and dual sovereignty with those occupying settler-states. As Kenneth surmised, “you have to assert your rights, you can’t just go around asking for your rights, you have to assert them. That’s what self-determination’s about!”

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## APPENDIX A

### Grand Chief Wilton Littlechild: Canada

Grand Chief Wilton Littlechild is from the Ermineskin reserve, Maskwacis. Though from a large family he is a survivor of Canada's residential schools. Early experiences as an athlete led to degrees in physical education before being the first Alberta Indian to obtain a law degree in 1976. Chief Littlechild has been actively engaged in the advocacy of Indigenous rights for close to 50 years. He was a member of the Indigenous delegation to the United Nations in 1977, and has remained an active since, including as a former member of EMRIP and Chair over two years and is also a former two term member of the United Nations Permanent Forum on Indigenous Issues. Domestically, Chief Littlechild was commissioner to the Truth and Reconciliation Commission of Canada from 2009-2015 and has been a regional and International Chief on Treaties No. 6, 7, 8. Chief Littlechild has been a member of the Canadian Parliament, Vice-President of the Indigenous Parliament of the Americas, North American representative to the UN Permanent Forum on Indigenous Issues, and a chairperson for the UN Expert Mechanism on the Rights of Indigenous Peoples and the Commission on First Nations and Métis Peoples and Justice Reform. He has been awarded the Order of Canada, the Canada 125 Medal, the Indspire Award for law and justice, the Pearson Peace Medal and honorary doctorates from several universities. Additionally, Chief Littlechild is the Creator of the North American Indigenous Games.

### Grand Chief Edward John: Canada

Grand Chief Edward John (Akilech'oh) is a Dakelh hereditary Chief and the current elected chief of the Tl'azt'en Nation located in northern British Columbia. He holds a Bachelor of Arts degree in sociology from the University of Victoria, a law degree from the University of British Columbia and has been awarded Honorary Doctor of Laws degrees from the University of Northern British

Columbia and the University of Victoria. Chief John has been active in advancing Indigenous rights and treaty negotiations. He is a First Nations Summit (FNS) elected Commissioner by the FNS Chiefs in Assembly in April 2024 and was central to the creation of the FNS and the BC Treaty Commission, having served on the FNS Task Group for 11 consecutive terms. Chief John was involved in the development of the UN Declaration on the Rights of Indigenous Peoples and served as the North American Expert Member to the United Nations Permanent Forum on Indigenous Issues From 2011 to 2016 and was Chair 2012-2013. Chief John was also Minister of Children and Families in BC and the Special Advisor on Aboriginal Child Welfare to the Minister of Children and Family Development in BC. A fluent Dene speaker he has held the position of Co-Chair, of UNESCO's Steering Committee on the UN General Assembly's International Year of Languages 2019.

### [Kenneth Atsenhainton Deer: Canada/United States Border](#)

Kenneth Deer is from the Bear Clan of the Mohawk Nation of the Kahnawà:ke territory. With a background as a school counsellor and High School Principal, he helped establish the Kahnawake Survival School and is a founding member of the First Nations Education Council and the National Indian Education Council. Mr Deer acted as a negotiator in the Oka crisis in 1990, following of which he founded 'The Eastern Door', Kahnawà:ke's award-winning newspaper. He is an award-winning journalist, newspaper publisher and editor, an educator and an internationally respected Indigenous rights activist. Mr Deer represented the Haudenosaunee at UN events in Geneva since 1987 in meetings of the UN Working Group on Indigenous Populations and the UN Working Group on the Draft Declaration on the Rights of Indigenous Peoples since 1995 and actively contributed to the development of the UN Declaration of the Rights of Indigenous Peoples. He served as the Chairman/Rapporteur of the UN Workshop on Indigenous Media in New York in 2000. Mr Deer was awarded an Honorary Doctorate Degree from Concordia University and the National Aboriginal

Achievement Award in 2010. He was appointed co-chair of the National Indian Education Council in Canada, was awarded an honorary doctorate of laws from Concordia University in Montreal in 2015 and is the 2024 Indigenous Knowledge Holder in the McGill University Indigenous Knowledge Holder Program.

### [Kristen Carpenter: United States of America](#)

Professor Kristen Carpenter is the Council Tree Professor of Law at the University of Colorado Law School. She was a member of the United Nations Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), representing North America for two terms, from 2017-2021 and was EMRIP Chair 2018-2020. Carpenter was appointed Senior Advisor to U.S. Secretary of the Interior Deb Haaland from 2023-2025. She currently serves as a Justice of the Shawnee Tribe Supreme Court and co-director of The Implementation Project, an initiative of the Native American Rights Fund and University of Colorado Law School to advance the United Nations Declaration on the Rights of Indigenous Peoples. Professor Carpenter has been awarded the Provost's Award for Faculty Achievement and the Outstanding New Faculty Award. She served as a director of the American Indian Law Program from 2012-2014, and as Associate Dean for Faculty Development from 2011-2013. In 2016 she was appointed as the Oneida Indian Nation Visiting Professor of Law at Harvard Law School. Professor Carpenter is a member of the American Law Institute and serves on the Board of the Federal Bar Association's Indian Law Section. Carpenter teaches and writes in the areas of Property, Cultural Property, American Indian Law, and Indigenous Peoples in International Law.

### [Claire Winfield Ngamihi Charters: New Zealand/Aotearoa](#)

Professor Claire Winfield Ngamihi Charters is a Māori academic from the Ngāti Whakaue, Tūwharetoa, Ngāpuhi and Tainui iwi (tribes). She studied at the University of Otago and at New York

University as a Fulbright Graduate Scholar, before completing a PhD at the University of Cambridge. She is Professor in the Faculty of Law at the University of Auckland and co-director of the Aotearoa New Zealand Centre for Indigenous Peoples and the Law. She specialises in the rights of Indigenous Peoples in international law, the relationship between human rights and Indigenous peoples' rights, the state legal system and constitutional law. She was previously employed by the Office of the United Nations High Commissioner for Human Rights from 2010-13 and a trustee on the UN Voluntary Fund for Indigenous Peoples (2014 - 2020). In 2017 Professor Charters was appointed as one of two Indigenous advisors to the United Nations General Assembly, and in 2024 she was reappointed as an Indigenous advisor to these processes. Professor Charters was awarded a Royal Society Rutherford Discovery Fellowship from the Royal Society Te Apārangi, in 2017, for her research project: 'Constitutional Transformation to Accommodate Māori in Aotearoa/New Zealand: Lessons from Around the Globe' and Rutherford Discovery Fellow from 2019-24. In 2019-20 Professor was the chairwoman of the panel that wrote the report He Puapua, commissioned by the New Zealand Government, on measure to achieve the United Nations Declaration on the Rights of Indigenous Peoples. Professor Charters is one of the University of Auckland interdisciplinary team of Māori and Pacific researchers of the Māpihi: Māori and Pacific Housing Research Centre, established in 2022 and was appointed to the Human Rights Commission in 2023 focusing on the rights of Indigenous Peoples.

### [Margaret Mutu: New Zealand/Aotearoa](#)

Professor Margaret Mutu is of Ngāti Kahu, Te Rarawa, Ngāti Whātua iwi (nations). She is chair of her iwi parliament Te Rūnanga-ā-Iwi o Ngāti Kahu, holding the position since 2001. She also chairs Karikari marae in the Far North and Kāpehu marae in the Northern Wairoa. She has represented Ngāti Kahu on the National Iwi Chairs Forum since its inauguration in 2005. Within the Forum

Margaret chairs Te Pou Tikanga, Matike Mai Aotearoa (the Constitutional Transformation Working Group) and the Aotearoa Independent Monitoring Mechanism (which reports to the Forum and the United Nations on New Zealand's compliance with the UN Declaration on the Rights of Indigenous Peoples). She is the Professor of Māori Studies at the University of Auckland where she teaches and conducts research on Māori language, tikanga (law), history and traditions, rights and sovereignty, He Whakaputanga o te Rangatiratanga o Nu Tirenī, Te Tiriti o Waitangi and treaty claims against the English Crown and constitutional transformation. She holds a BSc in mathematics, an MPhil in Māori Studies, a PhD in Māori Studies specialising in linguistics and a DipTchg. She is a Fellow of the Royal Society of New Zealand, elected in 2017. Professor Mutu is the Ngāti Kahu's head claimant and chief negotiator for treaty claims settlements and chairperson of Matike Mai Aotearoa: The Independent Working Group on Constitutional Transformation, convened by Moana Jackson, and chairperson of the Aotearoa Independent Monitoring Mechanism which monitors New Zealand's compliance with the United Nations Declaration on the Rights of Indigenous Peoples.

### Q"apaj Conde Choque: Bolivia

Q"apaj Conde Choque is an aymar lawyer from Plurinational State of Bolivia. Mr Choque is the associate programme management officer in the Peoples and Biodiversity Unit at the Secretariat of the Convention on Biological Diversity. He has previously served as an Indigenous fellow at the World Intellectual Property Organization (2013–2014) and as legal officer at the Centro de Estudios Multidisciplinarios-Aymara (2016–2017), an indigenous institution, which supports indigenous traditional authorities undertake training programs and legal support based on indigenous peoples' rights. He is member of the Red de Jóvenes Indígenas de América Latina, a regional Indigenous youth network and was formerly co-chair of the Global Indigenous Youth Caucus (2017–2018). He has worked at Qhapaq Uma Suyu Nation as a research assistant on traditional water administration

in the Uru Nation of Poopó Lake. Mr Choque has lectured at the Universidad Indígena del Tawantinsuyu. Mr Choque has regularly contributed to the United Nations Biodiversity Conferences. Mr Choque holds a law degree from the Universidad Mayor de San Andrés, a Master of Laws from the University of Seville, and a Doctor of Juridical Sciences from the Indigenous Peoples Law and Policy Program at the University of Arizona.

### Tammy Solonec: Australia

Tammy Solonec is a Nigena woman from Derby in the Kimberley of Western Australia. She was Indigenous Rights Manager at Amnesty International Australia at the time of interview and is a member of the WA Aboriginal Lawyers Committee. Between 2011 and 2014 she was a Director of the National Congress of Australia's First Peoples, Australia's former national Indigenous representative body. Tammy was awarded Young Female Lawyer and Lawyer of the Year for WA in 2012. She studied Law at the University of Western Australia and completed her legal qualifications through the Aboriginal Legal Service of Western Australia, where she worked for four years including as Managing Solicitor of the Law and Advocacy Unit. Ms Solonec has written and edited writer legal articles and social columns on issues impacting the Aboriginal and Torres Strait Islander communities and has presented widely on these issues. She has worked across the community sector on social justice and Indigenous rights and has been an active member of Western Australia's NAIDOC, the National Aboriginal and Islanders Day Observance Committee- a week-long celebration of Aboriginal and Torres Strait Silander Peoples, Committee. Throughout her career, Ms Solonec has been involved in advocating for Indigenous peoples on local, state, national and international levels, including at the United Nations.

## Yingiya Mark Guyula: Australia

Yingiya Mark Guyula is a Yolŋu man of the Djambarrpuyŋu clan and the Liya-Dhālinymirr people. Mr Guyula has the title of Djirrikaymirr (a senior leader) with authority within the Yolŋu traditional system of law, called Maḍayin, one of the Yolŋu central governance institution of Njārra (a foundational institution of law). He is an Australian politician, an independent member of the Northern Territory Legislative Assembly for the seat of Mulka in north-east Arnhem Land, where he has represented the region since 2016, winning on a platform of self-determination and treaty for Yolŋu people. Mr Guyula was born and raised in Mirrngadja in Arnhem Land, where he lived a traditional Yolŋu lifestyle until the age of 10, when he began a western education. As a young man he moved to Nhulunbuy to work with the Mission Aviation Fellowship (MAF), where he trained in aircraft maintenance and engineering. He later trained as a pilot and became the first Yolŋu commercial pilot for the region in 1983. Mr Guyula is also an accredited interpreter and has worked in cross-cultural education in various roles, regional bodies and community organisations and has worked as a senior lecturer at Charles Darwin University. Mr Guyula has been an outspoken advocate for Aboriginal and Torres Strait Islander Peoples particularly, in relation to over incarceration, child removal, and family violence not reflecting traditional law and was the first parliamentarian to make a speech in an Aboriginal language. At the 2018 Garma Festival he presented Prince Charles with a traditional letter stick asserting Yolŋu sovereignty was ongoing and requested the Prince Charles mediate a federal Treaty with the Australian Government.

