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## INDIGENOUS RIGHTS TO LAND UNDER THE AUSTRALIAN HUMAN RIGHTS ACTS

DR SCOTT CALNAN\*

This article examines the extent to which the *Human Rights Act 2004* (ACT), the *Charter of Human Rights and Responsibilities Act 2006* (Vic), and the *Human Rights Act 2019* (Qld) ('the Australian human rights acts') protect the rights of Indigenous peoples to their traditional lands. It firstly sets out the approach of Australian courts to interpreting the Australian human rights acts. Next, it considers the rapidly expanding and detailed jurisprudence in international human rights law concerning the rights of Indigenous peoples to their traditional lands. Finally, it concludes that this jurisprudence is incorporated in the Australian human rights acts and that if this jurisprudence contains more extensive land rights to Indigenous peoples than existing laws, it may open a new legal frontier with significant implications for future Indigenous struggles as regards traditional lands in Victoria, Queensland, and the ACT.

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## I INTRODUCTION

This article sets out how the human rights acts in the Australian Capital Territory ('ACT'), Victoria, and Queensland<sup>1</sup> ('the Australian human rights acts') incorporate the recent, considerably expanded, Indigenous rights to land set out in international human rights law. It argues that because of this incorporation, the Australian human rights acts, influenced by international jurisprudence, open up an alternative avenue for Indigenous peoples in some parts of Australia to pursue land rights beyond existing land rights and native title law. This article focuses on the nature of the alternative avenue itself, and does not address the complications of how that avenue may function in relation to broader issues, such as its interaction with Australian

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<sup>1</sup> *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld) (together, the 'Australian human rights acts').

native title law or how it may deal with issues such as overlapping Indigenous claims to land. While these issues may qualify, to some extent, the following analysis, they are left to be dealt with in other scholarship in the future.

Approaches based on human rights have become increasingly influential in advocacy for Indigenous peoples at the international level. This increasing influence has fuelled a rapid expansion of international human rights jurisprudence concerning Indigenous rights to traditional lands. In Australia, however, the impact of native title as founded by the High Court in *Mabo (No 2)*,<sup>2</sup> and the lack of general human rights legal protections through a bill of rights or human rights acts in most jurisdictions, have thus far impeded the growth of such a human rights approach. That international human rights jurisprudence on Indigenous rights to land would be imported into state and territory law by human rights acts was argued in Australian legal commentary some time ago.<sup>3</sup> However, since that commentary, both the international human rights jurisprudence on Indigenous rights to land and the statutory provisions and jurisprudence in Australia associated with human rights acts have expanded considerably, changing the nature of the issue itself. As such, an updated consideration of this topic is well overdue.

This article will first, in Part II, consider the relevant general provisions and case law of the Australian human rights acts to provide a general outline of why that legislation is capable of incorporating the jurisprudence on Indigenous rights to land set out in international human rights law. It will then, in Part III, set out the extensive development of international human rights law in relation to the rights of Indigenous peoples to land that would be the subject of that incorporation. Lastly, in Part IV, it will consider how the specific jurisprudence under the Australian human rights acts relevant to Indigenous rights to land and demonstrate, in a more detailed way, why and how such incorporation has occurred.

## II GENERAL APPROACHES TO INTERPRETING THE AUSTRALIAN HUMAN RIGHTS ACTS

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<sup>2</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>3</sup> Jackie Hartley, 'Indigenous Rights Under the Human Rights Act 2004 (ACT) and the Charter of Human Rights and Responsibilities Act 2006 (Vic)' (2007) 11(3) *Australian Indigenous Law Review* 6.

*A Statutory Construction Shows that the Australian Human Rights Acts Incorporate Human Rights as Understood in International Law*

It is clear from the relevant supplementary documentation that the parliaments of the ACT, Victoria, and Queensland intended that their human rights acts would enforce rights found in international human rights law. In the ACT, the Explanatory Memorandum to the Bill that became the *Human Rights Act 2004* (ACT) ('HRAACT') makes this point clear.<sup>4</sup> In Victoria, the Explanatory Memorandum to the Bill that eventually became the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('CHRRV') uses very similar terms.<sup>5</sup> In Queensland, similar statements were made in the Explanatory Notes to the Bill that became the *Human Rights Act 2019* (Qld) ('HRAQ').<sup>6</sup>

Statutes that are intended to embody the provisions of international agreements in domestic law would normally have the benefit of the common law principle of statutory interpretation that if an Act purports to give effect to an international agreement, a court is at liberty to look at the agreement in an endeavour to resolve any uncertainty or ambiguity in the Act.<sup>7</sup> Unusually, compared to other statutes giving effect to rights in international agreements, each of the Australian human rights acts also has provisions that expressly authorise courts to take account of relevant judgments of domestic, foreign, and international courts and tribunals in interpreting them ('the authorising provisions'). In that regard, s 31 of the HRAACT provides:

- (1) International law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right.

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<sup>4</sup> Explanatory Memorandum, Human Rights Bill 2003 (ACT) 3.

<sup>5</sup> Explanatory Memorandum, Charter of Human Rights and Responsibilities Act 2006 (VIC) 1; See also: Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1291 (Mr Hulls, Attorney-General).

<sup>6</sup> Explanatory Notes, Human Rights Act 2019 (Qld) 1. See also: Queensland, *Parliamentary Debates*, Legislative Assembly, 31 October 2018, 3184 (Hon. YM D'Ath, Attorney-General and Minister for Justice).

<sup>7</sup> In interpreting the CHRRV, courts have also taken into account international non-binding rules on detention – see: *Certain Children v Minister for Families and Children* (2016) 51 VR 473, [154]; *Certain Children v Minister for Families and Children (No 2)*(2017) 52 VR 441, [264]-[265] and *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, [176]-[178].

- (2) In deciding whether material mentioned in subsection (1) or any other material should be considered, and the weight to be given to the material, the following matters must be taken into account:
- (a) the desirability of being able to rely on the ordinary meaning of this Act, having regard to its purpose and its provisions read in the context of the Act as a whole;
  - (b) the undesirability of prolonging proceedings without compensating advantage;
  - (c) the accessibility of the material to the public.

In a less detailed way, s 32(2) of the CHRRV provides: 'International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.'<sup>8</sup> Section 48(3) of the HRAQ has identical terms to s 32(2) of the CHRRV.

#### *B Relevant Case Law on This Incorporation of International Human Rights*

Australian courts have approached the authorising provisions above in several ways. There have been some statements by courts in the relevant jurisdictions about international human rights jurisprudence having significant importance in the interpretation of the Australian human rights acts. In *PJB v Melbourne Health* ('*Patrick's Case*')<sup>9</sup> Bell J considered the weight to be given to Views of the United Nations Human Rights Committee and remarked, 'The opinions of the committee represent an important body of jurisprudence on the interpretation and application of the covenant. Australian courts of high authority have referred to and relied on the opinions and general comments of the committee when interpreting the provisions of the covenant or domestic legislation to which it is relevant.' Similarly, Refshauge J in the Supreme Court of the ACT, remarked in *Hakimi v Legal Aid Commission (ACT)*,<sup>10</sup> 'The process of identification of the content of rights enshrined in the Human Rights Act is properly to be assisted by the jurisprudence of international courts and

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<sup>8</sup> The definition of 'statutory provision' in s 3 of the CHRRV includes the CHRRV itself.

<sup>9</sup> *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373, [64]-[72] (Bell J).

<sup>10</sup> *Hakimi v Legal Aid Commission (ACT)* (2009) 3 ACTLR 127, [70]-[71].

tribunals, which consider the same or relevantly similar rights expressed in instruments similar to the Human Rights Act.<sup>11</sup>

This approach is consistent with the approach adopted by the UK House of Lords and UK Supreme Court in the interpretation of the *Human Rights Act 1998* (UK) ('HRAUK'). In *R (Ullah) v Special Adjudicator*,<sup>12</sup> Lord Bingham remarked that the duty of UK courts was to keep pace with, and reflect, the jurisprudence of the European Court of Human Rights on the human rights protected in the HRAUK.<sup>13</sup> It is also reflective of approaches taken by courts in New Zealand to the interpretation of the *Bill of Rights Act 1990* (NZ).<sup>14</sup> However, there have also been a number of statements by Australian judges calling for caution in the application of the above principle. In *Momcilovic v The Queen*<sup>15</sup> French CJ cautioned that, 'International and foreign domestic judgments should be consulted with discrimination and care. Such judgments are made in a variety of legal systems and constitutional settings which have to be taken into account when reading them.'

Even more stridently, Kaye J in *WBM v Chief Commissioner of Police*<sup>16</sup> remarked that care needed to be taken in relying on and following the decisions of foreign and international courts and tribunals 'literally and in their entirety'. He said that this was because the terms in which rights were expressed in the CHRRV were not necessarily the same as in international treaties, and the constitutional structures of those other countries were not necessarily the same as those in Victoria. He expressed particular concern with courts relying on decisions of the United Nations ('UN') Human Rights

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<sup>11</sup> See also: *WBM v Chief Commissioner of Police* (2012) 43 VR 446, [103] (Warren CJ). A similar approach to that of Warren CJ was taken by Martin J in: *Owen D'Arcy v Chief Executive Queensland Corrective Services* (2021) 9 QdR 250, [114]-[117].

<sup>12</sup> *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, [20].

<sup>13</sup> See: Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press, 2013) 39-40.

<sup>14</sup> See, for example: *Simpson v Attorney-General ['Baigent's Case']* [1994] 3 NZLR 667, 691-702 (New Zealand Court of Appeal) where Hardie-Boys J remarked 'Citizens of New Zealand ought not to have to resort to international tribunals to obtain adequate remedy for infringement of Covenant rights this country has affirmed by statute. I consider that the Courts are obliged to provide those remedies by domestic law.'; See also: Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, 2<sup>nd</sup> ed, 2015) 104.

<sup>15</sup> *Momcilovic v The Queen* (2011) 245 CLR 1, [18]-[19].

<sup>16</sup> *WBM v Chief Commissioner of Police* (2010) 27 VR 469, [49].

Committee because he said that those decisions involved value judgments at odds with the traditional judicial function in Victoria and Australia as a whole.<sup>17</sup>

### III RELEVANT INTERNATIONAL HUMAN RIGHTS JURISPRUDENCE ON THE RIGHTS OF INDIGENOUS PEOPLES TO TRADITIONAL LANDS

The above jurisprudence indicates the extent to which courts have taken into account rights provided for in international human rights law in interpreting the Australian human rights acts. In the next section, the specific rights to land of Indigenous people likely to be incorporated are outlined. This article focuses on the human rights that have been the primary basis on which Indigenous rights to land have been asserted in international human rights law. These rights have been the foundation of Indigenous rights to culture and minority rights to establish legal ownership over property. The principal international bodies that have articulated these rights are the UN Human Rights Committee, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights.

#### *A Minority Cultural Rights*

Although in reviewing UN Member states' ('States') reports; the UN Human Rights Committee ('the Committee') has called upon States parties to demarcate Indigenous lands and provide effective civil and criminal penalties for deliberate trespass on those lands,<sup>18</sup> the Views of the Committee on individual complaints have not been as explicit in stating that Article 27 of the ICCPR require such measures. In its decisions on individual complaints, the Committee has recognised, however, that the rights protected by Article 27 include the rights of Indigenous people, in community with other Indigenous people, to engage in economic and social activities that are not part

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<sup>17</sup> Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Thomson Reuters, 2<sup>nd</sup> ed, 2019) 281.

<sup>18</sup> William Schabas, *UN International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N.P.Engel, 3<sup>rd</sup> ed, 2019) 827, citing the Committee's Concluding Observations on the report of Brazil. See also: Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committees' Monitoring of ICCPR Rights* (Cambridge University Press, 2020) 820.

of the culture of the wider community.<sup>19</sup> Insofar as a resource extraction activity or other activity hinders or prevents such Indigenous economic or social activities, it can lead to a finding that Article 27 rights have been violated.<sup>20</sup> This is so even where traditional culture has changed and now uses more modern technology.<sup>21</sup>

However, measures that have a limited impact on the way of life of persons belonging to an Indigenous people will not necessarily amount to a denial of rights under Article 27.<sup>22</sup> A form of proportionality test is clearly being used by the Committee to determine whether the interference with the right is sufficient to deny the right in substance.<sup>23</sup> In many circumstances, however, the Committee has found that it is unable to find sufficient facts to enable it to come to a finding on a violation of Article 27 rights.<sup>24</sup> Because of its limited ability to engage in fact finding, commentators have noted that the Committee tends either to give States considerable leeway before finding that measures pose a threat to traditional cultures<sup>25</sup> or to be influenced by the fact that Indigenous minority representatives effectively participated in consultations concerning the impugned decision that affected them. As a result, adherence to appropriate consultative processes has become a good indicator of Article 27 compatibility.<sup>26</sup>

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<sup>19</sup> Human Rights Committee, *Views: Communication No 167/1984*, UN Doc Supp No 40 (A/45/40) (26 March 1990) [32.2] (*Lubicon Lake Band v Canada*); Human Rights Committee, *Views: Communication No 547/1993*, UN Doc CCPR/C/55/D/547/1993 (13 October 1995) (*Mahuika v New Zealand*).

<sup>20</sup> The approach of the UN Human Rights Committee in this regard appears to have been echoed by the African Court on Human and Peoples' Rights in its interpretation of Indigenous cultural rights in Article 17(2) of the *African Charter on Human and Peoples' Rights* in *African Commission on Human and People's Rights v Republic of Kenya (Judgment)* (African Court of Human and Peoples' Rights, App No 006/2012, 26 May 2017) [190] (*Ogiek Case*); See also: Human Rights Committee, *Views: Communication No 3624/2019*, UN Doc CCPR/C/135/D/3624/2019 (21 July 2022) [8.14] (*Billy v Australia*) where the Committee found that Australia's inadequate response to climate change interfered with such activities.

<sup>21</sup> Human Rights Committee, *Views: Communication No 511/1992*, UN Doc CCPR/C/52/D/511/1992 (8 November 1994) [9.3] (*Länsman v Finland*) (*Länsman I*); See also: Human Rights Committee, *Views: Communication No 671/1995*, UN Doc CCPR/C/58/D/671/1995 (30 October 1996) [10.7] (*Länsman v Finland*) (*Länsman II*).

<sup>22</sup> *Länsman I* (n 21) [9.4].

<sup>23</sup> Taylor (n 18) 810.

<sup>24</sup> See, for example: Human Rights Committee, *Views: Communication No 779/1997*, UN Doc CCPR/C/73/D/779/1997 (4 February 1997) [7.6] (*Äärelä and Näkkäljärvi v Finland*).

<sup>25</sup> Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2013) 852.

<sup>26</sup> *Ibid* 855.

In earlier cases, the UN Human Rights Committee had given significant weight to mere consultation with Indigenous people. However, in *Poma Poma v Peru*,<sup>27</sup> the Committee appeared to require free, prior, and informed consent rather than just consultation. This may have been because of the extent of the damage done to cultural activities and the fact that no consultation at all had been undertaken by the State party in that matter.<sup>28</sup> As a result, it is currently unclear whether the Committee requires free, prior, and informed consent in all cases or only in certain cases where there is extensive infringement of Article 27 rights.

A significant amount of the Committee's case law has concerned situations where Indigenous individuals have been in conflict with larger Indigenous societies. In a number of matters, the Committee has found that, in such circumstances, restrictions on the Article 27 rights of members of an Indigenous minority must be shown to have a reasonable and objective justification and be necessary for the continued viability and welfare of the Indigenous minority as a whole.<sup>29</sup> In its decision in *Mahuika v New Zealand*, it also appeared to suggest that, as with limitations of Article 27 rights in general, adequate consultation will carry weight with the Committee in finding that any such justification is reasonable and objective.<sup>30</sup>

In its recent decision, *Roy in representation of the members of the Wunna Nyiyaparli Indigenous People v Australia* ('*Roy*'),<sup>31</sup> the Committee decided that Articles 14 and 27 require that, in any mechanism for delimiting, demarcating, and granting collective titles to the traditional territories of Indigenous peoples, there must be prior consultation with the Indigenous people involved,<sup>32</sup> as well as effective participation

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<sup>27</sup> Human Rights Committee, *Views: Communication No 1457/2006*, UN Doc CCPR/C/95/D/1457/2006 (27 March 2009) ('*Poma Poma v Peru*') [7.6].

<sup>28</sup> Joseph and Castan (n 25) 857. In the recent decision of *Ailsa Roy, in representation of the members of the 'Wunna Nyiyaparli Indigenous People v Australia'* the Committee required effective participation by Indigenous people in judicial proceedings regarding their traditional lands.

<sup>29</sup> Human Rights Committee, *Views: Communication No 24/1977*, UN Doc CCPR/C/OP/1 (14 August 1979) [16]-[17] ('*Lovelace v Canada*'); Human Rights Committee, *Views: Communication No 197/1985*, UN Doc CCPR/C/33/D/197/1985 (27 July 1988) [9.8] ('*Kitok v Sweden*'); *Mahuika v New Zealand* (n 19) [9.6]; Human Rights Committee, *Views: Communication No 2102/2011*, UN Doc CCPR/C/110/D/2102/2011 (26 March 2014) [7.6] ('*Paadar v Finland*').

<sup>30</sup> *Mahuika v New Zealand* (n 19) [9.8].

<sup>31</sup> Human Rights Committee, *Views: Communication No 3585/2019*, UN Doc CCPR/C/137/D/3585/2019 (15 March 2023) ('*Wunna Nyiyaparli Indigenous People v Australia*').

<sup>32</sup> *Ibid* [8.5].

of those Indigenous people in the relevant proceedings.<sup>33</sup> This includes that the State must take all effective measures to ensure that Indigenous people can understand and be understood in such proceedings, including the provision of legal aid to ensure Indigenous people are represented in relevant proceedings.<sup>34</sup> While the Committee did not rule whether traditional lands needed to be under Indigenous ownership and control, it did refer to the right of Indigenous people to their traditional territory as a 'fundamental right'.<sup>35</sup> Therefore, the question of whether Article 27 can lead to a requirement of Indigenous ownership or control of traditional lands is an open one that has yet to be directly ruled on by the Committee. However, the statements in the *Roy* decision appear to suggest that the Committee might be open to such an argument in an appropriate matter.

### B Property Rights

Beginning in 2001, the Inter-American Court of Human Rights has found that traditional ownership by Indigenous peoples of their traditional lands gives rise to a property right in international law, which has the equivalent legal effect of a state-granted full property title.<sup>36</sup> This analysis was then adopted by the African Commission on Human and Peoples' Rights<sup>37</sup> and the African Court of Human and Peoples' Rights.<sup>38</sup>

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<sup>33</sup> Ibid [8.7].

<sup>34</sup> Ibid [8.13], [10].

<sup>35</sup> Ibid [8.7].

<sup>36</sup> See a summary of this jurisprudence in: *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina (Judgment, Merits, Reparations and Costs)* (Inter-American Court of Human Rights Series C No 400, February 6 2020) [173] ('*Lhaka Honhat*') [93]-[98]. For another overview of most of the case law see generally: Mariana Monteiro de Matos, *Indigenous Land Rights in the Inter-American System; Substantive and Procedural Law* (Brill Nijhoff Publishers, 2020).

<sup>37</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of the Endorois Welfare Council v Kenya* (African Commission on Human and Peoples Rights, Case No 276/2003, 4 February 2010) [199], [238] ('*Endorois Decision*'). This decision marked a turning point for the African Commission in favour of Indigenous land rights, especially in terms of its rejection of a system of land access for Indigenous people in favour of one of land ownership, see: Jérémie Gilbert, 'Indigenous Peoples' Human Rights in Africa: A Pragmatic Revolution of the African Commission on Human and Peoples' Rights' (2011) 60(1) *International and Comparative Law Quarterly* 245, 246, 260.

<sup>38</sup> *African Commission on Human and Peoples' Rights v Republic of Kenya (Judgment)* (African Court of Human and Peoples' Rights, Application No.006/2012, 26 May 2017) [123]ff ('*Ogiek Case*'). In this case the African Court interpreted the right to property in the light of Art 26 of the UNDRIP to come to a similar conclusion to that of the Inter-American Court: Lucy Claridge, 'The Approach to UNDRIP Within the African Regional Human Rights System' (2019) 23(1-2) *International Journal of Human Rights* 267, 274. See also: *African Commission on Human and Peoples' Rights v Republic of Kenya*

The Inter-American Court's jurisprudence<sup>39</sup> on this issue began with its seminal 2001 judgment in *Mayagna (Sumo) Awas Tingni Community v Nicaragua* ('Awas Tingni').<sup>40</sup> The Court's reasoning in that matter began with an analysis that the right to property in Article 21 of the American Convention on Human Rights<sup>41</sup> had an autonomous meaning distinct from that of the right to property in the domestic law of member states.<sup>42</sup> It further held that the right to property under the American Convention included the rights of members of Indigenous communities to their traditional lands.<sup>43</sup>

The Inter-American Court then set out why the right to property should include the right of Indigenous peoples to their traditional lands in the following well-known passage:

Indigenous groups, by the fact of their existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognised and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession or production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.<sup>44</sup>

Originally, in *Awas Tigni*, it was said by the Inter-American Court that what was needed to be shown by an Indigenous people to avail themselves of this property right was possession of traditional lands.<sup>45</sup> However, in later decisions, the Court clarified that it is the all-encompassing relationship of Indigenous people with their traditional

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*(Reparations)* (African Court of Human and Peoples' Rights, App No 006/2012, 23 June 2022) ('*Ogiek Reparations*').

<sup>39</sup> One commentator has referred to the Inter-American Court of Human Rights as a world leader in the adjudication and redress of Indigenous land claims – influencing authorities around the globe – see: Thomas Antkowiak, 'A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous peoples' (2014) 25(1) *Duke Journal of Comparative and International Law* 1, 3.

<sup>40</sup> *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua (Judgment, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 79, August 31 2001) ('*Awas Tingni*').

<sup>41</sup> *American Convention on Human Rights*, opened for signature 22 November 1968, 1144 UNTS 123 (entered into force 18 July 1978).

<sup>42</sup> *Awas Tingni* (n 40) [146].

<sup>43</sup> *Ibid* [148].

<sup>44</sup> *Ibid* [149].

<sup>45</sup> *Ibid* [151].

lands, as outlined in the quote above, that must be shown for Indigenous people to avail themselves of the property right.<sup>46</sup> The Court also developed a set of flexible evidential rules as guidance on when such a relationship exists.<sup>47</sup>

Because the Court has said that it is the nature of the relationship that Indigenous people have with their land that gives rise to a property right in international human rights law, it has also said that tribal peoples who are not Indigenous to an area but have the same sort of relationship to areas of land can have the same property right in relation to that land.<sup>48</sup> As a result, the Inter-American Court has also occasionally developed the jurisprudence applicable to Indigenous people in cases concerning tribal peoples who are not Indigenous.<sup>49</sup>

In its subsequent 2005 judgment in *Yakye Axa Indigenous Community v Paraguay*, the Court emphasised that State parties were required not only to acknowledge the right to communal property but to make this 'truly effective in practice'.<sup>50</sup> This was then clarified in its 2006 judgment in *Sawhoyamaxa Indigenous Community v Paraguay*,<sup>51</sup> where the Court stated that traditional possession of their lands by Indigenous people has equivalent effects to those of a state-granted full property title, and that traditional possession entitles Indigenous people to demand official recognition and registration of that property title.

In its recent judgment on reparations in the *Ogiek Case*, the African Court of Human and Peoples' Rights suggested that, in relation to the common law jurisdiction of

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<sup>46</sup> See, for example: *Case of the Kaliña and Lokono Peoples v Suriname (Judgment, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 309, November 25 2015) [150] ('*Kaliña and Lokono Peoples*').

<sup>47</sup> *Ibid* [151];

<sup>48</sup> *Case of the Saramaka People v Suriname (Judgment, Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 172, November 28 2007) ('*Saramaka*') [84]-[85].

<sup>49</sup> In that regard, see also: *Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Columbia (Judgment, Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, November 20 2013) ('*Operation Genesis*'); *Case of the Garifuna Punta Piedra Community and its Members v Honduras*, Judgment (Inter-American Court of Human Rights, Series C No.304, October 8, 2015) ('*Garifuna Punta Piedra*'); *Case of the Community Garifuna Community of Triunfo De La Cruz and Its Members v Honduras (Judgment)* (Inter-American Court of Human Rights, Series C No 305, October 8 2015) ('*Triunfo De La Cruz*').

<sup>50</sup> *Case of the Yakya Axa Indigenous Community v Paraguay (Judgment, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 12, June 17 2005) [141] ('*Yakya Axa*').

<sup>51</sup> *Case of the Sawhoyamaxa Indigenous Community v Paraguay (Judgment, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 146, March 29 2006) [128] ('*Sawhoyamaxa*').

Kenya, this may not require that a State provide a fee simple title to an Indigenous people in all circumstances as long as the Indigenous people can control access to traditional lands.<sup>52</sup> The status of this obiter comment is unclear. It may be that the African Court and the Inter-American Court disagree as to the meaning of what any 'full property title' might be that would need to be granted to an Indigenous people in such circumstances.

In subsequent cases, the Inter-American Court has indicated that, in addition to the obligation to grant title, the State also has an obligation to delimit and demarcate traditional lands so that there is 'geographical certainty'.<sup>53</sup> In more recent cases, the Court has also held that the process of demarcation, titling, and removal of land encumbrances must occur within a reasonable time period,<sup>54</sup> and that the State must ensure that Indigenous people control and own their territory without any type of outside interference by third parties.<sup>55</sup>

If Indigenous people have unwillingly left their traditional lands or lost possession of them according to this jurisprudence, they continue to have property rights in them even though they lack legal title, unless those lands have been lawfully transferred to third parties in good faith.<sup>56</sup> The members of Indigenous peoples who have unwillingly lost possession of their lands to third parties where lands have been lawfully transferred in good faith are entitled to restitution of those lands or to obtain other lands of equal size and quality.<sup>57</sup> In such situations, the Court has indicated that selection and transfer of alternative lands or payment of compensation is not purely at the discretion of the State, but rather a consensual agreement must be reached with

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<sup>52</sup> *Ogiek Reparations* (n 38), [111].

<sup>53</sup> See, for example: *Case of the Kuna Indigenous people of Madungandí and the Emberá Indigenous people of Bayano and Their Members v Panama (Judgment)* (Inter-American Court of Human Rights, Series C No 284, October 14 2014) [119] ('Kuna') and *Case of the Xucuru Indigenous People and Its Members v Brazil (Judgment, Preliminary Objections, Merits, Reservations and Costs)* (Inter-American Court of Human Rights, Series C No 346, January 5 2017) [118] ('Xucuru').

<sup>54</sup> *Xucuru* (n 53) [132]-[135]; *Kuna* (n 53) [137].

<sup>55</sup> *Kaliña and Lokono Peoples* (n 46) [132]; *Saramaka* (n 48) [115]; *Triunfo De La Cruz* (n 49) [153].

<sup>56</sup> *Sawhoyamaxa* (n 51) [128].

<sup>57</sup> *Ibid*; *Lhaka Honhat* (n 36) [95].

the Indigenous people involved, in accordance with their consultation mechanisms, values, customs, and customary law.<sup>58</sup>

The right of Indigenous people to property in their traditional lands is not absolute. The Court has also set out circumstances where a State can limit Indigenous property rights by issuing concessions or mining permits for natural resources on traditional lands. In *Saramaka People v Suriname* the Inter-American Court stated that the right to property protects those natural resources traditionally used and necessary for the very survival, development, and continuation of the relevant tribal or Indigenous people.<sup>59</sup> It then stated that a State can limit Indigenous property rights where the restrictions are a) previously established by law, b) necessary, c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society and, additionally, when it does not deny the survival of the Indigenous or tribal people.<sup>60</sup>

It then added to this, in order to ensure that the restriction of Indigenous or tribal property rights does not amount to a denial of their survival as an Indigenous or tribal people, the State must abide by three safeguards: 1) the State must ensure the effective participation of the Indigenous or tribal people, in accordance with their customs or traditions, in any decision regarding any development, investment, exploration, or extraction on their lands; 2) the State must ensure that the Indigenous or tribal people receive a reasonable benefit from any such plan; and 3) the State must ensure that no concession will be given by it on Indigenous or tribal land unless and until independent and technically competent agencies, under the State's supervision, perform a prior environmental and social impact assessment of the proposed concession.<sup>61</sup>

The requirement of consultation in situations of restriction of Indigenous and tribal property rights was expanded upon by the Court in *Kitchwa Indigenous People of the*

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<sup>58</sup> *Lhaka Honhat* (n 36) 102; *Yakya Axa* (n 50) [151].

<sup>59</sup> *Saramaka* (n 48) [122]. As a result, at least one commentator has argued that the rules as to limitation of property rights for extraction of resources only concern resources not traditionally used by the Indigenous people concerned: Alejandro Fuentes, 'Protection of Indigenous Peoples' Traditional Lands and Exploitation of Natural Resources: The Inter-American Court of Human Rights' Safeguards' (2017) 24(3) *International Journal of Minority and Group Rights* 229, 242.

<sup>60</sup> *Ibid* [127]-[128].

<sup>61</sup> *Ibid* [129].

*Sarayaku v Ecuador*.<sup>62</sup> In that decision, the Court set out that such consultation must be conducted in good faith, using culturally appropriate procedures, and must be aimed at reaching an agreement. In addition, it stated that the people or community must be consulted in accordance with their own traditions during the early stages of the development or investment plan, and not only when it is necessary to obtain the communities' approval, and that the State must ensure that the community is aware of the potential benefits and risks so that they can decide whether to accept the proposed development or investment plan.<sup>63</sup>

With regard to legislative proposals, it was held that Indigenous peoples or communities must be consulted in advance during all stages of the process of producing the legislation, and that those consultations must not be restricted to proposals.<sup>64</sup> The onus is on the State, and not the Indigenous people or community, to prove that the requirements of prior consultation have been adhered to.<sup>65</sup> In addition, according to the Court consultation is the responsibility of the State and cannot, therefore, be delegated by the State to private companies or third parties.<sup>66</sup> In addition to reviewing the adequacy of any participation, the Inter-American Court has also not been hesitant in reviewing the adequacy of any environmental and social impact statement.<sup>67</sup> A special case of such limitations on Indigenous property rights in traditional lands appears to be when such property rights are limited in order to create nature reserves or national parks to protect the environment. In those

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<sup>62</sup> *Case of the Kitchwa Indigenous People of the Sarayaku v Ecuador (Judgment, Merits and Reparations)* (Inter-American Court of Human Rights, Series C No 172, June 27 2012) ('*Kitchwa*') According to some commentators the Court has found that this requirement of consultation is a general principle of international law – see: Lisl Brunner and Karla Quintana, 'The Duty to Consult in the Inter-American System; Legal Standards After Sarayaku' (2012) 16(35) *American Society of International Law – Insights*.

<sup>63</sup> *Ibid* [177].

<sup>64</sup> *Ibid* [181].

<sup>65</sup> *Ibid* [179].

<sup>66</sup> *Ibid* [187]. Some commentators have argued that in some circumstances under this jurisprudence the consent of Indigenous people is what is required and not mere consultation – see: Efrén Olivares Alanís, 'Indigenous Peoples' Rights and the Extractive Industry; Jurisprudence from the Inter-American System of Human Rights' (2013) 5(1) *Goettingen Journal of International Law* 187, 213. Other commentators, however, are of the view that the Court has not required consent in any circumstances – see: Jo Pasqualucci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 27(2) *Wisconsin International Law Journal* 51, 90.

<sup>67</sup> *Ibid* [207]. In this instance the Court found the report inadequate.

circumstances, the Court has found that traditional Indigenous practices assist, rather than hinder, environmental protection.<sup>68</sup> As a result, it has been found that the failure of a State to allow participation of Indigenous people in the management of nature reserves on their traditional lands and to prevent them from accessing land in such nature reserves can constitute a violation of the right to property in international human rights law.<sup>69</sup>

In addition to the above, the Inter-American Commission in *Mary and Carrie Dann v United States*<sup>70</sup> set out certain standards that States must adhere to in the determination of the property rights of Indigenous peoples to their traditional lands.<sup>71</sup> Specifically, any determination by States of the extent to which Indigenous claimants maintain property interests in their traditional lands must be based upon a process of fully informed and mutual consent on the part of the Indigenous community as a whole. This requires, as a minimum, that all members of the community are fully and accurately informed of the nature and consequences of the process and are provided with an effective opportunity to participate both individually and as a collective in the process.<sup>72</sup>

The collective interests of Indigenous people in their ancestral lands are not to be asserted to the exclusion of the participation of individual members in the process.<sup>73</sup> In addition, the process must be effective and fair in the sense that it sufficiently reviews and actually comes to a conclusion on the evidence concerning issues such as the extinguishment of Indigenous title on such traditional land so that whether an Indigenous people can properly claim title to all or part of their traditional lands can be determined as a matter of fact.<sup>74</sup>

The above summary of the relevant jurisprudence sets out the rulings of the Inter-American Court (or Commission) of Human Rights and the African Court (or Commission) of Human and Peoples' Rights. It should be noted, however, that the

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<sup>68</sup> *Kaliña and Lokono Peoples* (n 46) [173].

<sup>69</sup> *Ibid* [198].

<sup>70</sup> *Mary and Carrie Dann v United States* (Inter-American Commission on Human Rights, Case No 11.140, December 27 2002) ('Dann').

<sup>71</sup> It should be noted, however, that these findings were based on both the right to property and the right to due process and judicial protection read together.

<sup>72</sup> *Dann* (n 70) [140].

<sup>73</sup> *Ibid* [165].

<sup>74</sup> *Ibid* [142].

view of the third regional human rights court globally, the European Court of Human Rights, does not feature in the above discussion. Although the European Commission on Human Rights has stated in passing in Indigenous rights cases that the right to 'possessions' (i.e. the right to property) applies to the claims made by Indigenous peoples regarding their lands, no case involving such an issue has, in fact, passed the admissibility stage and been ruled upon in the European system on its merits.<sup>75</sup>

Legal scholars are in disagreement as to what this position in the European Court and Commission means.<sup>76</sup> Some are critical of the European system for its lack of protection of Indigenous rights, with at least one attributing that lack of protection to a private law concept of property and a reluctance to adapt its jurisprudence to that of the other regional human rights systems.<sup>77</sup> However, other scholars see the European Court as only one step away from adopting the recognition of Indigenous ancestral tenure as property in a similar form to that adopted in the other regional systems once it has before it a 'good case'.<sup>78</sup>

The best view appears to be that the European Court of Human Rights currently has no position on the issue and that, as a result, the current international law of human rights regarding Indigenous property rights to traditional lands is determined by the jurisprudence of the Inter-American and African regional human rights systems.

#### IV HOW THE ABOVE HUMAN RIGHTS ARE PROPERLY INTERPRETED IN THE AUSTRALIAN HUMAN RIGHTS ACTS

In terms of the above discussion of applicable internationally recognised human rights, the right to culture/minority cultural rights exists in all the Australian human rights acts, while the right to property exists in the CHRRV and the HRAQ, but not in the HRAACT.

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<sup>75</sup> Péter Kóvacs, 'Indigenous Issues Under the European Convention on Human Rights, Reflected in an Inter-American Mirror' (2016) 48 *George Washington International Law Review*, 781, 786.

<sup>76</sup> *Ibid* 796.

<sup>77</sup> Elena Abrusci, 'Judicial Fragmentation on Indigenous Property Rights: Causes, Consequences and Solutions' (2017) 21(5) *International Journal of Human Rights* 550, 551.

<sup>78</sup> Kóvacs (n 75) 806.

*A Indigenous Right to Culture/Minority Cultural Rights*

Both specific Indigenous rights to culture and more general cultural rights of minorities that encompass Indigenous rights are included in all three of the Australian human rights acts. Because there is less jurisprudence on these rights, I will first consider the specific Indigenous rights to culture in each of the Australian human rights acts. After that, I will consider the protection of general minority cultural rights.

*1 Specific Indigenous Cultural Rights*

Section 27(2) of the HRAACT contains specific cultural rights for Aboriginal and Torres Strait Islander peoples. The 'Notes' just below the text of section 27(2) state that the primary sources of the rights there are Articles 25 and 31 of the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP')<sup>79</sup> and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').<sup>80</sup> Similarly, s19(2) of the CHRRV also protects the distinctive cultural rights of Indigenous Australian peoples. According to the Explanatory Memorandum to that Act, s19(2) is based on Art 25 of UNDRIP and Article 27 of the *International Covenant on Civil and Political Rights* ('ICCPR')<sup>81</sup> (as considered above). Lastly, s28(2) and (3) of the HRAQ also protect the distinctive cultural rights of Indigenous peoples. According to the Explanatory Notes for this provision it is based on Articles 25, 29 and 31 of UNDRIP and Article 27 of the ICCPR.

It is noteworthy that none of s27(2), HRAACT, 19(2), CHRRV and s28(2) and (3) of the HRAQ ('the specific Indigenous cultural provisions') were stated to be based on Article 26 of the UNDRIP, which specifically provides rights to Indigenous people regarding the land they have traditionally occupied or used.

By itself, this omission suggests that the intention behind the specific Indigenous cultural provisions, at least in Victoria and Queensland, was not that they would lead to Indigenous rights to traditional lands that approach those in a fee simple title, but

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<sup>79</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted September 13 2007).

<sup>80</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>81</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

rather that Indigenous people could have statutory rights to do certain things on the lands owned by other people. However, commentators on Article 25 of the UNDRIP have stated that in some cases, exclusive possession may be necessary for Indigenous people to fully realise their spiritual relationship with lands, territories and resources under Article 25 alone.<sup>82</sup> Article 25 thus certainly provides statutory rights of access for Indigenous peoples to some lands owned by non-Indigenous people. However, in some circumstances, on the basis of the authoritative commentary, it may also require the transfer of ownership or control to Indigenous peoples.

This result appears to be confirmed by a matter that was recently before the Queensland Human Rights Commission for conciliation. In that matter, a leader in the Aboriginal community and his family were camping, practicing their culture and performing traditional ceremonies on land subject to a pastoral lease. Police officers approached the group and asked them to leave, stating that an international mining company occupying the land had claimed they were 'trespassing'. The family told the police that they had expert advice that they could lawfully exercise their cultural rights and responsibilities on the land; despite this, the police required the group to pack up their equipment and leave within the hour. At the conclusion of the conciliation in the Queensland Human Rights Commission, the Queensland Police Service provided a public statement of regret and committed to taking into account the relevant legal and cultural issues in future responses.<sup>83</sup>

This seems to suggest that in Queensland s28(2), HRAQ certainly provides statutory rights of access to some Indigenous people to traditional lands, perhaps even to the extent of providing a defence to a charge of trespass. It also appears that it was because of the specific facts of the complaint that the wider question of whether the exercise of cultural rights required the transfer of rights to land to Aboriginal people was not addressed.

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<sup>82</sup> Claire Charters, 'Indigenous Peoples' Rights to Lands, Territories and Resources in the UNDRIP' in Jessie Hohmann, Marc Weller (ed), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 411.

<sup>83</sup> Queensland Human Rights Commission, *Annual Report 2020-21* (Report, 9 November 2023) 49-50.

The situation may be similar, but for different reasons, in the ACT. The notes in the text of s 27 of the HRAACT state that the primary sources of the rights in s27(2) are Articles 25 and 31 of the UNDRIP. However, in a note directly under this, it also states, 'The primary source of these rights is the International Covenant on Economic, Social and Cultural Rights.'<sup>84</sup>

Cultural rights are protected by Article 15 of the ICESCR. In its interpretation of Article 15, the UN Economic and Social Rights Committee has interpreted the right to take part in cultural life as encompassing, in appropriate cases, the right of Indigenous peoples to their ancestral land and natural resources.<sup>85</sup> This statement seems to suggest a requirement that ownership and control must be provided where it is necessary to preserve the exercise of Indigenous culture.

Whether the position of Indigenous people in the ACT is stronger than that of Indigenous people in Victoria and Queensland under the specific Indigenous cultural provisions may depend on how readily a court would accept academic commentary on Article 25 of the UNDRIP as compared to the more explicit statement of the UN Social and Economic Rights Committee.

As mentioned above, these specific cultural rights are contained in s 27(2), HRAACT, s 19(2), CHRR and s 28, HRAQ. However, almost all the existing case law on such specific cultural rights has occurred in Victoria interpreting s 19(2), CHRR.

In *Clark-Ugle v Clark*<sup>86</sup> the Victorian Court of Appeal at [140]-[149] held that s 19(2)(d) does not distinguish between Aboriginal persons who live on the land to which they have connection under traditional law and customs and other Aboriginal people who do not live on such land, but who nevertheless maintain a distinctive spiritual, material, and economic relationship with that land. More recently, in

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<sup>84</sup> It is noted that in the ACT and Victoria such a note is not part of an Act: *Legislation Act 2001* (ACT) s 127(1) and *Interpretation of Legislation Act 1984* (Vic) s 36(3A). The case may be otherwise in Queensland where such notes may, depending on their nature, be part of an Act: *Acts Interpretation Act 1954* (Qld) s 14(4). It would seem arguable though, however, that merely because a note is not part of an Act does not mean that a court may not take it into account – see, for example: s 36(4) of the *Interpretation of Legislation Act 1984* (Vic).

<sup>85</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 21: Right of Everyone to Take Part in Cultural Life (Art 15, para, 1(a))*, 43<sup>rd</sup> session, UN Doc E/C.12/GC/21 (21 December 2009) [36]. See also: Ben Saul, David Kinley, and Jacqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (Oxford University Press, 2014) 1198.

<sup>86</sup> *Clark-Ugle v Clark* [2016] VSCA 44 (Tate JA, with whom Ferguson & McLeish JJA agreed).

*Gardiner v Attorney-General (No.2)*<sup>87</sup> Richards J in the Supreme Court of Victoria held that it is at least arguable that the cultural rights protected by s 19(2) may be enjoyed by Aboriginal persons beyond the members of a traditional owner group within the meaning of s 3(a) of the *Traditional Owner Settlement Act 2010* (Vic). Neither of these decisions, however, reaches the question of the extent to which Indigenous people might have rights to land owned by third parties or whether the cultural rights of Indigenous people may necessitate ownership of such land, and so they are not of much assistance.

A starting point for the interpretation of all provisions of the Australian human rights acts, as recently mentioned by Martin J in the Supreme Court of Queensland in *Owen-Darcy v Chief Executive, Queensland Corrective Services*,<sup>88</sup> is that each of those human rights acts is beneficial and remedial legislation, and that their provisions should, as a result, be given a wide construction. A further starting point, as set out above is that both common law principles of statutory interpretation and specific authorising provisions of each of the Australian human rights acts authorise the relevant courts to interpret provisions of the Australian human rights acts in line with the treaties and international instruments that they are intended to implement. Lastly, as also detailed above, there have been statements in the Supreme Courts of both Victoria and the ACT to the effect that the relevant courts are properly assisted by international jurisprudence, although there are also judicial statements, including statements made by the High Court of Australia, to the effect that the weight to be given to international jurisprudence is to be carefully weighed according to the circumstances.

A beneficial and remedial interpretation of the specific Indigenous Australian cultural provisions in the three Australian human rights acts would suggest that both Indigenous Australian cultural rights on land privately owned by third parties and rights to ownership of lands where the enjoyment of culture requires it, as set out in international human rights law, would be created by those provisions. There are several reasons, however, why a relevant court may be reluctant to reach such a

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<sup>87</sup> *Gardiner v Attorney-General (No.2)* [2020] VSC 252 [53].

<sup>88</sup> *Owen-Darcy v Chief Executive* (n 11) [118]-[119].

conclusion. First, this result is not explicitly stated in the statutory provisions, and an Australian court may favour a literal interpretation of the relevant provisions. Second, there may be an argument that this outcome reflects foreign legal views and is incompatible with the property law system in the relevant Australian jurisdictions.

The first objection to the argument that the specific Indigenous cultural provisions fully incorporate the results of international law is reflected in the wording of s 32(2) of the HRAACT, as outlined above. The reservations in s 32(2) are often linked to the view that for an Australian court to go beyond the natural language of a statute would be to act beyond the traditional conception of the judicial function. In light of the above, it may be argued that understanding the specific Indigenous cultural provisions of the Australian human rights acts in the context of international instruments such as the UNDRIP or the ICESCR undermines the desirability of people relying on the ordinary meaning of the statutory provision. It may also be argued that UNDRIP and documents such as General Comments of the ICESCR are not generally accessible to the public and that resorting to such documents would unduly prolong proceedings by requiring an Australian court to ascertain the international law position on various human rights issues. It may also be argued that for a court to go beyond the text of the relevant statutory provisions would involve a court making political rather than legal decisions.

However, there are a number of strong arguments as to why the above approaches to interpreting the specific Indigenous cultural provisions should not prevail. First, as set out above, it is clear from the second reading speeches, explanatory memoranda, and notes in the text of the provisions that the provisions were intended to implement international human rights standards. The idea was that any such human rights complaints would be dealt with under an Australian human rights act so that Australian individuals would not have to complain to international human rights bodies.<sup>89</sup> An approach that interprets such provisions differently from international standards would defeat that statutory purpose and would require people to seek

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<sup>89</sup> This point was made in relation to remedies in the human rights act in New Zealand by Hardie Boys J in the NZ Court of Appeal in *Simpson v Attorney-General (Baigent's Case)* [1994] 2 NZLR 667. See also *Hosking v Runting* [2005] 1 NZLR1, [6] (Gault P and Blanchard J).

remedies for human rights violations from international bodies. This would be an undesirable result.

Second, for a statute that is intended to implement standards contained in international agreements and instruments, a literal approach would be contrary to the common law rules concerning the interpretation of such statutes, as well as the long-standing practice of courts in interpreting the Australian human rights acts by drawing upon international law decisions.<sup>90</sup> In this context, it is hard to see how statutory rights to enter private property or to have land transferred for Indigenous people would be reflective of foreign legal views and incompatible with the legal systems in Victoria, Queensland, or the ACT. Statutory limits on property rights and the resumption of property rights are common in all three jurisdictions. Such statutory rights under the Australian human rights acts would simply be additional such rights.

## *2 Minority Cultural Rights*

A threshold question in relation to how general rights in Australian human rights acts are interpreted in the context of Indigenous peoples would appear to be whether all cultural rights of Indigenous people are subsumed under the specific Indigenous cultural provisions of the Australian human rights acts. If this was the case, then the general minority cultural rights provisions in such statutes would essentially have nothing to do in the context of Indigenous cultural rights. If this is not the case, then the question is whether Indigenous people under the Australian human rights acts have cultural rights under both the specific Indigenous cultural provisions and the general minority cultural rights provisions. Given that the specific Indigenous cultural provisions are more specific it might be argued that it would be more logical and more in line with the common law principles of statutory interpretation<sup>91</sup> to conclude that Indigenous people would only have cultural rights under the specific Indigenous cultural provisions.

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<sup>90</sup> In relation to that practice see: Pound and Evans (n 17) 280.

<sup>91</sup> At common law this is the *eiusdem generis* rule of statutory interpretation: D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 2014) 171.

However, as stated above, the Australian human rights acts are remedial and beneficial legislation whose provisions should be given a wide construction. On this basis, it may be argued that a wide view should be taken that allows for Indigenous cultural rights to be derived both from the specific Indigenous cultural provisions and the more general minority cultural rights provisions. If this was the case, then the general minority provisions would be likely, for similar reasons to those set out above in relation to the specific Indigenous rights provisions, to be understood by courts in the light of the jurisprudence of the of the UN Human Rights Committee on Article 27 of the ICCPR as set out above.

### *B Property Rights*

Given, as outlined above, that two of the three regional systems in international human rights law base their protection of Indigenous rights to traditional lands on the human right to property, it is a matter of some significance as to how the rights to property (and protections against their deprivation) are interpreted in Victoria and Queensland, where human rights to property have been legislated into State law. Surprisingly, however, none of the secondary sources of statutory interpretation of these provisions, such as Explanatory Memorandums or Second Reading Speeches, nor the text of the CHRRV and the HRAQ, provides any explicit guidance as to whether the protections against deprivation of property include a property right of Indigenous people in their traditional lands.

There are a number of different conclusions that could be drawn from this. One is that the Victorian and Queensland Parliaments were unaware of the jurisprudence of the Inter-American and African human rights systems on Indigenous property rights to land and operated on the view that the property rights protected under the CHRRV and the HRAQ would be those known to common law. However, that view is clearly at variance with secondary materials explicitly specifying that the human rights in those statutes were to be interpreted in line with principles and instruments in international human rights law. Another view may be that Parliament simply wanted to state the right and leave it to the courts to interpret the full implications of the right to property. Such a view would be consistent with explanations of the right to

property in scholarly expositions of that legislation,<sup>92</sup> as well as the Judicial College of Victoria *Charter of Human Rights and Responsibilities Bench Book*,<sup>93</sup> which draw heavily on the jurisprudence of the European Court of Human Rights when considering the right to property. If the jurisprudence of the European Court can be drawn on to clarify the full implications of the right to property, it is hard to see why the jurisprudence of the Inter-American and African human rights systems could not also be drawn on for the same purpose, provided that they were consistent with the legal framework in Victoria and Queensland.

Understanding the rights to property in the CHRRV and the HRAQ in light of the Inter-American and African Indigenous human rights jurisprudence would also be consistent with the broad and liberal way in which the Victorian and Queensland courts have approached the right to property. In *PJB v Melbourne Health (Patrick's Case)*,<sup>94</sup> Bell J stated that the terms of the right should be interpreted 'liberally and beneficially to encompass economic interests and deprivation in a broad sense.' Similarly, the Land Court of Queensland in *Cement Australia (Exploration) Pty Ltd & Anor v East End Mine Action Group & Anor*<sup>95</sup> distilled three principles from the above decision in *Patrick's Case*. First, deprivation of property encompasses economic interests and deprivation in a broad sense. Second, formal expropriation is not required, and de facto expropriation of property is sufficient to breach the right. Third, while it is not contained in the Charter or the HRA, the right to ownership and peaceful enjoyment of property are key features of common law. This last point does not appear to be saying that the right to property under the HRAQ is limited to what would amount to deprivations of the same right at common law. Rather, it appears to indicate that the common law understanding of the right to property and the right under the HRAQ may overlap and reinforce each other in some circumstances.

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<sup>92</sup> Pound and Evans (n 17) 183.

<sup>93</sup> *Charter of Human Rights and Responsibilities Bench Book* (Judicial College of Victoria, 9 November) <<https://judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57496.htm>>

<sup>94</sup> *PJB v Melbourne Health* (n 9) [87].

<sup>95</sup> *Cement Australia (Exploration) Pty Ltd & Anor v East End Mine Action Group & Anor* [2021] QLC 22, [388].

The conclusion that the right to property encompasses Indigenous property rights in traditional lands as outlined in the Inter-American and African human rights systems is also reinforced by (1) the remedial and beneficial purposes of the CHRRV and the HRAQ; (2) the provisions in both statutes empowering the courts to draw on international human rights jurisprudence; (3) the practice of courts in both jurisdictions in drawing on international human rights jurisprudence;<sup>96</sup> as well as (4) the common law principle of statutory interpretation that requires statutes implementing international instruments to be interpreted in light of the meaning attributed to those instruments in international law. A view that the rights to property in the CHRRV and the HRAQ extend to Indigenous rights to traditional land is also reinforced by the fact that other provisions in both pieces of legislation require such a result. It is a general common law principle of statutory interpretation that statutory provisions are to be construed to be consistent with the language and purpose of all the provisions of the statute.<sup>97</sup>

Section 8(3), CHRRV and s 15(3), HRAQ both contain rights to equality and equal protection of the laws and arguably require the result that the right to property extends to Indigenous rights to traditional land. In Victoria, the right to equality has been seen to be capable of violation where provisions of legislation are applied in an unequal way by courts, and the right to equal protection of the law has been stated to require equality as a matter of substance.<sup>98</sup> An interpretation by courts of the rights to property in the CHRRV and the HRAQ that they protected other people's rights to property but did not extend to the protection of the rights of Indigenous peoples to their traditional lands would be likely to result in a breach of the rights to equality and equal protection of the law guaranteed under those statutes.<sup>99</sup> In that sense, the CHRRV and the HRAQ both appear to provide that a narrow interpretation of the right to property and what circumstances would lead to a breach of their provisions.

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<sup>96</sup> See for example: In *Owen-Darcy v Chief Executive* (n 11) [254] Martin J draws on the jurisprudence of the European Court of Human Rights.

<sup>97</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [69]; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315 (Mason J).

<sup>98</sup> *Re Lifestyle Communities Ltd (No3)* (2009) 31 VAR 286, [136]–[137] (Bell J).

<sup>99</sup> This analysis echoes that of the Inter-American Court of Human Rights where it also found that equal protection of the laws required the right to property to be interpreted to include property rights for Indigenous peoples in land: *Sawhoyamaxa* (n 51) [120].

Whether it technically leads to a breach of the rights to equality and equal protection of the laws or not, it would certainly be undesirable as a matter of statutory construction that an interpretation of the right to property be inconsistent with other statutorily protected human rights. As such, it would appear likely that courts would lean towards a liberal interpretation of the right to property that includes Indigenous rights to traditional lands.

Lastly, interpreting the right to property to include the right of Indigenous peoples to their traditional lands would not, as French CJ warned in *Momcolovic*, import law from alien legal systems that would be at odds with legal approaches and principles in Victoria and Queensland. The Inter-American human rights system has applied its approach to Indigenous property rights in land to the United States<sup>100</sup> and Belize<sup>101</sup> and the African human rights system has applied it to Kenya<sup>102</sup> – all countries with common law systems comparable to those in Victoria and Queensland. The legal systems of these countries are at least as similar to those in Victoria and Queensland as that in many civil law countries that feature in the jurisprudence of the European Court of Human Rights, such as France and Germany. Indeed, in many ways, they are much more similar.

## V CONCLUSION

As set out above, when the common law rules of statutory interpretation are considered along with the interpretation provisions in the Australian human rights acts themselves, and the text of the relevant provisions and the relevant case law in relation to them, it points strongly to the conclusion that the recently expanded international human rights jurisprudence on Indigenous rights to land forms part of the human rights enforceable under the Australian human rights acts. This conclusion opens up a series of other legal issues to be considered in future scholarship. However, what is clear is that based on the above analysis, the Australian human rights acts open a new avenue for Indigenous peoples to claim land outside of existing

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<sup>100</sup> *Dann* (n 70).

<sup>101</sup> *Maya Indigenous Community of the Toledo District v Belize* (Inter-American Commission on Human Rights, Case No 12.053, 12 October 2004) ('Maya Indigenous Community').

<sup>102</sup> *Endorois Decision* (n 37); *Ogiek Case* (n 22); *Ogiek Reparations* (n 38).

land rights and Native Title law. This new frontier of the use of the Australian human rights acts to assert the rights of Indigenous people to traditional lands could be of some importance in future Indigenous struggles for rights to land in the ACT, Victoria, and Queensland

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