

Traditional Pacific Land Rights and International Law: Tensions and Evolution¹

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I. INTRODUCTION

This paper outlines the potential benefits to all nations, including Australia, from a greater understanding of traditional Pacific land rights. It also shows how that understanding has been modified by international law developments and expectations. It begins by briefly outlining the status of Indigenous land rights in Australia. The paper then considers some aspects of international law of particular relevance to traditional Pacific land rights. Next, this paper discusses examples of friction between traditional land rights and international law. The paper concludes by considering potential future sources of tension and friction between Pacific nations' land rights and international law expectations, and how the international community and Pacific nations can symbiotically benefit from this friction.

Whilst focusing in large part on the uniqueness of different cultures, this paper emphasises the importance of recognising the many commonalities that exist amongst them. In 2009, Grant Sarra, an Indigenous executive, change agent, trainer, workshop facilitator, project manager, and report writer, presented a workshop for judicial officers on

¹ Based on a paper presented by Justice Margaret McMurdo AC, President of the Court of Appeal, Supreme Court of Queensland at the 18th Pacific Judicial Conference, 15 – 18 June 2009, Tahiti.

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Aboriginal and Torres Strait Islander People, and the Law in Queensland. Sarra observed that all Australians, whether Indigenous or non-Indigenous, have shared common values. Sarra suggested that these values were “caring, sharing, and respect for the land, people, and environment.” Members of the legal profession would probably add that these values must be under the umbrella of the rule of law, and an independent legal profession and judiciary.

Whilst most Pacific nations, including Australia, aspire to these shared common values, each country has distinct aspects to its culture and approach to traditional Indigenous land rights. Many nations, however, have more than one culture, and therefore, take a bi-cultural or even multi-cultural approach. To accurately record all traditional land rights in every Pacific nation would take many lifetimes, and is far beyond the scope of this paper.⁴ There are some commonalities amongst the Pacific nations. All have written laws providing that some person or body is the owner of land.⁵ Another commonality is the strong connection felt by Indigenous peoples with their land and its natural features.⁶ Pacific nations, however, vary considerably as to whether and how that connection is acknowledged. Some Pacific nations, such as the Cook Islands, Fiji, Kiribati, Nauru, Niue, American Samoa, Samoa, Solomon Islands, Tokolau, Tuvalu, and Vanuatu, have constitutional provisions or legislation providing for land to be held in accordance with Indigenous customs, usages, and traditions.⁷ Indeed, in the Cook Islands and Tuvalu, all land is held under customary land tenure.⁸

II. INDIGENOUS LAND RIGHTS IN AUSTRALIA

A brief discussion of the background to Indigenous land rights in Australia provides a useful platform for a wider consideration of international law and Pacific land rights. For tens of thousands of years before European contact, Indigenous peoples lived in what is now Australia under complex clan systems with diverse social and environmental rules and lore, and a variety of languages. They lived off and close to the land, which they nurtured, loved, and respected with deep spirituality.

⁴ A comprehensive overview of the topic is contained in JENNIFER CORRIN & DON PATERSON, *INTRODUCTION TO SOUTH PACIFIC LAW*, Chapter 10 ‘Land Law’ (2d ed. 2007).

⁵ *Id.* at 314-15.

⁶ S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 271 *ARIZ. J. INT’L & COMP. L.* 13, 35 (2004).

⁷ CORRIN & PATERSON, *supra* note 4, at 291.

⁸ Sue Farran, *Land rights and gender equality in the Pacific region*, 11 *AUSTL. PROP. L. J.* 131, 132 (2005).

During the colonial period following the 1788 European contact, international law recognised that one country could legally acquire occupied foreign land, either through conquest or cession. If the land was unoccupied, it could be declared *terra nullius*⁹ and subsequently acquired by the colonising nation. Some European colonial nations opportunistically extended the concept of *terra nullius* into what many now regard as a convenient legal myth. They used *terra nullius* to acquire land from people whom they deemed as “backward,” “barbarous,” and “without a settled law.” Britain founded the Australian colonies on the basis of *terra nullius*.¹⁰

The notion that Australia was *terra nullius* prior to British colonisation continued to be part of the law of the Federation of Australia until the High Court of Australia’s seminal decision in *Mabo v State of Queensland (No 2)*.¹¹ The High Court found that the Merriam people from the Torres Strait were entitled by way of common law native title to the possession, occupation, use and enjoyment of sections of the Murray Islands in the Torres Strait.¹² This native title was not extinguished either by the British annexation of the Murray Islands in 1879 or by any subsequent government actions. The *Mabo* decision was the first time that Australian courts unequivocally recognised that, insofar as Australia was concerned, the doctrine of *terra nullius* was a legal myth and that Australia was already inhabited when colonized by the British.¹³

With hindsight, perhaps the most remarkable thing about the *Mabo (No 2)* decision is that it took 204 years and some of the cleverest judicial minds in Australia to pronounce what Indigenous groups must have understood at the time they first experienced European contact. They knew they had a complex, organised, effective society with rules and lore closely entwined in collective clan ownership of the land on which the clan lived. They knew they were not “backward,” “barbarous,” or “without a settled law.”¹⁴ In *Wik Peoples v Queensland*,¹⁵ which took place four years after *Mabo (No 2)*, the High Court of Australia again considered the status of native title in Australia. The court recognised that an interest in land that was less than exclusive possession, in that case a

⁹ Derived from the Latin phrase “land belonging to no one.”

¹⁰ *Mabo v Queensland II* (1992) 175 CLR 1 at 34.

¹¹ *Id.*

¹² *Id.* at 97.

¹³ See e.g., *id.* at 58 (Brennan J), 109 (Deane & Gaudron JJ), & 180-182 (Toohey J); TONY BLACKSHIELD, MICHAEL COPER & GEORGE WILLIAMS (eds), THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA 496 (2001).

¹⁴ *Mabo v Queensland II* (1992) 175 CLR 1 at 37.

¹⁵ *Wik Peoples v Queensland* (1996) 187 CLR 1.

pastoral lease, could co-exist with, rather than extinguish, native title.¹⁶ The *Mabo (No 2)* and *Wik* decisions were major turning points in Australian post-colonial history and are seen by Indigenous and non-Indigenous Australians alike as keystones in the stairway to reconciliation between us.¹⁷ Indigenous rights are now statutorily recognised in all federal and state jurisdictions.¹⁸

Two recent High Court cases are also of particular significance. In *Northern Territory v Arnhem Land Trust* the High Court considered the Northern Territories' powers under the *Fisheries Act 1988 (NT)* to grant a licence to fish within areas of Aboriginal lands under the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*.¹⁹ The majority²⁰ held that the *Fisheries Act* abrogated any common law right to fish but did not authorise persons to fish in any particular place or area.²¹ The term "Aboriginal land" in context was not confined in inter-tidal zones to the land surface and should be understood as extending to the fluid (water or atmosphere) above the land surface ordinarily capable of use by an owner of land.²² The holding of a licence under the *Fisheries Act* did not authorise or permit the holder to fish in areas covered by the *Aboriginal Land Rights (Northern Territory) Act*.²³

In *Wurridjal v Commonwealth*,²⁴ the majority²⁵ found that Aboriginal statutory native title rights did not prevent the Commonwealth from creating statutory five year leases over Aboriginal land under the *National Emergency Response and Other Measures Act 2007 (Cth)* to prevent abuse of Indigenous children living on Aboriginal land. The

¹⁶ *Id.*

¹⁷ NOEL PEARSON, UP FROM THE MISSION: SELECTED WRITINGS 59, 60, 78, 79, 84 (Black Inc. 2009).

¹⁸ *Native Title Act 1993 (Cth)*; *Native Title Amendment Act 1998 (Cth)*; *Native Title Amendment Act 2007 (Cth)*; *Native Title Act 1994 (ACT)*; *Native Title (New South Wales) Act 1994 (NSW)*; *Native Title (Queensland) Act 1993 (Qld)*; *Native Title (South Australia) Act 1994 (SA)*; *Native Title (Tasmania) Act 1994 (Tas)*; *Native Title (State Provisions) Act 1999 (WA)*; *Validation (Native Title) Act (NT)*. See also *Federal Court of Australia Act 1976 (Cth)*; *Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)*; *Petroleum (Submerged Lands) Act 1967 (Cth)*; *Minerals (Submerged Lands) Act 1981 (Cth)*.

¹⁹ *Northern Territory v Arnhem Land Trust* (2008) 236 CLR 24.

²⁰ *Id.* (Gleason CJ, Gummow, Hayne & Crennan JJ, Kirby J agreeing generally; Hayden & Kiefel JJ dissenting).

²¹ *Id.* at 61.

²² *Id.* at 66.

²³ *Id.* at 62.

²⁴ *Wurridjal v Commonwealth* (2009) 252 ALR 232.

²⁵ *Id.* (French CJ, Gummow, Hayne, Hayden & Crennan JJ; Kirby J dissenting).

majority concluded that the Act was lawful as it provided a right to compensation on just terms for the Aboriginal land owners.²⁶

The relatively recent Australian jurisprudence relating to Indigenous land rights is likely to continue to develop under the influence of international law and by the jurisprudence of other Pacific nations.

III. INTERNATIONAL LAW CONCEPTS

It is useful to next consider some relevant international law concepts. Land rights claims of Indigenous people have led to expanding international law jurisprudence.²⁷ The United Nations (“UN”) declared the decade 1994–2004 as the First World Decade on the Rights of Indigenous Peoples. We are now in the midst of the UN’s Second World Decade on the Rights of Indigenous Peoples, 2005–2015.

A. *United Nations Declaration on the Rights of Indigenous Peoples*

The UN Declaration on the Rights of Indigenous Peoples is a milestone development in international law. The Declaration is aspirational, which means that it does not have the force of law, but it encourages nations to enact legislation appropriate to its aims. The UN General Assembly adopted the Declaration on 7 September 2007, with an overwhelmingly 143 votes in favour²⁸ and 11 abstentions.²⁹ Only four

²⁶ *Id.*, at 464.

²⁷ Jeremie Gilbert, *Historical Indigenous Peoples' Land Claims: A comparative and international approach to the common law doctrine on Indigenous Title*, 56 INT’L & COMP. L. Q. 583, 584 (2007).

²⁸ Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Austria, Bahamas, Bahrain, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei, Bulgaria, Burkina Faso, Cambodia, Cameroon, Cape Verde, Central African Republic, Chile, China, Comoros, Congo, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Democratic People’s Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kuwait, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritius, Mexico, Micronesia, Moldova, Monaco, Mongolia, Montenegro, Mozambique, Myanmar, Namibia, Nepal, Netherlands, Nicaragua, Niger, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Saint Lucia, Saint Vincent and the Grenadines, San Marino, Saudi Arabia, Senegal, Serbia, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Tanzania, Thailand, The former Yugoslav Republic of Macedonia, Timor-Leste, Trinidad and Tobago, Tunisia, Turkey, United Arab Emirates, United Kingdom, Uruguay, Venezuela, Vietnam, Yemen, Zambia and Zimbabwe.

²⁹ Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia, Samoa and Ukraine.

countries voted against the declaration: Australia, New Zealand, Canada and the United States of America. On 3 April 2009, Australia belatedly acknowledged the importance of this Declaration by adopting it. The majority of Pacific nations, including Fiji, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea, Solomon Islands, Tonga, Tuvalu and Vanuatu, were absent from the UN General Assembly when the Declaration was adopted.³⁰ It remains unclear, however, whether these absent nations regard the Declaration as binding, or even aspirational.

The Declaration has a significant focus on Indigenous land rights. Its provisions include the following. States should provide mechanisms for the prevention of and redress for any action, which has the aim or effect of dispossessing Indigenous people of their lands, territories or resources.³¹ Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned, or otherwise occupied and used lands so as to uphold their responsibility to future generations.³² Indigenous peoples have the right to the lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired.³³ Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess through traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.³⁴ States should give legal recognition and protection to these lands with due respect to the customs, traditions and land tenure systems of the Indigenous peoples concerned.³⁵ Indigenous peoples have the right to redress, by restitution or just, fair and equitable compensation, for any lands, territories and resources which they have traditionally owned, occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.³⁶ Unless otherwise freely agreed upon by the Indigenous peoples concerned, compensation shall be in the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.³⁷

³⁰ Chad, Cote d'Ivoire, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Grenada, Guinea-Bissau, Israel, Kyrgyzstan, Mauritania, Morocco, Romania, Rwanda, Saint Kitts and Nevis, Sao Tome and Principe, Seychelles, Solomon Islands, Somalia, Tajikistan, Togo, Turkmenistan, Uganda and Uzbekistan were also absent.

³¹ Universal Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 8(2) (Sept. 13, 2007).

³² *Id.*, art. 25.

³³ *Id.* art. 26(1).

³⁴ *Id.* art. 26(2).

³⁵ *Id.* art. 26(3).

³⁶ *Id.* art. 28(1).

³⁷ *Id.* art. 28(2).

Indigenous peoples have a right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States should establish and implement assistance programmes for Indigenous peoples for this purpose without discrimination.³⁸ States shall take effective measures to ensure that storage or disposal of hazardous materials does not take place on Indigenous lands without the free, prior and informed consent of the Indigenous people concerned.³⁹

Unfortunately, the Declaration contains internal tensions that may impact its effectiveness and implementation. On the one hand, it allows and encourages Indigenous self-determination:

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

On the other hand, the Declaration specifically denies the right to take any action that may impact on the nation's territorial integrity or sovereignty:

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.

³⁸ *Id.* art. 29(1).

³⁹ *Id.* art. 29(2).

Whether the Declaration will ultimately improve the lot of Indigenous peoples through successful land rights claims, at least in the short term, remains to be seen.

B. *The United Nations Universal Declaration of Human Rights*

Another fundamental tenet of international law with the potential to conflict with traditional Pacific land rights is much older than the Declaration on the Rights of Indigenous Peoples. The UN Universal Declaration of Human Rights was adopted on 10 December 1948, over 60 years ago, in no small part through the mighty diplomatic efforts of the indomitable Eleanor Roosevelt, chair of the Commission of Human Rights. It affirms in 30 articles the inherent dignity of all members of the human family, and their equal and unalienable rights of freedom, justice and peace. In a shrinking globalised world at the end of the first decade of the 21st century, its 61-year-old aspirations continue to shine as a guiding beacon to those who are committed to the sound governance of nations. It declares that all people are entitled to rights and freedoms without distinction of any kind, including gender, property ownership, birth, or other status.⁴⁰ It highlights that all people are equal before the law and entitled to equal protection without discrimination.⁴¹ Men and women are also entitled to equality, including equal rights to marriage, during marriage, and its dissolution.⁴² It declares that all people have the right to own property alone as well as in association with others.⁴³ The Declaration also determines that no one is to be arbitrarily deprived of their property.⁴⁴

The potential for tension between these declared human rights and both the rights of traditional Indigenous landowners in Pacific Nations, and those who have subsequently acquired property under comparatively newly imposed colonial laws, is manifest. This will be considered further below.

C. *Other International Law Matters*

Other aspects of international law with the potential of conflict with traditional Pacific land rights include the International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on Economic, Social and Cultural Rights; and the Convention on the Rights of the Child.

⁴⁰ Universal Declaration of Human Rights, art. 2.

⁴¹ *Id.* art. 7.

⁴² *Id.* art. 16.

⁴³ *Id.* art. 17(1).

⁴⁴ *Id.* art. 17(2).

In Australia, the High Court has recognised that Australia's ratification of UN conventions gives rise to a legitimate community expectation that the executive will act in conformity with the convention.⁴⁵ The ratification of a convention alone does not make the convention part of Australian law, however, unless the convention's provisions are specifically incorporated into Australian domestic law by statute.⁴⁶ It is noteworthy that, although the Convention on the Rights of the Child has been ratified by Australia,⁴⁷ it did not feature in argument before or in the reasoning of the High Court in *Wurridjal*. Other aspects of international law⁴⁸ did, however, feature in the reasoning of some members of the High Court, but not, apparently, in arguments before the court.⁴⁹ This may be because Australian lawyers are not accustomed to the reasoning behind international law concepts or to a human rights based jurisprudence. After all, Australia remains one of the few nations in the world without a Bill or Charter of Rights⁵⁰ despite the recommendation of the National Human Rights Consultation Report (September 2009) to introduce a federal Human Rights Act.⁵¹

As for the Universal Declaration of Human Rights, the tensions between these covenants, conventions, and traditional Pacific land rights are self-evident.⁵² As we noted earlier in this paper, however, one example of such a conflict arose, but was not addressed, in *Wurridjal* when Aboriginal Australians' rights to control entry onto their traditional land

⁴⁵ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

⁴⁶ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; but see the Australian Senate's Legal and Constitutional Affairs Committee's "Commonwealth Power to Make and Implement Treaties" Report, chapter 6, available at http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/pre1996/treaty/report/index.htm.

⁴⁷ The Federal Government ratified the Convention in December 1990 and it became binding on Australia in January 1991.

⁴⁸ Including the Universal Declaration of Human Rights, the UN Declaration on the Rights of Indigenous Peoples, the Convention concerning Indigenous and Tribal Peoples in Independent Countries, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination.

⁴⁹ *Wurridjal*, 252 ALR 232, at 52 (French CJ), 147 (Gummow & Hayne JJ), 213, 244 & 262 (Kirby J).

⁵⁰ Two Australian States have a Bill of Rights. See *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

⁵¹ National Human Rights Consultation (2009), <http://www.humanrightsconsultation.gov.au/>.

⁵² An in-depth consideration of these conflicts is beyond the scope of this paper. See Claire Charters, *Indigenous peoples and international law and policy*, 18 PUB. L. REV. 22 (2007).

conflicted with the Australian Government's obligations to its children under the Convention on the Rights of the Child.

IV. EXAMPLES OF TENSIONS BETWEEN TRADITIONAL PACIFIC LAND RIGHTS AND INTERNATIONAL LAW

Having outlined aspects of international law relevant to this discussion, this paper next considers examples of the tension that can arise between international law and traditional Pacific land rights. The most commonly experienced tension between traditional Pacific land rights and international law arises when collective, traditional land rights and individual, human rights collide. International law is broadly based on western legal and political systems, with an emphasis on the individual rights highlighted in the Universal Declaration of Human Rights.⁵³ Indeed, national and international legal systems, insofar as they are based on a human rights discourse, can sometimes seem incompatible with the collective focus of the culture of many Indigenous groups in Pacific nations.⁵⁴ Nevertheless, globalisation, and especially international migration have kept Indigenous collective rights relevant in contemporary democratic states with multi-national and multi-ethnic components.⁵⁵ That is certainly the case in many Pacific nations like Fiji, New Zealand, Australia, and others.

The most common form of ownership of customary land in Pacific nations is through group or communal ownership where members of a group or community own joint, undivided interests in an area of land where the community is located.⁵⁶

The Australian Indigenous peoples' deep connection with the land as its traditional custodians is a concept that is difficult to adequately describe in the English language. Traditional Pacific land ownership is not ownership as we, from the "West," understand it. It involves a spiritual connection with the land, and the concept of stewardship and protection of the land, quite inconsistent with the western and international approach to land as a commodity in a modern market economy. The traditional approach of many Pacific Indigenous peoples to their land involves a

⁵³ Anaya, *supra* note 6, at 37 - 38.

⁵⁴ See Megan Davis, *The UN Declaration on the Rights of Indigenous Peoples*, 6(30) INDIGENOUS L. BULL. 6 (2007), available at <http://www.austlii.edu.au/au/journals/ILB/2007/50.html>.

⁵⁵ Ryszard Piotrowicz, *United Nations Declaration on Indigenous Peoples*, 82 AUSTL. L. J. 306, 308 (2008).

⁵⁶ See, for example, the *mataqali* or *tokatoka* in Fiji, the *kaainga* in Kiribati and Tokelau, the *mangafoa* in Niue, or the *pui kaainga* in Tuvalu; CORRIN & PATERSON, *supra* note 4, at 293.

union between the land and the people, entirely contrary to the perception of western land ownership as domination and power over the land.⁵⁷

For this reason, some Pacific nations have revised their constitutions to recognise traditional concepts of land ownership and to accommodate customary property rights. This is, however, often difficult to successfully achieve in light of international law.⁵⁸ A key theme of the Universal Declaration of Human Rights is that all people are created equal, and should have the same rights. It follows that nations should not have laws that discriminate against, or are in favour of, one group of people on the basis of race, gender, or some similar characteristic. The concept of traditional Pacific land rights does not necessarily share or incorporate this individual rights-based view. The resulting tension is probably the biggest challenge facing many Pacific nations post-independence from colonial rule. How can Pacific nations both preserve its customary laws and practices, and at the same time, comply with the international human rights expected of it?⁵⁹ After all, these international expectations as to the governance of Pacific nations on an individual rights basis are often a prerequisite to World Bank approval for much-needed international funding and investment.⁶⁰

Samoaan culture, for example, is based on the *matai* system. The word *matai* means something similar to a “chief.” It can be a specific honour bestowed on someone in acknowledgement for services provided. The *matai* title can be given to both men and women, but it is much more common for men to receive this honour.⁶¹ Until recently, only *matais* could vote in Samoan parliamentary elections, and even now, only *matais* are eligible to seek parliamentary office. Changes to the more arbitrary aspect of *matai* rule are gradually being made in Samoa in response to demands that the country respect international human rights and democratic governance.⁶²

⁵⁷ John Crosetto, *The Heart of Fiji's Land Tenure Conflict: The law of traditional and vakavanua, the customary "way of the land"*, 14 PAC. RIM L. & POL'Y J. 71, 73 (2005).

⁵⁸ *Id.* at 74.

⁵⁹ Kenneth Brown & Jennifer Corrin Care, *Conflict in Melanesia: Customary Law and the Rights of Women*, 24 COMMONWEALTH L. BULL. 1334, 1334 – 35 (1998).

⁶⁰ For a consideration of the World Bank's status on human rights, see Ana Palacio, *The Way Forward: Human Rights and the World Bank*, WORLD BANK DEVELOPMENT OUTREACH (Oct. 2006), <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:21106614~menuPK:445673~pagePK:64020865~piPK:149114~theSitePK:445634,00.html>.

⁶¹ AFAMASAGA TOLEAFOA, A CHANGING FA'AMATAI AND IMPLICATIONS FOR GOVERNMENTS, available at <http://www.clg.uts.edu.au/pdfs/Toleafoa.pdf>.

⁶² *Id.*

In many Pacific nations like Fiji, the Solomon Islands, and Vanuatu, land is managed collectively by forums or councils, invariably comprised of chiefs and leaders, very few of whom are women.⁶³ Chiefs often have traditional power to approve or refuse the use of land to members of their group, giving the chiefs rights of control rather than rights of ownership.⁶⁴ Customary laws often focus on patriarchy and the maintenance of male power and control.⁶⁵ This means that gender inequality is a significant issue in many Pacific nations, even though some are signatories to the Convention on the Elimination of All Forms of Discrimination against Women⁶⁶ or have constitutional provisions advocating equal treatment.⁶⁷ This cannot be diminished as a “women’s issue.” It is, as “women’s issues” usually are, a broad human rights issue. Women in Pacific nations who do not have access to land may be denied a livelihood. This may have the result that the women and their children could be denied equal opportunities and the whole family, male-children included, fall into the poverty trap.⁶⁸

A primary method of acquiring rights to ownership of customary land is through inheritance. Pacific nations vary greatly as to their customary laws of inheritance. Some permit only male children to succeed their father’s interests (patrilineal). Others permit only daughters to succeed their mother’s interests (matrilineal). Sometimes male and female children succeed either mother or father (ambilineal), or both mother and father (bilineal).⁶⁹ Some customs give preference to female children, others to male children, and some differ in their treatment of legitimate, illegitimate, and adopted children.⁷⁰ A common thread under customary laws is that women generally cannot inherit property from men.⁷¹ In Kiribati and Tuvalu, discriminatory customary practices providing for different treatment of male and female heirs are formalised in written

⁶³ Farran, *supra* note 8, at 134-35.

⁶⁴ CORRIN & PATERSON, *supra* note 4, at 296.

⁶⁵ Brown & Care, *supra* note 59, at 1335.

⁶⁶ Australia, Cook Islands, Fiji, Kiribati, Marshall Islands, New Zealand, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tuvalu, United States of America and Vanuatu (as of 11 June 2009).

⁶⁷ See Farran, *supra* note 8.

⁶⁸ *Id.* at 139.

⁶⁹ CORRIN & PATERSON, *supra* note 4, at 296.

⁷⁰ *Id.* at 296.

⁷¹ Brown & Care, *supra* note 59, at 1349.

laws.⁷² Other Pacific nations have followed the western model in regulating succession laws.⁷³

In the 1994 Vanuatuan case of *Noel v Toto*,⁷⁴ a woman applied to establish her right to land and to share with her brother in its benefits. The local custom differentiated between the rights of males and females by depriving married women of certain rights. The Vanuatuan Constitution contained internal tensions that created difficulties in resolving the dispute. It provided that all people should be treated equally.⁷⁵ It also provided that custom should form the basis of ownership and use of the land.⁷⁶ The court resolved the tension by holding that where custom discriminates against the land rights of women, those customs will be subject to the Constitutional recognition of fundamental human rights. Vanuatuan customary law applied in determining ownership of land, but subject to the limitation that any customary rule discriminating against women could not be applied.⁷⁷ *Noel v Toto* has been a seminal case for many Pacific nations in interpreting their Constitutions so as to balance customary laws against competing individual human rights.

There is obviously much to commend in this approach. It recognises that traditional cultures change and that all societies evolve, ideally blending the best of the old with the best of the new. An example of this evolution is the dramatic change in the status of women under “Western” legal systems over the past 200 years. Those of us who come from cultures based on the English and US common law traditions should never forget that in some of those jurisdictions, until the 1800s men were entitled to beat their wives with a stick, as long as it was no thicker than a thumb (hence the ‘rule of thumb’);⁷⁸ women upon marriage lost the right to own property until the passing of various *Married Women’s Property Acts* from 1848 onwards;⁷⁹ until the early 20th century, women could not be admitted as lawyers since male judges did not consider a woman to be a

⁷² Farran, *supra* note 8, at 134.

⁷³ See, for example, Fiji’s *Succession, Probate and Administration Act* (1970); Brown & Care, *supra* note 59, at 1350.

⁷⁴ Unreported, Supreme Court, Vanuatu, CC 18/94, 19 April 1994, available at http://www.vanuatu.usp.ac.fj/pacific%20law%20materials/Vanuatu_cases/Volume_G-N/Noel_v_Toto.html.

⁷⁵ *Vanuatuan Constitution* art. 5.

⁷⁶ *Id.* art. 74.

⁷⁷ Brown & Care, *supra* note 59, at 1343.

⁷⁸ Susan A. Lentz, *Revisiting the Rule of Thumb*, 10(2) *WOMEN & CRIMINAL JUSTICE* 9, 17 – 18 (1999). *But cf.* Henry Ansgar Kelly, *Rule of Thumb and the Folklaw of the Husband’s Stick*, 44(3) *J. LEGAL EDUC.* 341 (1994).

⁷⁹ See JOCELYNNE A. SCUTT, *WOMEN AND THE LAW* 205 – 06 (1990); Lentz, *supra* note 78, at 18 – 19.

“person;”⁸⁰ and until the late 20th century, there was no crime of rape within marriage.⁸¹ Just as English and US common law traditions continue to positively evolve, so too do the traditions of Pacific nations. Those whose rights and powers are diminished by this positive evolution sometimes oppose it, allowing short-term self-interest to take precedence over what is best for the long-term social fabric of the nation. There have been similar problems through the millennia of human development in every culture experiencing change. Change, even positive change, is seldom painless, and no less so when the change is inevitable. Great leaders of Pacific nations recognise the need to embrace positive change and help those detrimentally affected by the change to accept and manage it.

V. POTENTIAL FUTURE TENSIONS

The final part of this paper considers some potential future tensions between Pacific Land Rights and international law, with a specific focus on issues of environmental management and conservation. The Declaration of the Rights of Indigenous Peoples presents a promising vehicle to lessen the tension between traditional Pacific land rights and international concepts of individual rights. It contains, however, its own internal tension between the rights of traditional Indigenous people to self-determination and the state’s right to territorial integrity and sovereignty. International lawyers and those with a direct interest in Indigenous land rights will be considering how to use the Declaration to benefit Indigenous land owners, and will be closely monitoring any jurisprudence arising from it.

Many Pacific nations are attempting to increase economic development in their countries, whether in the form of primary industries, manufacturing, or tourism, to raise the standard of living of their citizens. Such development can conflict with traditional Indigenous land rights. In 1987, the UN World Commission on Environment and Development (“WCED”) released the report, *Our Common Future*. This report is also known as the Brundtland Report in recognition of the then chair of the WCED, former Norwegian Prime Minister, Ms. Gro-Harlem Brundtland. The Brundtland Report spear-headed the issue of global sustainable development, defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁸² It recognised that the forces of economic development are likely

⁸⁰ SUSAN PURDON & ALADIN RAHEMTULA, A WOMAN’S PLACE 9-16 (2005).

⁸¹ See, for example, amendments to the definition of ‘consent’ under the *Criminal Code* 1899 (Qld), s 347 in *The Criminal Code, Evidence Act and Other Acts Amendment Act* 1989 (Cth), s 31.

⁸² As defined in *Our Common Future*.

to affect and disrupt traditional lifestyles, and that special consideration will be required to preserve traditional land rights.⁸³

Most people, especially young people who are every nation's future and their most treasured asset, are concerned about the effect of climate change on the world's ability to preserve our present lifestyle for our grandchildren and great-grandchildren. Many believe that climate change is the greatest world threat. The debate as to whether there is climate change and, if so, whether it has been effected by human-induced factors, continues. All thinking people, however, recognise that any environmental degradation is concerning, not just for the immediate area involved, but for the entire global community. Environmental degradation is occurring in Pacific nations, as it is elsewhere in the world. All too often, the traditional lands of Indigenous people suffer the gravest and most immediate consequences of environmental damage. Pacific nations and, with them, the international community, would be foolish not to involve traditional Indigenous landowners in providing solutions to these environmental challenges.

So much was recognised in the 1992 Rio Declaration on Environment and Development, which specifically noted the important role of Indigenous people in environmental management because of their deep understanding of land management.⁸⁴ British gardener, writer, and documentary producer, Monty Don, has recently written about the Brazilian Indians' success in sustainably cultivating rainforest through their *terra preta* or Black Earth policy which captures carbon in the soil. This practice is the complete antithesis to Western agriculture's rainforest clearing practice of slashing and burning, which has caused massive increase in world carbon emissions.⁸⁵ Tensions can, however, arise between traditional land usage, which invariably involves hunting and fishing rights, and domestic and international law aimed at protecting endangered flora and fauna.⁸⁶ A topical Pacific example is the *Wild Rivers Act* 2005 (Qld) and the stark divisions it has raised between conservationists and Indigenous people wishing to build local businesses and enterprises on their traditional land around the Lockhart, Stewart, and Archer Rivers on Cape York, far north Queensland.⁸⁷

⁸³ Graeme Neate, *Looking after Country: Legal Recognition of Traditional Rights to and Responsibilities for the Land*, 16 U. NEW SOUTH WALES L. J. 161, 165 (1993).

⁸⁴ Claire Charters, *Indigenous Peoples and International Law and Policy*, 18 Pub. L. Rev. 22, 44 – 45 (2007).

⁸⁵ MONTAGU DON, EXTRAORDINARY GARDENS OF THE WORLD 138-41 (Weidenfeld & Nicolson 2009).

⁸⁶ Charters, *supra* note 84, at 46.

⁸⁷ ABC NEWS, *Divisions Run Deep in Qld Wild Rivers Debate*, 20 April 2009, available at <http://www.abc.net.au/news/stories/2009/04/20/2547012.htm>.

One aspect of climate change, in particular global warming, is that sea levels are predicted to rise. This has the potential to detrimentally impact on many Pacific nations by the loss of low-lying land gulfed by the rising sea levels. Scientists have reported that Tuvalu faces a real possibility of disappearing completely within this century. International law does not presently address the concept of environmental refugees. This omission should be remedied – and soon. Countries close to those Pacific nations that are most likely to be gravely affected must prepare neighbourly, compassionate, and appropriate contingency plans in the event of such a catastrophe.

This paper has highlighted some current and future challenges facing Pacific nations. These challenges include maintaining their traditions in their evolving cultures and developing domestic legal systems to reflect both those traditions and the current international human rights regime. These challenges are common amongst most nations of the world, but are exacerbated for Pacific nations because of traditional land rights and practices.

A further obstacle to Pacific nations obtaining the full benefit from international law is the world community's failure to fully engage and include Pacific nations in these developments. The UN Declaration of the Rights of Indigenous Peoples should have greatly assisted the Indigenous people in Pacific nations. Yet, very few Pacific nations were actively involved in its adoption. As a result, its legal status, efficacy, and legitimacy, may have been undermined and its potential not realised. It is essential that the international community encourage all countries, including Australia's Pacific neighbours, to be involved in international legal developments, especially those which are likely to closely and significantly have an impact on them.

As noted earlier, cultures, communities, societies, and nations change and evolve as they preserve their most valued traditions, whilst also adopting the brightest and best of new, foreign concepts and ideas. This is as true for Western liberal democracies as it is for traditional Pacific cultures and nations. The international community has much to learn from traditional Pacific Indigenous culture, for example, from the impressive track record of many such cultures in caring for and nurturing their beloved land and surrounding marine environment. Traditional Indigenous Pacific cultures may also learn and grow from understanding and respecting internationally recognised individual human rights, which encourage and enable every human being to develop fully and contribute their real potential to their nation.

VI. CONCLUSION

This paper has considered the tension between traditional Pacific land rights and aspects of international law. It has highlighted that Pacific nations have much to gain from a greater consideration of the international

human rights regime. On the other hand, Western nations and the entire international community have much to gain from a greater openness to Pacific Indigenous culture and its harmony with the physical environment, especially in light of the current world environmental challenges. Like the cycle of life, this paper will finish where it began, with the statement of the Australian Indigenous workshop presenter, Grant Sarra, to Queensland judicial officers. If our grandchildren and great-grandchildren are to be able to exist in a sustainable, liveable world in the second half of the 21 century, all nations, whether from a Western liberal democratic tradition or from a traditional Pacific Indigenous background, must share Grant Sarra's vision and be united in their "caring, sharing, and respect for the land, people, and environment." And if our grandchildren and great-grandchildren are to not only survive, but be allowed to develop to their full potential, they must live in nations where international human rights are upheld under the rule of law, enforced through an independent legal profession and judiciary.⁸⁸

⁸⁸ It was reaffirming in this respect that the members of the 18th Pacific Judicial Conference, Papeete, Tahiti (Chief Justices and senior judges from most Pacific nations) at which I presented an earlier version of this paper, unanimously agreed to the following statement issued by the conference chair, President Olivier Aimot, on 18 June 2009:

In keeping with the 1995 Beijing Statement of Principles of the Independence of the Judiciary, which affirms that no community can live in peace, freedom and prosperity unless governed by the rule of law, members reiterated the importance of maintaining the rule of law through an independent judiciary, assisted by an independent legal profession.

Members viewed with concern reports on recent events in Fiji and the serious threats these events represent to the independence of the judiciary and the legal profession and thus to the maintenance of the rule of law in that country.

They urge Fiji's resumption of its world status as exemplar of the rule of law. And they look forward to the judges of Fiji resuming their rightful place among their number.