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I. INTRODUCTION

Australian Aboriginals share the common heritage of indigenous peoples. It is a history of violent dispossession, followed by alternating neglect and paternalism, culminating in belated and bewildered concern.[2] An international movement has evolved to rectify these wrongs.[3] 1993 is to be the International Year of the World's Indigenous Peoples[4] during which

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1. Mabo v. Queensland, 107 A.L.R. 1 (1992).

2. *See* JANINE ROBERTS, MASSACRES TO MINING 13-19 (1981)[hereinafter ROBERTS]; MARC GUMBERT, NEITHER JUSTICE NOR REASON 15-25 (1984); HENRY REYNOLDS, DISPOSSESSION (1989)[hereinafter REYNOLDS]. For a discussion of the history and problems of other indigenous peoples, see Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127 (1991)[hereinafter Torres].

3. There have been three areas of activity. The International Labour Conference has produced two conventions, Convention 107 Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, 328 U.N.T.S. 247. In 1989, the Conference adopted a revised version of Convention 107 (Convention 106). *See* Berman, *The International Labour Organization and Indigenous Peoples: Revision of ILO Convention No. 107 at the 75th Session of the International Labour Conference, 1988* THE REVIEW 48, 49 (Int'l Convention Jurists 1988); Andree Lawrey, *Contemporary Efforts to Guarantee Indigenous Rights Under International Law*, 23 VAND. J. TRANSNAT'L L. 703, 717-20 (1990). Second, in 1972 the U.N. Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a Special Rapporteur on the problems of discrimination against indigenous people. The Rapporteur, Jose Martinez Cobo presented a final report in 1983. *See Study of the Problem of Discrimination against Indigenous Populations*, U.N. Doc. E/CN.4/Sub2/Add. 1-4 (1986-87)[hereinafter *Cobo Report*]. In 1985 the U.N. General Assembly established the U.N. Fund for Indigenous Populations to assist representation of indigenous populations in the activities of the Working Group. The Fund was established by G.A. Res. 40/131. *See Report of the Economic and Social Council: United Nations Voluntary Fund for Indigenous Populations, Report of the Secretary General*, U.N. GAOR 43rd Sess., Agenda Item 12, U.N. Doc. A/43/706 2 (1988). The third area of activity has been the work of non-governmental organizations. The first meeting of the World Council of Indigenous Peoples met in Canada in 1975; representative groups are the Four Directions Council, the Maori Council, the National Aboriginal and Islander Legal Service Secretariat, the National Indian Youth Council, the Indigenous World Association, the International Indian Treaty Council, The Indian Council of South America and the Inuit Circumpolar Conference. *See The Rights of Indigenous Peoples*, U.N. Center for Human Rights, Geneva, Fact Sheet No. 9, 3-4 (1990); Torres, *supra* note 2, at 151.

4. G.A. Res. 45/164 of 18 Dec. 1990; *see* U.N. Doc. E/CN.4/Sub.2/39 (1991); *see also*

the United Nations Working Group on Indigenous Peoples[5] will present its Declaration on the Rights of Indigenous Peoples[6] for adoption by the United Nations. In Australia the Commonwealth government has established the Council for Aboriginal Reconciliation[7] and a Royal Commission into Aboriginal deaths in custody.[8] A treaty between the Commonwealth government and the Aboriginal people has also been proposed.[9]

On the judicial front, in recent years, Aboriginal litigants relying on the *Western Sahara* case[10] have challenged the long standing assumption that Australia was occupied by peaceful possession of *terra nullius*. Rather, they argue that sovereignty was acquired by conquest. This has important legal consequences. In settled colonies (occupation of *terra nullius*) applicable English laws are automatically in force on settlement because there are no pre-existing laws (or rights), whereas conquered or ceded colonies retain their indigenous laws until the new sovereign alters them.[11] It has generally been assumed that Australia was a settled colony, the laws of which did not recognize Aboriginal title.[12] As recently as 1979 in *Coe v. Commonwealth*[13] two members of the High Court were firmly of the view that it was fundamental to the Australian legal system that Australia was acquired by settlement and not by conquest.[14]

In June of 1992, in a watershed opinion, the Australian High Court in *Mabo v. Queensland* reversed prior authority, and held in a plurality decision that Australia was not *terra nullius* when occupied and that significant pre-settlement indigenous land rights continue to exist under the common law of Australia. All judges agreed the acquisition of sovereignty by the Crown was an act of State that could not be questioned in the municipal courts;[15] nor was it questioned that on gaining sovereignty the

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Reed Brody et al., *The 42nd Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 13 HUM. RTS. Q. 260, 286 (1991).

5. Established by E.S.C. Res. 1982/34, U.N. Doc. E/82 Supp. 1, at 26 (1982); Douglas Sanders, *The U.N. Working Group on Indigenous Populations*, 11 HUM. RTS. Q. 406 (1989).

6. *See Report of the Working Group on Indigenous Populations on its Ninth Session*, 43d Sess., Agenda Item 15, U.N. Doc. E/CN.4/Sub.2/40/Rev.1, Ann.1, Rec. 33 (1991).

7. Council for Aboriginal Reconciliation Act, 127 AUSTL. C. ACTS 4685 (Cth. 1991).

8. The Commission handed down its report last year. *See* 1-11 ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY (1991).

9. *See* Garth Nettheim & Tony Simpson, *Aboriginal Peoples and Treaties*, 12 CURRENT AFF. BULL. 18 (1989).

10. Advisory Opinion No. 61, Western Sahara, 1975 I.C.J. 5 (Oct.16).

11. 1 SIR WILLIAM BLACKSTONE, COMMENTARIES 108 (1978)[hereinafter BLACKSTONE].

12. Cooper v. Stuart, [1889] 14 App. Cas. 286; Randwick Mun. Council v. Rutledge, 102 C.L.R. 54 (1959); New South Wales v. Commonwealth, 135 C.L.R. 337, 438-9 (1975). *See also* Bryan Keon-Cohen, *The Makarrata: a Treaty within Australia between Australians*, 1985 CURRENT AFF. BULL. 5.

13. Coe v. Commonwealth, 24 A.L.R. 118 (1979).

14. *Id.* at 129 (Gibbs & Aicken, JJ., concurring). *See also* Coe v. Commonwealth, 18 A.L.R. 592, 596 (1978)(Mason J.); Re Phillips; Ex parte Aboriginal Development Commission, 72 A.L.R. 508 (1987).

15. Mabo, 107 A.L.R. at 20 (Brennan, J.); 72 (Deane & Gaudron, JJ.); 92 (Dawson, J.); 142 (Toohey, J.).

Crown acquired radical or absolute title to all lands in Australia,[16] meaning that under the tenure doctrine all land is held ultimately through the Crown.[17] The issue in the case was whether, as had always been assumed, the Crown had also acquired beneficial ownership over all lands, thereby extinguishing any pre-existing indigenous rights.

Justice Brennan (with whom Mason, C.J., and McHugh, J., concurred) held it to be an untenable position that Australia was occupied as uninhabited territory because its indigenous peoples were few in number and of such low social order that it would be idle to impute to them legal rights. The view that Australia was *terra nullius* was based on misinformation, was racially discriminatory and as such was not in keeping with contemporary international law or current Australian community values.[18] Although the acquisition of sovereignty by the Crown was not justiciable before municipal courts, the courts did have jurisdiction to determine the consequences of such acquisition under municipal law.[19] Justice Brennan considered that no territory inhabited by human beings could be thought to be *terra nullius* under the common law of Australia.[20] It followed from this that certain pre-settlement Aboriginal rights continued to exist under Australian law. Justices Deane and Gaudron, in a separate judgment, argued that the original act of State that acquired sovereignty and radical title to the lands of Australia did not indicate an intention to also acquire beneficial ownership over unoccupied lands, thereby extinguishing Aboriginal title.[21] Justice Toohey, in a separate opinion, agreed with Justice Brennan that it was unacceptable that inhabited land could be considered *terra nullius*.[22] His Honor thought, however, that if land was in fact occupied, as was much of Australia, the common law protected the indigenous rights of the occupiers.[23] Justice Dawson alone dissented. His Honor thought that under the common law it mattered not whether land was acquired by conquest, cession or settlement if the sovereign manifested an intention to acquire beneficial title to all lands.[24] According to Justice Dawson, nothing in the early history of Australia indicated any intent on the part of the sovereign to recognize Aboriginal rights.[25]

The Court was also divided on the implications that could be drawn from the decision on the rights of the Crown to extinguish the Aboriginal title thus recognized. Chief Justice Mason, and Justices Brennan, Dawson and McHugh held that, absent a clear and unambiguous statutory provision to the contrary, the Crown could extinguish the Aboriginal title with-

16. *Id.* at 93 (Dawson, J.).
17. *Id.*
18. *Id.* at 26-9 (Brennan, J.).
19. *Id.* at 20.
20. *Id.* at 28-9.
21. *Id.* at 73 (Deane & Guadron, JJ.).
22. *Id.* at 142 (Toohey, J.).
23. *Id.*
24. *Id.* at 368 (Dawson, J.).
25. *Id.* at 368-9.

out compensation. Justices Deane, Gaudron and Toohey held to the contrary.[26]

The case is important for what it has to say regarding the rights of indigenous peoples generally, the concept of *terra nullius*, the doctrine of intertemporal law, and the relationship of international law and municipal law.

II. FACTS OF THE CASE[27]

The action was commenced in the High Court[28] in 1982 by the plaintiffs who are Murray Islanders. Each of the plaintiffs claimed specific parcels of land on the Murray Islands. They claimed to hold the land either under traditional native title, or usufructuary rights over the land, or by way of customary title. The plaintiffs did not deny the Crown's sovereignty over the Islands nor its radical title to the land, but argued that the immemorial rights of the islanders had not been extinguished upon the acquisition of sovereignty. To accept this proposition it was necessary to find, first, that there were such pre-existing rights, which would not be the case if the Islands were considered *terra nullius,* and second, that the rights had not been extinguished by the Crown after annexation.

The Murray Islands of Mer, Dauar, and Waierlie lie at the eastern end of the Torres Strait. They cover an area of nine square kilometers and are occupied by the Meriam people, who are Melanesians and number no more than 1000. The Meriam people are gardeners living in small villages. Their society was one regulated by customs, taboo, sorcery and magic. European contact occurred initially at the end of the 18th century and continued sporadically through to the middle of the 19th century. In 1877 the London Missionary Society established its headquarters on Mer. The Imperial government in 1872 and 1875 passed the Pacific Islanders Protection Acts[29] in order to protect the islanders from blackbirders.[30] The 1875 Act expressly disavowed any territorial claims to the islands, although the Queensland authorities did exercise some de facto control over the islands in the 1870's. In 1879 the Queensland Legislature passed the Queensland Coast Islands Act and the Governor of Queensland acting under Letters Patent from the Crown, annexed the Murray Islands into the Colony of Queensland. The Letters Patent used for the 1879 annexation, however, was ineffective because the Queensland Colony's boundaries had been determined by Imperial legislation; it was therefore necessary to annex the islands by Imperial legislation. This was accomplished

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26. *Id.* at 7 (Mason, CJ. & McHugh, J.).

27. The facts of the case are taken from the judgment of Brennan J. *Id.* at 6-15.

28. Mabo v. Queensland (High Crt of Aust., Brisbane Office of the Registry, No. B12 of 1982). The case was remitted to the Queensland Supreme Court for a determination of facts.

29. 35 and 36 Vict. Acts c 19; 38 and 39 Viv c 51.

30. The term used for a person or vessel engaged in kidnapping blacks or Polynesians for slavery.

by the Colonial Boundaries Act of 1895 (Imp).[31] In *Wacando v. Commonwealth*[32] the High Court rejected an argument that procedural discrepancies had prevented the annexation of the Islands.

In 1985 the government of Queensland attempted to abort the *Mabo* case with the Queensland Coast Islands Declaratory Act. This Act purported to declare retroactively that the intention of the Queensland Coast Islands Act of 1879 was not only to acquire sovereignty, but also to extinguish native title, assuming such title existed. The Act was challenged in *Mabo v. Queensland*[33] where a majority[34] of the High Court held that the Act offended section 10(1) of the Commonwealth's Racial Discrimination Act (1975) which makes ineffective legislation that prevents racial or ethnic groups from enjoying rights, as defined by Art. 5(d) of International Convention on the Elimination of All Forms of Racial Discrimination,[35] that are enjoyed by other racial or ethnic groups.[36] For the purposes of the litigation, the High Court assumed that the rights claimed by the Meriam people existed, confining themselves to the issue of whether those rights had been extinguished by the Queensland Coast Islands Declaratory Act.

Proceedings in the Queensland Supreme Court to determine the issue of fact were finalized in November 1991 and the matter came once again before the High Court. The various judgements of the Court cover some 170 pages. As is apparent from the, facts the Court could have confined itself solely to the issue of the status of the Murray Islands. As Justice Brennan stated:

> This court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher "in the scale of social organization" than the Australian Aboriginals whose claims were "utterly disregarded" by the existing authorities or the court can overrule the existing authorities, discarding the distinction between inhabited colonies that were *terra nullius* and those which were not.[37]

The Meriam people are different from mainland Australian Aboriginals in their social organization, culture, racial background and co-

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31. 58 & 59 Vict. c 34.

32. Wacando v. Commonwealth, 148 C.L.R. 1 (1981).

33. Mabo v. Queensland, 63 A.L.J.R. 84 (1988).

34. Deane, Brennan, Toohey, and Gaudron, JJ. (Mason C.J., Dawson and Deane, JJ. dissenting).

35. International Convention on the Elimination of All Forms of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195.

36. 10(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, a person of a particular race, color or national or ethnic origin do not enjoy a right that is to be enjoyed by persons of another race, color or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, color or national or ethnic origin, then notwithstanding anything in that law, persons of the first mentioned race, color or national or ethnic origin, shall by force of this section shall enjoy that right to the same extent as persons of that other race, color or national or ethnic origin.

37. Mabo, 107 A.L.R. at 27.

lonial experience.[38] Moreover, it could be argued that the 1872 and 1875 Pacific Islanders Protection Acts strongly suggest that the Islands were not considered *terra nullius* by the British authorities. Commenting on such treaties of protection in the *Western Sahara* case,[39] Judge Hardy Dillard noted, "you do not *protect* a *terra nullius*." All of the judgments in *Mabo*, however, rejected the approach of confining the case to the status of the Murray Islands. Justice Dawson agreed that the status of the Murray Islands could not be determined without first establishing the intention of the Crown with regard to New South Wales. The colony of Queensland inherited the laws of New South Wales, and it was the laws of Queensland that were introduced on the annexation of the Murray Islands. It was, therefore, unnecessary to determine whether the Murray Islands were conquered, ceded, or settled territory, as the Crown had expressly declared the law to be applied to Queensland and hence the Murray Islands on the occupation of New South Wales.[40]

A. *The Occupation of Australia as Terra Nullius*

Early international law writers were divided on the question whether territory inhabited by indigenous peoples could be considered *terra nullius* for the purpose of occupation. Francisco Vitoria,[41] Grotius,[42] and Blackstone[43] thought that occupied land could only be acquired by conquest or cession. Vattel[44] gave limited recognition of sovereignty to native peoples while Hyde,[45] Oppenheim[46] and Lindley[47] denied recognition of sovereignty to those whom they classified as backward people. After an extensive survey of relevant publicists Lindley concluded that:

> [E]xtending over some three and a half centuries, there had been a persistent preponderance of juristic opinion in favour of the proposition that lands in possession of any backward peoples who are politically organised ought not to be regarded as if they belonged to no one. But that, and especially in comparatively modern times, a different doctrine has been contended for and has numbered among its exponents some well-known authorities; a doctrine which denies that International Law recognizes any rights in primitive peoples to the terri-

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38. *See* Beckett, *Ownership of Land in the Torres Strait Islands, in* ABORIGINES, LAND AND LAND RIGHTS 202-206 (Nicolas Peterson & Marcia Langton eds., 1983).

39. Western Sahara, 1975 I.C.J. at 124.

40. 107 A.L.R. at 106.

41. FRANCISCO DE VITORIA, DE INDIS ET DE IVRE BELLI RELECIONES 127-28 (J. Bates trans., 1917)(1964).

42. 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 550 (F. Kelsey trans., 1925).

43. BLACKSTONE, *supra* note 11, at 107-8.

44. 3 EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 85 (Charles Fenwick trans., 1964).

45. 1 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 175 (1922).

46. LASSA OPPENHEIM, INTERNATIONAL LAW 383-84 (3d ed. 1920).

47. MARK FRANK LINDLEY, THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW 80 (1926).

> tory they inhabit, and, in its most advanced form, demands that such peoples shall have progressed so far in civilization as to have become recognized as members of the Family of Nations before they can be allowed such rights.[48]

John Westlake argued in 1910 that because indigenous societies were unable to supply a government suitable for the protection of white men they could not be given international status.[49]

International Tribunal Awards in the 1920s and 1930s similarly did not recognize indigenous territorial rights.[50] Even when the land was ceded or conquered and there was a treaty between the indigenous peoples and the colonial power, the treaty had little impact in international law. Max Huber in the *Islands of Palmas* case said of such treaties that, "they are not in the international law sense, treaties or conventions capable of creating rights and obligations."[51]

It was not until 1975 in the *Western Sahara* case that an international tribunal raised doubts about the question whether land occupied by indigenous people could be considered *terra nullius*. Vice President Ammoun in his Separate Opinion considered that the concept of *terra nullius* had been employed at all periods to justify conquest and colonization and as such stood condemned.[52] The majority thought, however, that territory was not *terra nullius* if it were occupied by peoples having "social and political organization."[53] This seems to suggest that the Court considered that there might be territory where the inhabitants do not have such organization and as such is *terra nullius*.

The history of the concept of *terra nullius* and indeed the *Western Sahara* case itself illustrates a continuing conflict between lofty ideals and the practical reality of greed and acquisition. It is an irony that the Court's Opinion in the *Western Sahara* case, on which Justice Brennan relies, that the peoples of the Western Sahara were entitled to self-determination was ignored by Morocco and Mauritania, who divided the area between themselves.[54]

The early history of Australia shows a similar conflict between the

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48. *Id.* at 20.

49. J. WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 141-143 (1920).

50. Legal Status of E. Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53; Islands of Palmas Case (U.S. v. Neth.), 2 R.I.A.A. 829 (1928); Cayuga Indians (Gr. Brit. v. U.S.), 6 R.I.A.A. 173 (1926).

51. Islands of Palmas Case, 2 R.I.A.A. at 858. He did not think, however, that they were totally without effect internationally in that fulfillment of the obligation may be a basis for determining whether the colonial power was exercising suzerainty for the purposes of recognition of sovereignty by other states. This point will be returned to later in the text.

52. Western Sahara, 1975 I.C.J. at 86.

53. *Id.* at 39.

54. In 1978 Mauritania formally renounced its claims to the Western Sahara and the entire area was taken over by Morocco. For a general account of the conflict, see J. DAMIS, CONFLICT IN NORTH-WEST AFRICA: THE WESTERN SAHARA DISPUTE (1983). *See also* Franck, *The Stealing of the Sahara*, 70 AM. J. INT'L L. 694 (1976).

pious hopes of high government officials and the actual practices of the settlers. Captain Cook, when he visited the east coast of Australia in 1768, was given instructions to show the natives, "every kind of civility and regard [and] . . . also *with the consent of the natives* to take possession of convenient situations in the country."[55] Arthur Phillips, when he was commissioned to sail the first fleet to Botany Bay, was instructed to treat the natives with kindness and punish those who unnecessarily interrupted them in their occupations. He was also commissioned to grant away lands that were in the Crown's power to dispose of. No direct mention was made, however, of Aboriginal land rights.[56] As late as 1839 Lord Russell at the colonial office wrote in a despatch to Governor Gipps in Australia, "it is impossible that the Government should forget that the original aggression was our own, and that we have never yet performed the sacred duty . . . to impart to the former occupiers of New South Wales the blessings of Christianity, or the knowledge of the Arts and advantages of civilized life."[57]

Although he found inhabitants, Cook did not seek nor obtain their consent when he claimed possession of half the Australian continent in 1770.[58] After this there followed a period of dispossession, conflict and extermination.[59] The statement of Mr. Lesina, the Member of Parliament for Clermon in Queensland in 1901, reflected a typical view at the turn of the century:

> I do not think there is any necessity why we should step out of our way to preserve the aboriginal population . . . the aboriginal population of this country must eventually disappear entirely. . . . The law of evolution says that [they]. . .shall disappear in the onward progress of the white man.[60]

Under these circumstances the High Court in *Mabo* was faced with a monumental task in logically holding that Australia was not viewed as *terra nullius* when first occupied and moreover, that aboriginal rights continue to subsist.

Justice Brennan thought that if the Crown did have exclusive ownership of all the land in Australia it would mean that the common law extinguished the land rights of the indigenous people on the first settlement thereby exposing them to:

> deprivation of the religious, cultural and economic sustenance which

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55. *Secret Instruction Book of the British Admiralty in* JOHN BENNETT & ALEX CASTLES, AN AUSTRALIAN LEGAL HISTORY 253-254 (1982)[hereinafter BENNETT & CASTLES].

56. 1 BARTON, HISTORY OF NEW SOUTH WALES FROM THE RECORDS 483 (1989).

57. Despatch No. 62 Lord Russell to Gipps, 21 Dec. 1839 [H.R.A., (1924), i20.439, at 440], *cited in* Mabo v. Queensland, 107 A.L.R. 1, 108 (Dawson, J.).

58. BENNETT AND CASTLES, *supra* note 55.

59. HENRY REYNOLDS, THE OTHER SIDE OF THE FRONTIER 64-95 (1981); ROBERTS, *supra* note 2, at 13-19.

60. *Quoted in* ABORIGINAL LAND RIGHTS : A HANDBOOK 109 (Nicolas Peterson ed., 1981). *See also* REYNOLDS, *supra* note 2, at ch. 4.

> the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live. Judged by civilized standard, such law is unjust and its claim to be part of the common law to be applied in contemporary Australia must be questioned.[61]

While accepting that acquisition of territory by a state for the first time cannot be challenged in the courts, Justice Brennan thought that the courts could determine the consequences of acquisition of sovereignty under local law; that the courts could determine the body of law that is in force in the new territory. This depended on the manner of its acquisition. How a state acquired territory was governed by international law. The common law, in accordance with the manner of acquisition, determined the body of law that applied in the new territory.

His Honor considered acquisition of territory by way of the enlarged doctrine of *terra nullius*: namely, that states could acquire territory by discovery and occupation, although the territory had an indigenous population provided that the Aboriginal inhabitants were not organised in a society that was united for political action. The enlarged doctrine of *terra nullius*, however, created problems in determining what law was to be applied to an occupied territory. Blackstone,[62] for example, was unable to declare any rule by which the common law became part of territory acquired by occupation that was not uninhabited. Justice Brennan therefore, came to the conclusion:

> It is one thing for our contemporary law to accept that the laws of England . . . became the laws of (Australia). . . . It is another thing for our contemporary law to accept that when the common law of England became the common law of the several colonies, the theory which was advanced to support the introduction of the common law of England accords with our present knowledge and appreciation of the facts. . . . The facts as we know them today do not fit the 'absence of law' or 'barbarian' theory underpinning the colonial reception of the common law of England. That being so, there is no warrant for applying in these times rules of the English common law which were the product of that theory.[63]

His Honor then considered the status of the enlarged theory of *terra nullius* in international law. Referring to the *Western Sahara* Opinion, particularly that of Vice President Ammoun, he concluded that the enlarged notion of *terra nullius* no longer commanded general acceptance.[64] It followed from this that

> [i]f the international law notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of

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61. 107 A.L.R. at 18 (Brennan, J.).
62. BLACKSTONE, *supra* note 11, at 107.
63. 107 A.L.R. at 26 (Brennan, J.).
64. *Id.* at 28.

> the common law which depend on the notion that native peoples may be "so low in the scale of social organization" that it is 'idle to impute to such people some shadow of the rights known to our law" can hardly be retained. If it were permissible in the past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. . . . The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[65]

Thus Justice Brennan's reasoning is, first, that a law based on mistaken facts should have no application if it leads to racial discrimination and, second, that as international law no longer accepts the enlarged doctrine of terra nullius, the current doctrine should be applied in order to protect indigenous human rights. This second proposition appears to apply the international law doctrine of intertemporal law to the law of Australia.

In the *Islands of Palmas* case[66] Max Huber considered that for occupation to be effective the Sovereign had not only to show that sovereignty was acquired in accordance with international law, but also that it was maintained in accordance with developing international law.[67] Justice Brennan does not question the Crown's acquisition of sovereignty. However, the rejection of the expanded concept of *terra nullius* has, for practical purposes, diminished what would have been the entitlements of the Crown under what was thought to be the international and common law at the time of occupation. As this is achieved by incorporation of contemporary international law standards into Australian domestic law, two questions can be asked: Is the standard applied by Justice Brennan in fact the contemporary standard? Second, would international law apply the contemporary standard of *terra nullius*? In other words is intertemporal law applicable in this situation?

Insofar as the first question is concerned, it is not at all clear that the *Western Sahara* case rejects the expanded notion of *terra nullius* as part of current international law. The Court, in its Advisory Opinion, seems to adopt an evaluative test in determining whether the nomadic tribes of the Western Sahara satisfied the relevant test. The Court concluded, "[i]n the present instance . . . at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were *socially and politically organized in tribes and under chiefs competent to represent them.*"[68] Justice Brennan rejects any test of social or political evaluation as being racially prejudicial and as such inconsistent with international law. His position accords with that of Vice President Ammoun, who would have

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65. *Id.*
66. Island of Palmas, 2 R.I.A.A. 829.
67. *Id.* at 839.
68. Western Sahara, 1975 I.C.J. at 39 (Emphasis added).

excluded from the concept of *terra nullius* any inhabited territory.[69]

The *Western Sahara* case was decided in 1975. Since the 70's, however, numerous declarations,[70] studies,[71] working groups,[72] and state policies dealing with indigenous concerns[73] suggest that an indigenous norm is in the process of emerging for the protection of indigenous rights, including land rights. One focus of this norm relates to the classification of territory occupied by indigenous people as *terra nullius*. The Indigenous Nongovernmental Organizations submitted to the Working Group on Indigenous Populations Fifth Session a draft declaration asserting that, "[d]iscovery, conquest, settlement on a theory of *terra nullius* and unilateral legislation are never legitimate bases for States to claim or retain the territories of indigenous nations or peoples."[74]

While one might say that a norm is emerging regarding indigenous peoples' land rights and an aspect of this norm is the rejection of the enlarged doctrine of *terra nullius*, can one say that it has emerged so as to reject the expanded notion of *terra nullius*? In the development of international law there is that shadowy period when non obligatory state

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69. *Id.* at 86. It should be noted that some of the judges expressed doubts concerning the relevance of the *terra nullius* question to the case in that none of the involved parties had claimed that the Western Sahara was *terra nullius*. *See id.* at 74-75 (Gros, J.); 113 (Petren, J.); 123 (Dillard, J.).

70. *See Study of the Problem of Discrimination Against Indigenous Populations: Report of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, U.N. Doc. E/CN.4/Sub.2/476/Add.4 (1981): Resolutions of the Inuit Circumpolar Conference, Annex 1; the Draft Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere prepared by the International Non-Governmental Organizations Conference on the Discrimination against Indigenous Populations, Annex IV; Resolutions of the First Congress of the Indian Movements of South America, Annex V; Conclusions and Recommendations Regarding the Rights of Indigenous People by the Seminar on Human Rights in Rural Areas of the Andean Region, Annex VI; Recommendations of the Forth Russell Tribunal on the Rights of the Indians of the Americas, Annex VII. The San Jose Declaration of 1981, *Study of the Problem of Discrimination Against Indigenous Populations: Report of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities*, U.N. Doc. E/CN.4/Sub.2/21/Add.3, 25 (1983). The Declaration of Principles Adopted by Indigenous Peoples at a prepatory meeting in Geneva, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations, Report of the Working Group on Indigenous Populations in its Fifth Session*, 39th Sess., Agenda Item 10, U.N. Doc. E/CN.4/Sub.2/22 Annex V (1987). *U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Discrimination Against Indigenous Populations, First Revised Text of the Draft Universal Declaration on Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/33 (1989).

71. *See Study of the Problem of Discrimination Against Indigenous Populations, Commission on Prevention of Discrimination and Protection of Minorities*, U.N. Doc. E/CN.4/Sub.2/7 Add. 1-4 (1986); *see also* ROXANNE ORTIZ, INDIANS OF THE AMERICAS (1984).

72. In 1982 the Sub-Commission on the Prevention of Discrimination and Protection of Minorities established the Working Group on Indigenous Populations.

73. *See generally* Torres, *supra* note 2.

74. INDIAN LAW RESOURCE CENTER ET AL., DRAFT DECLARATION OF PRINCIPLES, *reprinted in Report of the Working Group on Indigenous Populations on its Fourth Session*, U.N. Doc. E/CN.4/Sub.2/22 Add.1 (1985).

practice becomes a binding rule of international law. In this process municipal courts have an important role to play; perhaps an even greater role than the international tribunals. Somewhere along the line an indication of the obligatory nature of the rule must be established. Without action at this crucial stage international law cannot advance. Lord Justice Nourse in the *Tin Council* case[75] articulated the appropriate course for a municipal court where an international rule had not solidified:

> An uncertain question of international law is one which cannot be settled by reference either to an opinion of the International Court of Justice or to some usage, custom or general principle of law recognized by all civilized nations. The authorities show that where it is necessary for an English court to decide such a question . . . [it] must do so; being guided by municipal legislation and judicial decisions, treaties and conventions and the opinions of international jurists; and, where no consensus is there found by those opinions which are most nearly consistent with reason and justice.[76]

This dynamic role is imperative in matters involving human rights. This is because the claimants often have no means of bringing their cases before international tribunals or forums where the existence of a norm of international law may be established. In such situations it is the municipal courts who must bear the burden of articulating the norm of international law. Moreover, in the case of indigenous peoples' rights, the courts of a state with a large indigenous population, such as Australia, have a particular obligation to articulate the international standard concerning such people.[77]

In determining the second question, whether intertemporal law would apply, the decision of the Court in the *Western Sahara* case is of little help. The Court there considered itself bound by the question put to it by the General Assembly to decide the *terra nullius* question according to the law in force at the time of colonization.[78] Justice Brennan's intertemporal approach, however, does find support in the separate opinions of Judges De Castro and Forester. De Castro argued that changes to facts and changes to law could not be ignored in the *Western* Sahara case:[79] "whatever the existing legal ties with the territory may have been at the time of colonization by Spain, legally those ties remain subject to intertemporal law. . . ."[80] Judge Forster similarly thought that the Opin-

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75. Maclaine Watson & Co. v. Dept. of Trade, [1988] 3 W.L.R. 1033.

76. *Id.* at 107.

77. As De Visscher has said of the development of customary international law; "Among the users are always some who mark the soil more deeply with their footprints than others, either because of their weight . . . or because their interests bring them more frequently this way." CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 155 (1960).

78. Western Sahara, 1975 I.C.J. at 38-9.

79. *Id.* at 169 (DeCastro, J.).

80. *Id.* at 171. Judge De Castro believed that the issue of *terra nullius* and existing ties should have been considered independently.

ion of the Court minimized, "the social and temporal context of the problem."[81] Philip Jessup, commenting on Huber's conception of intertemporal law, found it "highly disturbing" that a state's title to territory might be affected by the development of international morality. "Every state would constantly be under the necessity of examining its title to each portion of its territory in order to determine whether a change in the law had necessitated, as it were, a re-acquisition."[82] Jessup was concerned about a state losing its sovereignty over territory by virtue of a new rule of international law. This is clearly not the situation here. The doctrine, however, is of general application to customary international law and is not confined solely to the acquisition of territory.[83]

Brownlie[84] and other writers[85] have pointed out that the concern expressed by Jessup, while correct in theory, rarely has a practical effect. This is because the doctrines of acquiescence, prescription and desuetude will limit its application. Also, "inter-temporal law has never been applied where a change in the law has come about in a short time."[86] With regard to this latter point it can be said that, from the time of the writings of Vitoria and Blackstone, the extended doctrine of *terra nullius* has been questioned. Certainly since 1945, when the protection of indigenous peoples has been more prominently on the political agenda, acquisition by way of the extended doctrine has been under attack. With particular regard to Australia, the despatch of Lord Russell to Governor Gipps[87] indicated an awareness of the wrong done to the indigenous people of Australia and, as one does not perform acts of aggression against *terra nullius*, it seems relatively clear that since 1839 the idea that Australia was acquired as *terra nullius*[88] was a fiction. This is illustrated by the fact that the idea that Australia was settled as *terra nullius* was challenged in the Australian courts as early as 1836.[89] Under these circumstances it can hardly be said that the abandonment of the extended doctrine *terra nullius* occurred within a short time. Therefore, it seems that under the circumstances international law would call for the application of intertemporal law in the application of the *terra nullius* doctrine insofar as it relates to the rights of indigenous peoples.

One final question relating to this aspect of Justice Brennan's judgment is the applicability of intertemporal law to municipal systems. This

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81. *Id.* at 103 (Forster, J.).

82. Philip Jessup, *The Island of Palmas Arbitration*, 22 AM. J. INT'L L. 735 (1928). *See also* R. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 30 (1963); W. VERFELT, THE MIANGAS ARBITRATION 14, 149 (1933).

83. T.O. Elias, *The Doctrine of Intertemporal Law*, 74 AM. J. INT'L L. 285 (1980)[hereinafter Elias].

84. I. BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 132 (1973).

85. Elias, *supra* note 83, at 286-287.

86. A. ROCHE, THE MINQUIERS AND ECREHOS CASE 83 (1959).

87. *See* text accompanying note 57.

88. Western Sahara, 1975 I.C.J. at 124.

89. R. v. Murrell (1836) Legge 72.

was raised indirectly in the United States,[90] the United Kingdom[91] and the Federal Republic of Germany[92] in cases involving the applicability of the absolute theory of sovereign immunity as opposed to the more recently developed restrictive theory. In each case the court indicated that it would apply the current rule of international law although, in the common law jurisdictions, there was prior authority adopting the absolute theory into their law.

While Justice Brennan supported his decision with the incorporation of contemporary international law standards of *terra nullius* into Australian law, Justices Deane and Gaudron in their separate opinion, adopt an approach more in line with the first strand of Justice Brennan's opinion. They agreed that the acquisition of sovereignty was unchallengeable in the municipal courts and also that the common law determined the law applicable after acquisition; and, referring to United Kingdom authority,[93] they concluded that the common law of the time did recognize indigenous title if the territory was occupied. Then after reviewing the historical data they conclude that the act of State establishing sovereignty over Australia indicated nothing more than an intention to assert radical title to land in Australia:

> [I]t seems to us to be simply not arguable that there was anything in the act of State establishing the Colony which constituted either an expropriation or extinguishment of any existing native interests in the vast areas of land in the new Colony or a negation or reversal of the strong assumption of the common law that such native interests were respected and protected under the law. . . .[94]

Their Honors explain the absence of any specific reference to Aboriginal title in the early documents on the basis that because of a lack of information regarding the inhabitants generally,

> it was simply assumed either that the land needs of the penal establishment could be satisfied without impairing any existing interests (if there were any) of the Aboriginal inhabitants in specific land or that any difficulties which did arise could be resolved on the spot with the assent or acquiescence of the Aboriginals.[95]

While subsequent acts of dispossession might explain an ambiguity in the original claim to sovereignty, subsequent acts could not do so when, as in the case of the Australian settlement, there was no ambiguity regarding the relevant act of State.[96]

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90. Alfred Dunhill v. Republic of Cuba, 425 U.S. 682 (1976).

91. Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] 2 W.L.R. 356, *reprinted in* 16 I.L.M. 471 (1977).

92. Nonresident Petitioner v. Central Bank of Nigeria, 16 I.L.M. 501 (1977).

93. Attorney-General for Quebec v. Attorney-General for Canada, [1921] 1 App. Cas. 408; Amodu Tijani, [1921] 2 App. Cas. 409, 410.

94. Mabo, 107 A.L.R. at 73.

95. *Id.* at 74.

96. *Id.*

Justice Toohey in his separate opinion adopted a slightly different approach. He agreed with Justice Brennan that it was unacceptable that land which is in regular occupation should be regarded as *terra nullius*.[97] However, His Honor thought that the doctrine of *terra nullius* had no application to the case. He argued that because the land was in fact occupied by the Aboriginal people when the Crown obtained sovereignty, the Crown could only obtain radical title to occupied land, this regardless of any intentions it mights have had to the contrary:

> Immediately on acquisition indigenous inhabitants became British subjects whose interests were to be protected in the case of a settled colony by the immediate operation of the common law. The Crown did not acquire a proprietary title to any territory except that truly uninhabited.[98]

These aspects of the judgements are concerned with interpreting historical data by way of present mores and information concerning indigenous people. The International Court in the *Western Sahara* case in deciding the status of the territory at the time of occupation took a similar approach and was able to look at information regarding the Western Sahara's legal status and legal ties at other times, if this shed light on the initial occupation.[99]

Justices Deane and Gaudron, in their judgment, suggest that if the Crown officers had been aware of the numbers of Aboriginals on the Australian continent, and the sophistication of their culture and social organization, they would not have considered the territory *terra nullius*. As they had no such information, and as there was a strong common law presumption protecting indigenous title, the act of State acquiring sovereignty only extended to the extent of acquiring radical title. The content of the Sovereign's intention is therefore supplied with hindsight based on accurate information as to Aboriginals and their society.

Justice Toohey's position was that the Sovereign's intention at the time was irrelevant if the land was in fact occupied. He then employed current information regarding Aboriginals and their relationship to the land to show that the land was in fact occupied on settlement and therefore protected by the common law.

Justice Dawson dissented. He thought that the issue of whether territory is classified as ceded, conquered, or settled was irrelevant for municipal law purposes where the new law which is introduced is expressly declared by the new Sovereign.[100] In Australia, the sovereign had no intention to preserve Aboriginal title:

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97. *Id.* at 142. His honor also thought that the idea that land which was not in regular occupation was *terra nullius* needed great scrutiny. The failure of people to remain in one spot may be due to the harshness of the climate rather than a lack of attachment to the land. *Id.* at 141.

98. *Id.* at 142.

99. Western Sahara, 1975 I.C.J. at 38.

100. 107 A.L.R. at 106 (citing Cooper v. Stuart, [1889] 14 App. Cas. 286, 291).

> Upon any account, the policy which was implemented and the laws which were passed in New South Wales make it plain that, from the inception of the colony, the Crown treated all land in the colony as unoccupied and afforded no recognition to any form of native interest in the land. It simply treated the land as its own to dispose of without regard to such interests as the natives might have had prior to the assumption of sovereignty. What was done was quite inconsistent with any recognition, by acquiescence or otherwise, of native title.[101]

After considering the historical data, including the early instructions to governors, the dispossession of the Aboriginal people of their land, and the creation of reservations, His Honor concluded:

> [T]here may not be a great deal to be proud of in this history of events. But a dispassionate appraisal of what occurred is essential to the determination of the legal consequences, notwithstanding the degree of condemnation which is nowadays apt to accompany any account. The policy which lay behind the legal regime was determined politically and, however insensitive the politics may now seem to have been, a change in view does not of itself mean a change in the law. It requires the implementation of a new policy to do that and that is a matter for government rather than the courts. In the meantime it would be wrong to attempt to revise history or to fail to recognize its legal impact, however unpalatable it may now seem. To do so would be to impugn the foundations of the very legal system under which this case must be decided.[102]

In this regard Justice Dawson agrees with Justice Brennan in that the actual intention of the Sovereign on occupation was to claim all beneficial ownership of the land in Australia. The difference is that Brennan simply would not give effect to such an intention based as it was on incorrect information. As the relevant intention is colored with the knowledge or lack thereof of Aboriginal culture and numbers together with racial prejudices prevalent at the time, it is relatively clear that the Crown did intend to occupy the Australian continent as *terra nullius*. The intent is manifest if one compares the instructions of Lord Normanby, the Secretary of State for War and the Colonies, to Captain Hobson, the Crown negotiator with the New Zealand Maori people — a territory not considered *terra nullius* — with those of the Crown officers occupying New South Wales:

> [The Crown] disclaims . . . every pretension to seize on the Island of New Zealand, or to govern them as part of the Dominion of Great Britain, unless free and intelligent consent of the Natives, expressed according to their established usages, shall be first obtained. . . .All dealings with the Aborigines for their Lands must be conducted on the same principles of sincerity, justice, and good faith as must govern

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101. *Id.* at 106-7.

102. *Id.* at 111. For an account of legislative attempts to reject the terra nullius application to Australia, see Andree Lawrey, *Contemporary Efforts to Guarantee Indigenous Rights Under International Law*, 23 VAND. J. TRANSNAT'L L. 703, 743 (1990).

> your transactions with them for the recognition of Her Majesty's Sovereignty of the Islands. . . . The acquisition of Land by the Crown for future settlement . . . must be confined to such Districts as the Natives can alienate without distress or serious inconvenience to themselves.[103]

In holding that the intention at the time of settlement was not to occupy as *terra nullius* Justices Deane and Gaudron were able to further hold that the present indigenous rights were not extinguishable by the Crown without compensatory damages. Justice Toohey reached the same conclusion by a different route. The majority, however, thought that Crown could extinguish the native title. This raises the question of whether *Mabo* is yet another instance of "Indian giving". One more empty promise. To answer this it is necessary to consider the nature of the interest recognized and the extent to which it can be protected.

B. *The Implications of Mabo*

1. The Nature of Indigenous Title

In determining whether the Aboriginal people retained presettlement rights and interests in their land, Justice Brennan thought that the court could adopt contemporary notions of justice and human rights if in so doing it did not fracture the skeleton of principles which gave the common law its shape and consistency.[104] By this His Honor apparently meant the recognition of the indigenous interest might run afoul of an essential doctrine of the common law. An essential doctrine in part being indicated by whether, if a rule were to be overturned, the disturbance to the law would disproportionate to the benefit achieved.[105]

His Honor considered the doctrine of tenure to be an essential doctrine of the common law.[106] Recognizing that the Crown only acquired radical title in the land, so that beneficial ownership lay with the indigenous title holders, would not fracture the tenure doctrine. The recognition of radical title in the Crown was quite consistent with the recognition of native title to land, radical title was necessary for when the Crown exercised its sovereign power to grant or to appropriate land within its territory. Unless this sovereign power is exercised in one of these ways there was no reason why land within the Crown's territory should not continue to be subject to native title.[107]

> It was only by fastening on the notion that a settled colony was *terra nullius* that it was possible to predicate of the Crown the acquisition

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103. Normanby to Hobson, 14 Aug. 1839, CO 209¼, 251-81. *See also* SPEECHES AND DOCUMENTS ON NEW ZEALAND HISTORY 10 (William David McIntyre & W.J. Gardner eds., 1971).

104. 107 A.L.R. at 29.

105. *Id.* at 19.

106. *Id.* at 31.

107. *Id.* at 35-6.

> of ownership of land in a colony already occupied by indigenous inhabitants. It was only on the hypothesis that there was nobody in occupation that it could be said that the Crown was the owner because there was no other. If that hypothesis be rejected, the notion that sovereignty carried ownership in its wake must be rejected too.[108]

In *Milirripum v. Nabalco Pty. Ltd.*,[109] Justice Blackburn of the Supreme Court of the Northern Territory had held that the Aboriginal relationship with their land was not of a proprietary nature. This was because, while the Aboriginals felt that they had obligations towards the land, it was not an economic relationship whereby they could exclude others or alienate the land.[110] Justice Brennan thought Aboriginal title constituted a proprietary interest when it was possessed by a community that was in exclusive possession of land. It did not matter whether or not the land belonged to individuals in the community so long as the community effectively asserted that none but its members had the right of occupancy or use of the land. Justice Brennan rejected the view in *Milirripum* that alienability was an essential indicia of a proprietary interest. The fact that individual members of a group enjoyed usufructuary rights over land did not mean that the Aboriginal community or group did not have a proprietary interest, which was a burden on the radical title of the Crown.[111]

The Aboriginal title, which survived the past 200 years were those where the clan or group had continued to observe, as far as practicable, the laws and customs based on the traditions of the group so that the connection with the land was maintained.[112] If the clan or group no longer practiced the customs, then the foundation of the native title had been abandoned, and could not be revived. Full title had vested in the Crown.[113]

Insofar as alienability was concerned Aboriginal title could not be acquired from an indigenous people by one who not being indigenous could not acknowledge their laws and customs. Similarly, a right or interest cannot be acquired by a clan or group or member of an indigenous people unless the acquisition is consistent with the laws and customs of the people. Only the Crown can acquire native interest outside the laws and customs of the indigenous people, it being an incident of sovereignty that the Crown alone can accept the surrender of native title.[114]

The rights and interests recognized will be protected by the appropriate legal and equitable remedies of the common law and established by the evidence as to whether the right is proprietary or personal and usu-

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108. *Id.* at 31.
109. Milirripum v. Nabalco Pty. Ltd., 17 F.L.R. 141 (1971).
110. *Id.* at 270-73.
111. Mabo, 107 A.L.R. at 36.
112. *Id.* at 42.
113. *Id.* at 43.
114. *Id.*

fructuary; and whether it is possessed by community, group or individual.[115]

Justices Deane and Gaudron adopted a similar approach. They defined native title as being one where the interest under the local law or custom involved "an established entitlement of an identified community, group or [rarely] individual to the occupation or use of particular land and that entitlement . . . be of sufficient significance to establish a locally recognized [interest] between the particular community, group or individual and that land."[116] The entitlement may be one that correlates to common law notions of ownership, possession and property or it may not. If it does not correlate with a common law interest then it may either be transformed into an interest recognized by the common law or the common law may be modified so as to accommodate the new interest.[117]

Whatever the nature of the entitlement, however, it is a personal interest and not a legal or beneficial interest or estate in the land. Following from this it cannot be alienated outside of the native system except to the Crown; and it may be extinguished by a grant or other dealing with the land that was inconsistent with the common law native title.[118] As personal rights they can be extinguished by surrender to the Crown or may be lost by the abandonment of the connection with the land. Their Honors were not prepared to decide whether the interest would be lost by abandonment of the traditional customs and ways of the group. Their present feeling is that occupancy and use of the land sufficient to maintain the interest.[119]

Justice Toohey took the most radical approach to the nature of the indigenous title, starting from the premise that it is the presence of the indigenous people on the land that prevents the Crown from acquiring beneficial title. It follows from this that presence would be insufficient to establish title if it were coincidental or truly random, "having no connection with or meaning in relation to a society's economic, cultural or religious life." The use of the land must be meaningful as understood from the perspective of the society.[120] Referring to *Sac and Fox Indian Tribes v. United States*,[121] and *Hamlet of Baker Lake v. Minister of Indian Affairs*,[122] His Honor thought that the proof of occupancy should be by reference to the demands of the land and the society in question.[123] He did not think, however, that anything more than established occupancy at

115. *Id.* at 44.
116. *Id.* at 64.
117. *Id.* at 65-6.
118. *Id.* at 66.
119. *Id.* at 83.
120. *Id.* at 146.
121. Sac and Fox Indian Tribes v. United States, 383 F.2d 991, 998 (1967).
122. Hamlet of Baker Lake v. Minister of Indian Affairs, 107 D.L.R.3d 513, 544-45 (1979).
123. 107 A.L.R. at 147.

time of annexation was needed. His Honor did not see why "long prior" occupancy was necessary.[124] Nor was it necessary that occupancy be exclusive,[125] except insofar as was necessary to preclude indiscriminate ranging over land as a basis of title. If more than one band occupied the land each small group could be said to have title or it was vested in the larger society.[126] His Honor also thought that the inalienability of native title was open to question, and the characterization of native title as personal rather than proprietary, "fruitless" and "unnecessarily complex."[127] Justice Toohey thought that there was power in the Crown to extinguish traditional title, but there is some authority that suggests consent is required.[128]

Justice Dawson, in his dissent, acknowledged that the annexation of land did not bring to an end those rights which the Crown in the exercise of its sovereignty chooses to recognize.[129] His Honor thought that the indigenous interest need not correspond with common law notions of property.[130] The critical question for Justice Dawson was whether the Crown had accepted the indigenous title either expressly or impliedly. This was because once the Crown assumed radical title pre-existing title was held under the Crown and the Crown must accept that title.[131]

The judgments of the Court in *Mabo* advance the status of indigenous title in Australia to the extent that they now recognize that Aboriginal interests in land need not correspond with common law concepts of ownership. The extinguishment of Aboriginal interests by an assumed abandonment because of an absence from the land or the dismemberment of the group is inappropriate. First, it assumes that the connection with the land is primarily a physical one. Aboriginals may not have lived on their lands for years perhaps generations yet continue to have spiritual links with the land and its sacred sites. Also they may have been absent from their land due to misrepresentations, false promises and violence. The abandonment doctrine may ultimately protect only that land which the white settlers considered insufficiently valuable to be worth the effort of driving off the Aboriginal people, while at the same time disenfranchising those who are the most oppressed.

The restriction on alienability may be less significant than it appears. The indigenous title holders presumably can relinquish their title to the Crown in return for a grant back of the land in fee simple. Moreover, the

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124. *Id.* at 147-8. This was required in Hamlet of Baker Lake, 107 D.L.R.3d at 546.

125. *Id.* at 148 (citing United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339, 345 (1941)).

126. *Id.* at 48.

127. *Id.* at 151-2.

128. *Id.* at 151 (citing Worcester v. Georgia, 31 U.S. 350, 370 (1832)(the crown's title comprised, "the exclusive right of purchasing such lands as the natives were willing to sell").

129. *Id.* at 93-4.

130. *Id.* at 97.

131. *Id.* at 98-9.

right to exclude ordinarily includes the right to include. It would follow that the title holders could grant leases and licenses to their lands, but cannot alienate it completely. The inalienability of traditional title is a significant feature of the claims of indigenous people. The World Council of Indigenous Peoples identified as one of their irrevocable and inborn rights "inalienable, collective land ownership."[132]

2. The Crown's Power to Extinguish Indigenous Title

The defendant in *Mabo* argued that under the common law, pre-existing customary rights were extinguished unless expressly recognized by the Crown.[133] Justice Brennan considered the preferable rule to be that a change in sovereignty did not extinguish native title,[134] and that the indigenous inhabitants were in the same position as inhabitants of a conquered territory. In so holding, the Court overruled long standing authority to the contrary. This was necessary to prevent the continued discrimination against the Aboriginal people. Moreover, it also accorded with the reality of Australian history. The acquisition of sovereignty did not encompass beneficial ownership of the land. The Aboriginals were not dispossessed of their lands by such acquisition, but rather by recurrent exercises of paramount power to exclude the indigenous inhabitants from their lands as the colonies expanded.[135]

The acquisition of sovereignty, however, carried with it the power to create and extinguish private rights in the land. The courts could not review the merit of an extinguishment, only its legality. Following United States[136] and Canadian[137] authority, the exercise of the power must reveal a clear and plain intention to do so. Such an intention is not revealed by a law which merely regulates the enjoyment of title. Similarly, a law which reserves land from sale for the purpose of permitting the indigenous to enjoy the native title does not work an extinguishment.[138]

Justices Deane and Gaudron rejected the notion that native title was no more than permissive occupancy which the Crown was lawfully entitled to revoke or terminate regardless of the wishes of those living on the land.[139] This would give the indigenous people no real security as they

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132. Special General Assembly of the World Council of Indigenous Peoples: Declarations and Resolution, *reproduced in Cobo Report, supra* note 3.

133. 107 A.L.R. at 38 (citing Secretary of State for India v. Bai Rajbai, 42 I.A. 229 (1915); Vajesingji Joravarsingji v. Secretary of State for India, 51 I.A. 357 (1924); Secretary of State for India v. Sardar Rustam Khan, I.A. 356 (1941)).

134. 107 A.L.R. at 41.

135. *Id.*

136. United States v. Santa Fe Pacific R.R., 314 U.S. 339, 353 (1941); Lipan Apache Tribe v. United States, 180 Ct. Cl. 487 (1967).

137. Calder v. A.G. of British Columbia, 34 D.L.R.3d 145, 210 (1973); Hamlet of Baker Lake v. Minister of Foreign Affairs, 107 D.L.R.3d 513 (1979); Reg. v. Sparrow, 70 D.L.R.4th 385 (1990).

138. 107 A.L.R. at 48.

139. *Id.* at 67-68.

could be dispossessed at the whim of the executive.[140] Their Honors thought that if the Crown wrongfully extinguished native title it would be obliged to pay compensation.[141] As native title constitutes a legal right, the Commonwealth would be obliged to provide just terms for any acquisition. The Racial Discrimination Act also restrains the States and Territories from extinguishing or diminishing Aboriginal title.[142]

Justice Toohey thought that the Crown had the power to extinguish native title by clear and plain legislation.[143] His Honor, however, thought that there exists a fiduciary duty to ensure that traditional title was not impaired or destroyed without the consent or against the interests of the title holders.[144] Otherwise the title holders would be entitled to compensation.[145]

Chief Justice Mason and Justices McHugh[146] and Dawson[147] agreed with Justice Brennan on the power of the Crown to extinguish Aboriginal title without compensation. In practical terms the distinction may not be as great as it appears. The states may be able to extinguish native title with a grant to an Aboriginal group. Thus the government of South Australia vested in the Pitjantjatjara people some 102,630 square kilometers (more than a tenth of the states land area) of their traditional lands.[148] Such an exercise of power would probably extinguish native title. The legislation vesting the land was held in *Gerhardy v. Brown*[149] not to offend the Commonwealth Racial Discrimination Act because its purpose was to ensure adequate advancement of certain racial groups requiring protection under section 8(1) of the Commonwealth Act. Other acts by the states to extinguish title would probably violate the Act under the ruling of *Mabo v. Queensland*.[150] While the Commonwealth government has the power to extinguish Aboriginal title, it would now be politically unacceptable for it to do so. In this regard, the Australian Aborigines may find themselves better off than indigenous peoples whose lands were taken by cession or conquest.

III. CONCLUSION

Clearly the judgments of the various members of the Court indicate a strong desire to right the wrongs done to the Aboriginal people. The ap-

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140. Citing Attorney General for Quebec v. Attorney General for Canada, [1921] 1 App. Cas. 406; Nireaha Tamaki v. Baker, [1901] App. Cas. 576.

141. 107 A.L.R. at 84.

142. *Id.*

143. *Id.* at 152.

144. *Id.* at 156-60 (citing Delgamuukw v. British Columbia, 70 D.L.R.4th 185, 482 (1991); Guerin, [1984] 2 S.C.R. 384).

145. *Id.*

146. *Id.* at 7.

147. *Id.* at 96.

148. Pitjantjatjara Land Rights Act No. 20 of 1981.

149. Gerhardy v. Brown, 57 A.L.R. 472 (1985).

150. *See generally, supra* note 1.

proaches of the majority show a great deal of ingenuity in resurrecting rights thought dead and buried for some 200 years. The members of the Court, however, were hamstrung by precedent and a natural caution not to go too far. The implications of the case for Australian Aborigines are not clear. *Mabo* dealt with land rights. Indigenous people, however, claim many other rights.[151] If Australia is no longer to be considered as settled as *terra nullius*, how many other indigenous rights have survived? The answer to this question, in the judgment of Justice Brennan, will have to be found in the pre-existing rights and whether their recognition will fracture the skeleton of the common law. Presumably Justices Deane and Gaudron would answer the question according to the case law relating to conquered territory. In either case, the question is not easily answered. From an international perspective the decision must provide a profound impetus to the claims of indigenous peoples everywhere.

151. Professor Nettheim lists ten specific classes of indigenous claims: physical survival, cultural survival and cultural identity, sovereignty, self-determination, self-government, land rights, control of land and its resources, compensation, non-discrimination, and affirmative action. Garth Nettheim, *"Peoples" and "Populations" - Indigenous Peoples and the Rights of Peoples, in* THE RIGHTS OF PEOPLES 107, 116 (James Crawford ed., 1988).