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AUSTRALIA'S FIRST NATIONS COMMUNITY AND THE RIGHT TO WATER

by Maya Martin
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Australia's First Nations peoples¹ have historically

* Maya Martin Tsukazaki is a second-year law student, also pursuing a master's degree in international affairs from American University. The author wishes to emphasize that Aboriginal and Torres Strait Islander groups have been fighting for preservation and recognition of their land and water rights since the colonization of the continent of Australia. A few Indigenous-led organizations that are active in land and water rights advocacy today include ANTAR, <https://antar.org.au/>, and SEED Youth Climate Network, <https://www.seedmob.org.au/>.

¹ In this article "First Nations" is used to refer to the peoples indigenous to the main island of Australia. The Australian government officially refers to indigenous Australians as Aboriginal and Torres Strait Islander people. See *Indigenous Australians: Aboriginal and Torres Strait Islander people*, AUSTRALIAN INST. FOR ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES (AIATSIS), <https://aiatsis.gov.au/explore/articles/indigenous-australians-aboriginal-and-torres-strait-islander-people> (last visited 30 Sept. 2020). Some communities claim the term "Aboriginal person." See *Indigenous Terminology*, UNIV. OF NEW SOUTH WALES (2019), <https://teaching.unsw.edu.au/indigenous-terminology>. However, other Indigenous groups, particularly outside of the context of Australia, argue that the term "aboriginal" can be used to mean "not original." See *Why we say "Indigenous" and not "Aboriginal"*, INDIGENOUS INNOVATION (June 17, 2020), <https://www.animikii.com/news/why-we-say-indigenous-instead-of-aboriginal>. For clarity, this article will use the term "First Nations peoples" to recognize the communities in this article as the sovereign, original inhabitants of the land. See also *Aboriginal, Indigenous, or First Nations?*, COMMON GROUND, <https://www.commonground.org.au/learn/aboriginal-or-indigenous> (last visited 30 Sept. 2020).

valued water as the essential source of life.² However, Australia is a continent with frequent droughts that are exacerbated by climate change.³ Because of this, Australia's water management policies tend to prioritize water access in the more densely populated southern cities, or in northern farms and pastures.⁴ These policies have often been implemented at the expense of rural First Nations communities' access to water.⁵ In the Northern Territory (NT), water tainted with lead, manganese, and uranium has harmed First Nations communities.⁶ In the town of Laramba, a majority-First Nations community with 350 residents, reports revealed that the drinking water has been contaminated by uranium at nearly 300 percent over the safe level for over ten years.⁷ In November 2019, after the government failed to take any action based on these reports, the community of Laramba sued the NT Department of Housing for failing to solve the

² Sue Jackson, *Aboriginal Access to Water in Australia: A Social Justice Challenge for the Murray Darling Basin Plan*, GLOB. WATER F. (Oct. 6, 2010), <https://globalwaterforum.org/2010/10/06/aboriginal-access-to-water-in-australia-a-social-justice-challenge-for-the-murray-darling-basin-plan/>. This article was written before the global COVID-19 pandemic, which has heightened needs for access to clean water and sanitation.

³ *Annual Climate Statement 2019*, AUSTL. GOV'T BUREAU METEOROLOGY (Jan. 9, 2020), <http://www.bom.gov.au/climate/current/annual/aus/#tabs=Rainfall>.

⁴ Virginia Marshall, *Deconstructing Aqua Nullius: Reclaiming Aboriginal Water Rights and Communal Identity in Australia*, 8 INDIGENOUS L. BULL. 9 (2016).

⁵ Elizabeth Macpherson et al., *Water in Northern Australia: A History of Aboriginal Exclusion*, THE CONVERSATION (Aug. 1, 2016), <https://theconversation.com/water-in-northern-australia-a-history-of-aboriginal-exclusion-60929>.

⁶ Nina Lansbury Hall et al., *Getting Clean Drinking Water Into Remote Indigenous Communities Means Overcoming City Thinking*, THE CONVERSATION (Nov. 20, 2018), <https://theconversation.com/getting-clean-drinking-water-into-remote-indigenous-communities-means-overcoming-city-thinking-106701>.

⁷ *Pleas for Action Over Uranium in Drinking Water*, ABC NEWS (June 20, 2018), <https://www.abc.net.au/7.30/pleas-for-action-over-uranium-in-drinking-water/9887966>; Helen Davidson, *Uranium in Remote Communities' Water Puts 'People's Lives at Risk'*, THE GUARDIAN (June 19, 2018), <https://www.theguardian.com/australia-news/2018/jun/20/uranium-in-remote-communities-water-puts-peoples-lives-at-risk>.

contaminated water issue.⁸ However, in July 2020, the NT Civil and Administrative Tribunal found that this was not the Department of Housing's responsibility.⁹ By failing to provide safe drinking water for its First Nations population in Laramba and elsewhere, Australia is violating human rights norms, as well as its domestic Native Title Act.¹⁰

As rainfall is somewhat heavier in the north of Australia than in the middle and southern regions of the country, the government has introduced irrigation techniques to supply water throughout the rest of the country.¹¹ Extreme droughts from 1997-2009 led to the implementation of the National Water Initiative ("The Initiative"), which planned new irrigation channels and dams across Australia.¹² In The Initiative, the Australian government wrote that it must consider any claims to native title before making water management decisions; however, the government failed to stipulate how to establish whether any First Nations persons held title to groundwater.¹³ The Australian government has made some effort to incorporate traditional First Nations water management methods into national policy, but little has been done to include the First Nations community in water management discussions.¹⁴ Human Rights Watch reported

that severe droughts, driven by climate change, will continue to aggravate the lack of clean drinking water in Australia, disproportionately affecting small, rural, First Nations communities.¹⁵

The issue of First Nations water access is particularly relevant in NT, where 25.5 percent of the population is of First Nations descent.¹⁶ While thirty percent of land in Australia is under native title (twenty-three percent in NT), only 0.01 percent of water rights belong to the First Nations population.¹⁷ The water supply for most rural NT communities comes from bore water, or groundwater, collected from deep underground.¹⁸ Groundwater often contains higher concentrations of potentially harmful minerals.¹⁹ While the uranium in Laramba's water supply may have been naturally occurring in the soil, mining and farming activity has also been known to increase mineral content.²⁰ In 2018, reports exposed that the bore water supply in Borroloola, NT was heavily contaminated by zinc and manganese from a nearby mining operation.²¹ In 2018, journalists exposed that, for the past decade, at least three rural First Nations communities in NT, including Laramba, were consuming water with uranium levels significantly higher than the maximum safe level.²²

⁸ Isabella Higgins, *Indigenous Community Launches Lawsuit Against NT Government Over Housing, Uranium Water Issues*, ABC News (Nov. 18, 2019), <https://www.abc.net.au/news/2019-11-19/indigenous-community-launches-law-suit-against-nt-government/11696158>.

⁹ Katrina Beavin & Henry Zwart, *Residents of Remote NT Community of Laramba Lose Legal Battle Over Uranium in Water*, ABC News (Jul. 14, 2020), <https://www.abc.net.au/news/2020-07-14/nt-community-laramba-lose-legal-battle-over-uranium-in-water/12454206> (noting that the plaintiffs from Laramba plan to appeal the decision).

¹⁰ *Native Title Act 1993* (Commonwealth) (Austl.), <https://www.legislation.gov.au/Details/C2019C00054>.

¹¹ *Climatic Extremes*, AUSTL. GOV'T: GEOSCIENCE AUSTL., <https://www.ga.gov.au/scientific-topics/national-location-information/dimensions/climatic-extremes> (last visited Sept. 20, 2020); Macpherson, *supra* note 5.

¹² Lily O'Neill et al., *Australia, Wet or Dry, North or South: Addressing Environmental Impacts and the Exclusion of Aboriginal Peoples in Northern Water Development*, 33 ENV'T & PLAN. L. J. (2016).

¹³ Marshall, *supra* note 4. While the Native Title Act refers to "indigenous" populations, this article uses the term First Nations peoples.

¹⁴ *Id.*

¹⁵ Elaine Pearson & Louise Chappell, *5 Human Rights Issues That Defined 2019*, THE CONVERSATION (Dec. 10, 2019), <https://theconversation.com/5-human-rights-issues-that-defined-2019-126939>.

¹⁶ *2016 Census QuickStats: Northern Territory*, AUSTL. BUREAU OF STATISTICS, https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/7?opendocument (last updated Sept. 19, 2020).

¹⁷ O'Neill, *supra* note 12 at 14; *Native Title Newsletter Vol. 2*, AIATSIS (2018) 1, 10-11, https://aiatsis.gov.au/sites/default/files/research_pub/1802_nativetitlenewsletter_final_web_0_2.pdf.

¹⁸ *Environmental Health: Water Supply*, AUSTL. INDIGENOUS HEALTHINFO.NET, <https://healthinfonet.ecu.edu.au/learn/determinants-of-health/environmental-health/water-supply/> (last visited Sept. 20, 2020).

¹⁹ Isabella Higgins et al., 'Our Kids Need Proper Water': Families Plead for Action Over Uranium in Drinking Water, ABC NEWS (June 19, 2018), <https://www.abc.net.au/news/2018-06-19/families-plead-for-action-over-uranium-in-drinking-water/9879748>.

²⁰ Lansbury Hall, *supra* note 6; Higgins, *supra* note 8.

²¹ Helen Davidson, *NT Camp Water Still Contaminated Two Weeks After Alert*, THE GUARDIAN (May 5, 2018), <https://www.theguardian.com/australia-news/2018/may/05/nt-camp-water-still-contaminated-two-weeks-after-alert>.

²² Davidson, *supra* note 7.

Australia has violated human rights norms by failing to provide clean water access to its citizens, a basic human right. Australia is also violating its obligation to First Nations communities and their right to access and autonomy over safe drinking water. First, the 2002 Committee on Economic, Social and Cultural Rights (CESCR) wrote a general comment outlining the right to water, which clarified that the right to an adequate standard of living was preserved in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).²³ Second, the UN General Assembly adopted Resolution 64/292 in 2010, which declared that access to clean water is a human right.²⁴ Australia abstained from this vote but did not dissent. Third, Article 32 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which Australia signed in 2009, asserts that states must obtain consent from indigenous peoples before developing, utilizing, or exploiting natural resources that are held by those communities.²⁵ Additionally, Article 7 of the UNDRIP protects the indigenous individual's inherent right to life, a jus cogens standard that is echoed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), and the ICESCR.²⁶ Failure to maintain safe drinking water sources causes significant health problems, which

violates the adequate standard of living obligation protected in the ICESCR.²⁷

Perhaps most significantly, Australia's 1993 Native Title Act (NTA) protects the water rights of First Nations peoples.²⁸ Section 24HA gives Aboriginal and Torres Strait Islander peoples with title to any body of water the right to be informed and negotiate on water management and regulation.²⁹ This includes surface and subterranean water.³⁰ Section 212 states that while the Commonwealth of Australia can claim water rights, First Nations claims to water rights are not necessarily automatically extinguished.³¹ Approximately twenty-three percent of the land in NT is held under native title, and according to the NTA, First Nations communities should have a greater voice over the use of the adjoining subterranean groundwater.³²

As recommended by both the NTA and UNDRIP, Australia must commit to giving First Nations communities a voice in the approval of activities that degrade the environment and affect their communities' access to both land and water. However, the NTA also preserves the government's right to manage most natural resources, including water.³³ Thus, the Australian government still has ultimate responsibility over water management in First Nations communities. Therefore, the NT and Australian governments cannot claim that they have no responsibility for water access in communities like Laramba because, under the ICESCR, the Australian government still has an obligation to provide safe drinking water to all communities.³⁴

Rural access to clean water is a problem that will increase with climate change, as temperatures rise and

²³ U.N. Econ. & Soc. Council, Comm. on Econ., Soc., & Cultural Rts., General Comment No. 15 (2002): The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); International Covenant on Economic, Social and Cultural Rights art. 11, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICCPR].

²⁴ G.A. Res. 64/292 (Aug. 3, 2010).

²⁵ G.A. Res. 61/295, art. 32, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP]; *Experts Hail Australia's Backing of UN Declaration of Indigenous Peoples' Rights*, UN NEWS (Apr. 3, 2009), <https://news.un.org/en/story/2009/04/295902-experts-hail-australias-backing-un-declaration-indigenous-peoples-rights>.

²⁶ UNDRIP, *supra* note 25 art. 7; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); ICCPR, *supra* note 23; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

²⁷ Division of Toxicology & Human Health Sciences, *Public Health Statement: Uranium*, AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY (Feb. 2013), <https://www.atsdr.cdc.gov/Tox-Profiles/tp150-c1-b.pdf>; ICSECR, *supra* note 26.

²⁸ *Native Title Act 1993*, *supra* note 10. Note that the Native Title Act refers to "Aboriginal and Torres Strait Islander peoples," although the term "indigenous" is used to refer to land use agreements with Aboriginal and Torres Strait Islander communities.

²⁹ Katie O'Bryan, *More Aqua Nullius? The Traditional Owner Settlement Act 2010 (VIC) and the Neglect of Indigenous Rights to Manage Inland Water Resources*, 40 MELB. U. L. REV. 547 (2016).

³⁰ *Native Title Act 1993*, *supra* note 10.

³¹ O'Bryan, *supra* note 29.

³² *Native Title Newsletter*, *supra* note 17 at 10-11.

³³ *Native Title Act 1993*, *supra* note 10.

³⁴ Davidson, *supra* note 7.

extreme droughts and unpredictable weather grow more frequent.³⁵ If Australia fails to take action, there will undoubtedly be more communities like Laramba. The Australian government is violating the right to life, delineated in the ICCPR, ICESCR, and UDNRIP, by failing to provide safe drinking water to all peoples. In NT, where a significant percent of the population is rural and of First Nations descent, it is imperative that the NT government takes further action by enacting legislation to comply with the NTA and ensure that all persons have equal access to safe, clean drinking water.³⁶ Australia has violated international and domestic law by failing to address the issue of contaminated water for over a decade. The Australian government needs to prioritize the needs of First Nations communities to find a sustainable, safe solution to protect every Australian's right to water.

U.S. "ASYLUM COOPERATIVE AGREEMENTS" WITH CENTRAL AMERICAN COUNTRIES ARE UNLAWFUL

by *María Alejandra Torres*^{*}

At the beginning of 2020, the Trump administration announced that it would begin deporting Mexican asylum seekers to Guatemala to claim asylum there, as part of a bilateral agreement with Guatemala.¹ The United States is working on similar agreements with Honduras and El Salvador.² Although the media has referred to these agreements as "Safe Third Country" agreements, the U.S. government calls them "Asylum Cooperative Agreements" ("ACAs") insofar as the government has negotiated cooperation with these states

³⁵ U.N. Water, *Water and Climate Change*, U.N., <https://www.unwater.org/water-facts/climate-change/> (last visited Sept. 20, 2020); *State of the Climate Report 2018: Australia's Changing Climate*, CSIRO & AUSTRALIAN BUREAU OF METEOROLOGY, <https://www.csiro.au/en/Research/OandA/Areas/Assessing-our-climate/State-of-the-Climate-2018/Report-at-a-glance> (last updated Dec. 20, 2019).

³⁶ 2016 Census QuickStats, *supra* note 16; Royce Kurmelovs, *High Levels of Uranium in Drinking Water of NT Community*, NITV (Jul. 31, 2020), <https://www.sbs.com.au/nitv/article/2020/07/31/high-levels-uranium-drinking-water-nt-community> (noting that NT does not have a law setting a minimum standard for drinking water, unlike other states and territories).

^{*} *María Alejandra Torres was born in Bogotá, Colombia, and has lived in the United States since she was three years old. Being a Latin American immigrant has greatly shaped her worldview, as well as her academic and career interests. After completing her 1L year at American University Washington College of Law, she transferred to New York University School of Law. She aspires to work in civil rights and international human rights law. Alejandra wants to thank the Human Rights Brief for introducing her to the world of human rights scholarship so early in her career. She is grateful that the Brief has continued to provide her with the opportunity to explore her interests and share her ideas. She wishes the Brief continued success.*

¹ Priscilla Alvarez & Geneva Sands, *US to Send Mexican Asylum Seekers to Guatemala*, CNN POL. (Jan. 7, 2020), <https://www.cnn.com/2020/01/07/politics/us-sending-mexican-asylum-seekers-guatemala/index.html>.

² Geneva Sands et al., *Trump Administration Begins Deporting Asylum Seekers to Guatemala*, CNN POL. (Nov. 21, 2019), <https://www.cnn.com/2019/11/21/politics/guatemala-asylum-agreement/index.html>.