

**The Sydney Centre for International Law and the International Law Association
(Australian Branch)**

**Twilight seminar: *Race Discrimination, the Intervention and Indigenous
Australians***

5 pm Tuesday 24 March 2009: Speakers George Newhouse; Greg Marks

Speaking Notes Greg Marks

- There are a number of perspectives in respect of the current complaint on behalf of Aboriginal people of the Northern Territory, members of the Prescribed Areas People Alliance (PAPA), to the UN Committee on the Elimination of Racial Discrimination (CERD) that I want to pick up on today. These are points are not so much directed at the specifics of the complaint to CERD, which by the way is excellent, but some of the contextual issues.

Firstly, an historical perspective:

- Australia has been in a situation of almost constant dispute with CERD since August 1998, when the CERD Committee, acting under its early warning measures and urgent action procedures, sought information from the Australian Government, in particular on amendments to the *Native Title Act 1993* (NTA).
- CERD had become aware of the ‘worrying’ or ‘clearly deteriorating’ developments in respect of Indigenous affairs in Australia since the previous generally very positive assessment of Australia by CERD in 1994.
- In March 1999 the Committee considered the situation in Australia, including the information provided by the Australian Government. Its decision (UN Doc A/54/18 (1999)) found a number of key provisions of the amended Native Title Act were not consistent with CERD obligations, and that, as amended, the Native Title Act, despite its Preamble, could no longer be considered a special measure within the meaning of the relevant articles of CERD.
- Incidentally, this finding indicates that it is not up to a State party to unilaterally decide what is and what is not a special measure. Just asserting that legislation represents a special measure does not make it so.
- CERD also found that there had been a lack of effective participation by indigenous communities in the formulation of the NTA amendments. CERD strongly affirmed the requirements to protect the rights of Indigenous peoples to own, develop, control and use their common lands, territories and resources, as set out in its General Recommendation XXIII,¹ and to ensure that ‘no decisions directly relating to their rights and interests are taken without their informed consent.’

¹ CERD Committee, *General Recommendation XXIII: Indigenous Peoples*, UN Doc A/52/18.

- The Australian Government refuted these findings (Note to UN High Commissioner for Human Rights Geneva 5 July 1999) and made no endeavour to find some common ground with CERD. Indeed, it claimed that the decision was unbalanced, factually incorrect and failed to take account of the Government's written and oral submissions. The Government also refused to agree to a proposed visit to Australia by some CERD Committee members.
- Instead a long drawn out argument has since ensued between Australia and CERD. In the lead up to the following CERD meeting in August 1999 the Government ran a diplomatic offensive, targeting the Committee chairman, individual committee members and key UN figures including the Secretary General and the High Commissioner for Human Rights.
- As CERD Committee members sit on the Committee as independent experts and not as country representatives this approach by Australia was seen as inappropriate and it was resented. Despite the Government's attempts to spin the outcome of the August 1999 CERD meeting its endeavours at that meeting were unsuccessful and counter productive, as was shown by the CERD decision in respect of Australia in 2000.
- In its 2000 decision CERD noted the unsatisfactory responses from Australia in 1999 and expressed its concern at the continuing risk of further impairment of the rights of Australia's Indigenous communities. It reiterated the requirement of informed consent as required under article 5 (c) and General Recommendation XXIII.

International law arguments

- The Australian Government ran, and I think continues to run, various international law arguments against CERD's recommendations to it. These arguments are, in my view, doubtful at best, spurious at worst. These resemble what I term 'decoy arguments'. As in rugby football, whilst one has these decoy runners in play, one can get on with the main game.
- Such arguments provide a distraction, they buy time. As Balakrishnan Rajagopal has observed, we live in an age where government legal advisors distinguish themselves by offering the best 'apologetic' legal arguments for hegemony and abuse of power.² For example, Australia does not recognise any right on the part of Indigenous peoples to provide informed consent, or there to be even any special consultation requirements in respect of Indigenous peoples. They are to be treated as just another stakeholder, no more and no less important than others.
- In particular, previous Australian Governments have made a point of rejecting CERD General Recommendation XXIII. So, in a report to CERD in May 2006 the Australian Government stated, amongst other things, that it 'does not accept that it cannot, or should not, make any decisions directly relating to the rights and

² Balakrishnan Rajagopal, 'Martti Koskenniemi's From Apology to Utopia: a reflection', 7 German Law Journal No. 12 (1 December 2006).

interests of Indigenous Australians without their 'informed consent', and is of the view that general recommendation XXXIII is not binding'.³

- General Recommendation XXIII is important – it makes clear that the provisions of CERD apply to protect Indigenous peoples and provides guidance on their implementation in respect of such peoples.
- The Australian Government, in developing this position, has critiqued the inner workings of CERD when it adopted the General Recommendation. Australia has asserted that at the CERD session where General Recommendation XXIII was adopted there was significant dissent on the issue of the reference to 'informed consent', and that it was included in the document on the basis that the document was not a legally binding instrument.
- However, examination of the Summary Record⁴ of that meeting reveals that no more than three members raised any concerns with the term, and that those concerns were resolved through discussion and the text was adopted by consensus. The Government's criticism of General Recommendation XXXIII, as well as appearing to be wrong in fact, more significantly reflects a lack of appreciation of the consensus mode of operating of such UN Treaty bodies.
- Again, Australia was reminded of the right of informed consent under General Recommendation XXIII by the Special Rapporteur on Racism, Doudou Diène as recently as February 2008.⁵ And the beat goes on - I understand the position of Australia still has not changed in regards to informed consent, General Recommendation XXIII etc.
- Incidentally, this makes rhetoric about increased consultation and participation suspect – such consultation clearly continues to be seen as discretionary, not an obligation in law. In respect of the NTER, the record of consultation under the new Government seems to be little more than anecdotal recollections of chats by the Minister with various Indigenous people, particularly women, in the Northern Territory. This hardly amounts to consultation, and leaves informed consent entirely out of the picture.

The Northern Territory Emergency Intervention (NTER)

- Turning now to the charge of discrimination against the NTER legislation and its implementation, it is noted that with the NTER there is a deeper agenda at play. This agenda goes way beyond whether quarantining of social security entitlements is discriminatory. I am not sure that the deeper agenda is widely appreciated.
- Certainly commentators have seen the assimilationist bias in current policy settings, including the NTER. To many observers the weakening of the rights of traditional owners through the 5 year township leases, 99 year and 40 plus 40 year

³ CERD/C/AUS/CO/14/Add.1 16 May 2006.

⁴ CERD, *Summary Record*, UN doc CERD/C/SR.1235 5 August 1997.

⁵ UNGA Un Doc A/HRC/7/19/Add.1 20 February 2008.

leases appears arbitrary, unfair and unnecessarily cautious in terms of securing government assets including housing.

But what is happening here is not really about securing government assets.

- It's about undermining the functional relationships in the *Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA)*. A 3-way process for decision making is built into the ALRA – the three parties to any decisions are the traditional owners, land councils and trusts. Decision-making in respect of ALRA land is based on the informed consent of traditional owners (TOs) – which when you think of it is quite striking in a parliamentary democracy. The Australian parliament has provided legislated recognition of another form of authority and decision-making: traditional authority that relies on descent and mythology; decision-making procedures that may be opaque to western eyes.
- By for those public service mandarins who are the architects of *current* policy settings, and whose influence does not appear to have diminished in the slightest with the change of government, this recognition of traditional authority is anathema – it is seen as fundamentally undemocratic, feudal, archaic, and the root cause of Aboriginal disadvantage and dysfunction.
- Their project in response to this diagnosis is to modernise and renovate Aboriginal society. Fundamental to this project is to get rid of the role of traditional owners in decision making.
- However, to repeal the ALRA would not be politically viable. So the process has to be to undermine it, to roll it back. There are two main prongs to this task. One is to remove the role of traditional owners in township areas by various leasing arrangements – once the land is leased it is outside (effectively forever) the control of traditional owners.
- The push for leasing in townships was on before the NTER. It was really just brought in under the NTER umbrella to make it more politically sellable – it was presented as part of addressing the national emergency, but really this ship was well and truly out of the dock before the NTER. Indeed, the origins of the attack on the role of TOs goes back to the Reeves Report (“Building on Land Rights for the Next Generation – The Review of the Aboriginal Land Rights (Northern Territory) Act 1976” John Reeves 1998).
- But how to deal with the rest of ALRA land – the great bulk of Aboriginal land holdings? The answer here is relatively simple – that is to negate the problem of traditional owners making decisions by depopulating the bush – ‘encouraging’ people to move to the so-called ‘growth centres’.
- The key document here is the MOU of September 2007 between the Australian Government and the Northern Territory in respect of Indigenous Housing, Accommodation and Related Services. It is an extremely important document.
- The MOU prohibits any Commonwealth funding for public housing going to outstations and similar small communities – ever! That is about 500 of the

approximately 600 discrete Aboriginal communities in the Northern Territory will never be provided with a new house – the idea is that the current housing stock will be largely left to deteriorate and that over time accommodation pressures plus the lack of services such as education and health will lead to most people re-locating to the so-called growth centres or the urban areas such as Alice Springs and Katherine.

- Aboriginal people are thereby to be forced to ‘choose’ to leave their own country, resulting perhaps in a new *terra nullius* – land belonging to no-one or an empty land. As one commentator has put it, the land will revert, not to *terra nullius*, but to *terra vacua*.⁶ Some have wondered if we are seeing a second wave of dispossession. The drift of population to Alice Springs and similar centres is not just an accident.
- There is a level of obscenity about this – Aboriginal people are allowed to remain the legal owners of the land, but with few or no services or houses eventually the land is to become deserted. There will be no need to undercut the authority of the TOs - it will stay on paper but will have little practical application.
- What this deliberate policy constitutes is a *profound level of discrimination* – one where in theory land is owned by Aboriginal people but where in practice they are meant to move off it. This is the game.
- What we see here, in human rights terms, is a refusal to allow people to live with a degree of autonomy on their traditional lands. An analysis of how this situation offends international law would take a week. But in particular there is a total disregard of the economic, social and cultural rights of Aboriginal people here. These are rights which Australia has undertaken to respect and implement.
- To grant land rights but at the same time make it increasingly difficult to live on the Indigenous estate is surely perverse. Legal recognition and *de facto* dispossession sit side by side.
- This is deep-seated, but disguised, discrimination. The discrimination built into the NTER is a crucial part of a wider agenda. As such, the discrimination in the NTER needs to be brought before the attention of international opinion, as this complaint to CERD has done.
- But also we must look behind the NTER to the deliberate vitiation of Aboriginal life outside major settlements and urban areas. This is intended to undermine traditional life.

⁶ Altman J, ‘In search of an outstations policy for Indigenous Australians’, CAEPR WP 34/2006, p.ii.