

Indigenous Rights and the Origins of International Law

In March 1999 the UN Committee on the Elimination of Racial Discrimination made a finding in respect of Australia's compliance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (the Racial Discrimination Convention - ICERD)¹. The Committee examined amendments made by the Howard Government in 1998 to the *Native Title Act* 1993. The Committee, in expressing its concern over the compatibility of the Native Title Act, as currently amended, with the Racial Discrimination Convention, stated:

"While the original Native Title Act recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act. While the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title holders, the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title."²

Strong words indeed.

Of particular note is the Committee's concern about the lack of adequate consultation with indigenous communities about the amendments. In this context, the Committee referred to its General Recommendation XXIII³ which calls upon States Parties to:

"recognise and protect the rights of indigenous people to own, develop, control and use their common lands, territories and resources"

and which stresses the importance of ensuring:

"that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions relating to their rights and interests are taken *without their informed consent*". (emphasis added)⁴

The ICERD provides strong support within international human rights law for the rights of indigenous peoples vis-à-vis the nation states within which they reside. At least for those states which have ratified the Convention, and the ICERD is widely ratified, including by Australia, it is impossible to deny the reach of international law in respect of the racial equality rights of indigenous peoples. They have an internationally protected right to be treated in a non-discriminatory fashion and to be fully consulted about matters which affect them.

¹ CERD/C/54/Misc.40/Rev.2 18 March 1999. P.ara. 6.

² At para 6

³ UN Doc CERD/C/51/Misc.13/Rev 4 (1997) paras 4-5

⁴ At para 9.

Despite denials to the contrary, the CERD decision clearly caused the Australian Government a degree of embarrassment. The decision was consequent to the Committee applying its early warning and urgent procedures, whereby it examines the situation in States Parties where it considers that there is particular concern on the basis of actual or potential circumstances. These procedures have rarely been invoked in respect of Western democracies. The Committee was concerned not only about the amendments to the Native Title Act, but in the approach more broadly to indigenous issues in Australia. For example, the Committee was also aware of proposed changes to the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) contained in the review of the ALRA commissioned by the Commonwealth Government⁵ - this matter is as potentially contentious as the amendments to the Native Title Act.

The CERD Committee called upon the Australian Government to address its concerns as a matter of urgency and to re-open negotiations with representatives of the Aboriginal and Torres Strait Islander communities in order to find solutions in respect of the Native Title legislation "which would comply with Australia's obligations under the Convention"⁶. The pressure has continued on the Australian Government, as the Committee kept the matter on its agenda under its early warning and urgent action procedures and reviewed the situation again at its fifty-fifth session in August 1999.⁷

But the CERD is by no means the only international instrument addressing, either directly or indirectly, the rights of indigenous peoples. Also of relevance are the Universal Declaration of Human Rights of 1948, the International Covenant on Civil and Political Rights 1966 (ICCPR) - in particular Article 27 concerning the rights of members of minorities, the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), the Convention on Biological Diversity, and the International Labour Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989⁸. The Convention Concerning the Protection of the World Cultural and Natural Heritage⁹ provides the international law context for the concerns of the World Heritage Committee about the protection of indigenous peoples and their cultures in assessing the on-going World Heritage status of Kakadu National Park. As well, the UN is also developing a Draft Declaration on the Rights of Indigenous Peoples.

It can be argued that the ILO Convention 169 and, to a degree, the UN Draft Declaration, embody and develop norms of international customary law in respect of indigenous

⁵ Reeves, J. "Building on Land Rights for the Next Generation" The Review of the *Aboriginal Land Rights (Northern Territory) Act 1976* ATSIIC 1998. See also the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Report "Unlocking the Future: The Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976" August 1999.

⁶ At para 12.

⁷ Despite considerable pressure from the Australian Government, CERD, in its decision of 16 August 1999, reaffirmed its earlier March decision. It drew attention in particular to the ongoing attenuation of land rights in Australia due to the ongoing implementation of the 1998 NTA amendments in the various State and Territory jurisdictions in Australia.

⁸ Australia has not ratified this important ILO Convention, which is the only international instrument to date dealing specifically with indigenous rights.

⁹ Convention Concerning the Protection of the World Cultural and Natural Heritage (1972)

peoples which are binding on states regardless of whether they have ratified particular conventions and treaties. Australia is bound by customary international law as well as treaty law. As James Anaya has observed:

"there is a substantial level of international concern for indigenous peoples, and with this concern there is a certain convergence of international opinion about the content of indigenous peoples' rights. This convergence of opinion carries subjectivities of obligation and expectation attendant upon the rights, regardless of any treaty ratification or other formal act of assent to the norms articulated." ¹⁰

The present Government is, despite any protestations to the contrary, concerned by international scrutiny in respect of Aboriginal and Torres Strait Islander peoples. Considerable resources have been devoted by the Government to responding in the relevant international fora. When this has not been successful there has been an attack on the competence and integrity of the procedures of the relevant UN bodies. For example, the Attorney General, Darryl Williams, said in an interview in response to the CERD decision:

"Well, I've read the report and I don't feel the least bit embarrassed on behalf of Australia because regrettably the Committee has presented an unbalanced report that doesn't recognise any of the submissions made by the government, which were quite extensive"¹¹

Whilst to date the Government has affirmed its commitment to Australia meeting its international obligations, one option available to it would be to take the legally difficult and politically high risk strategy of denouncing all or some of Australia's obligations in respect of human rights Conventions such as the Racial Discrimination Convention. However, even such a radical step would not absolve Australia of its obligations under international law.

Indeed, the international dimension of the rights of the indigenous peoples of Australia was clearly recognised by former Prime Minister Gough Whitlam in 1972. He said:

"More than any foreign aid program, more than any international obligation which we meet or forfeit, more than any part we may play in any treaty or agreement or alliance, Australia's treatment of her Aboriginal people will be the thing upon which the rest of the world will judge Australia and Australians"¹²

¹⁰ Anaya, S J *Indigenous Peoples in International Law* (1996) p55

¹¹ Interview on 2BL "The World Today" 19 March 1999. Note that the CERD decision of 16 August 1999 rebuts this accusation.

¹² Whitlam, E G, "Australia's International Obligations" in G Nettheim, *Human Rights for Aboriginal People in the 80's* 1983, p11

A degree of ambivalence can be seen in Australia in respect of its international obligations in respect of indigenous peoples. This in part reflects the strong desire of settler societies such as Australia to avoid outside scrutiny, initially by the imperial authorities, later by the international community. However, Whitlam was correct in emphasising the international dimension of indigenous rights. The relationship between indigenous peoples and the independent states within which they exist is, no matter what appeals are made to national sovereignty and the principle of non-intervention in domestic affairs, essentially and fundamentally international in character.

Indeed, it is in the discussion of the relationship between the coloniser and the indigenous at the beginnings of European colonial expansion into the New World in the sixteenth century that, it is argued here, international law itself had its beginnings. International law was at its origin a discourse about the norms and principles to apply to the relationship between indigenous peoples and colonisers. Only later did international law evolve into the system based on state sovereignty, exclusive jurisdiction, territorial integrity and non-intervention in domestic affairs which we know today. The state-centred system of international law came to deny that individuals, indigenous societies, and even those nations deemed not to be sufficiently "civilised"¹³, could be subjects of international law and have rights under such law.

But this is not how international law began. Over the centuries international law moved a long way from its origins. The nadir of international law was reached in the late 19th and early 20th centuries when, as Alexandrowicz has pointed out, it contracted "into a regional (purely European) legal system abandoning its centuries-old tradition of universality based on natural law doctrine...International law shrank to regional dimensions though it still carried the label of universality".¹⁴

However, there has been a reaction against a system where there are only state actors. Bailey has referred to "the astonishing emergence, led and epitomised by the Universal Declaration of Human Rights in 1948, of a comprehensive international movement for the promotion and observance of human rights".¹⁵ This development post 1945 of human rights law, and in particular an emerging concern with the situation of indigenous peoples, should not be seen as a new development in international law. Instead, it can more properly be viewed as international law returning to its original concerns.

The emergence of human rights law in the wake of World War 2 provides the opportunity for indigenous peoples to bring their concerns before the international community. The common origins of international law and indigenous rights gives valency to this discourse. The international status of indigenous societies is embedded in the earliest international law formulations. This is why the governments of sovereign states will not succeed in being dismissive of international claims for justice by indigenous peoples. Governments that rely on a positivist legal construction of the international order are

¹³ See for example Lassa F L Oppenheim, *International Law* (Ronald F Roxburgh ed 3rd ed 1920)

¹⁴ Alexandrowicz, C H. *An Introduction to the History of the Law of Nations* 1967 p2

¹⁵ Bailey, P. *Human Rights - Australia in an International Context* (1990) p276

finding that their claims for exclusive domestic jurisdiction are increasingly criticised, rejected or ignored.

That the origins of international law lie in the sixteenth century discourse about the legal and moral relationship between the colonisers and indigenous peoples has been noted by a number of commentators. They describe a long tradition of recognition of the status and rights of indigenous peoples within international law. This tradition is seen by some to validate contemporary claims by indigenous peoples for international standing and protection. However, others have argued that this recognition of indigenous rights was fundamentally ambiguous and flawed from the beginning and has served to legitimise colonialism.

The issue to be emphasised here however is simpler and more basic. It is to go behind the positivist assumption that international law is no more and no less than the law of consenting sovereign nation states. It is also to go behind the view that human rights law, as developed since World War 2, is simply an overlay on this positivist construction - that is to say that it is a largely modern phenomenon arising from the acceptance by nation states that human rights need international protection unless we are to degenerate into unspeakable atrocities and international chaos.

However, indigenous rights are not simply a recently discovered sub-set of the post war International Bill of Rights. Nor do they exist at the whim of an international order that is constructed entirely by sovereign nation states. Nevertheless, we see both these points of view represented in Australia. There remains a strong sentiment that the treatment of Australia's indigenous peoples is essentially a domestic matter. As evidently self-serving as this view is, it also reflects an inadequate understanding of the origins of international law, and the continuing tradition within that body of law, whether ambivalent or muted, of recognition of the international status of indigenous peoples. To make progress at the domestic level we need to understand and accept the legitimacy of international concern - a concern which stretches back to the 16th century.

The British publicist, M F Lindley, writing in the 1920s, noted that international law had a long history of recognising, in theory at least, the territorial rights of indigenous peoples:

"...extending over some three and a half centuries, there had been a persistent preponderance of juristic opinion in favour of the proposition that lands in the possession of any backward peoples who are politically organized ought not to be regarded as if they belonged to no one."¹⁶

Lindley also observed the derogation from such recognition of indigenous rights evident in the late nineteenth and early twentieth centuries, as exemplified in the writings of publicists such as Westlake.¹⁷ According to Lindley:

¹⁶ Lindley, MF. *The Acquisition and Government of Backward Territory in International Law* (1926) p20

¹⁷ Oppenheim, P. ed *The Collected Papers of John Westlake on International Law* 1914 cited in Lindley 18

"...especially in comparatively modern times a different doctrine has been contended for...; a doctrine which denies that International Law recognizes any rights in primitive peoples to the territory they inhabit." ¹⁸

A similar interpretation of the historical development of international law in respect of indigenous rights has been offered by Berman who has noted that recognition of such rights was to be found within international law, at least prior to the nineteenth century. As Berman puts it:

"Before the era of European colonialism in the 19th century, a legal order since repudiated by the international community, the rights of indigenous peoples were widely recognized. The writings of Vittoria (sic), Grotius, Pufendorf, Vattel and others are replete with passages which describe indigenous societies as distinct political entities with territorial rights." ¹⁹

The re-emergence of indigenous rights in international law in recent times has been noted by a number of commentators, among them Sanders²⁰, who notes contemporary developments such as increased indigenous advocacy and the development of international standards. Former Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Dodson, notes that some, of what he calls the "better moments" in Australian law, such as the *Racial Discrimination Act 1975*, the *Aboriginal Land Rights (Northern Territory) Act 1976* and the High Court's Mabo decision of 1992, were firmly grounded in, if not derived from, international law.²¹ He refers to "[T]his project of fully utilising the international human rights system".²²

Sanders identifies indigenous rights as having been previously posited within international law, but as having been progressively brought within the ambit of the domestic law of the successor states of the colonial empires during the nineteenth century. For example, in the United States, a limited international dimension to the position of the Indians had been recognized by the Supreme Court in the early nineteenth century, in Chief Justice Marshall's doctrine of Indians as "domestic dependent nations" under the guardianship of the Federal Government.²³ However, even this acknowledgement of the international status of the Indians - limited and paternalistic as it was - was progressively eroded in that country over time.

Sanders sees the roots of the modern resurgence of indigenous rights as being in the humanitarian movements of the nineteenth century, and in the persistence of indigenous

¹⁸ Lindley at 20

¹⁹ Berman, H R. Panel Discussion "Are Indigenous Populations Entitled to International Juridical Personality" 79 *American Society of International Law Proceedings* 189 at 190.

²⁰ Sanders, D. "The Re-emergence of Indigenous Questions in International law" *Canadian Human Rights Yearbook* 3 (1983), 12-30

²¹ Dodson, M. "Linking International Standards with Contemporary Concerns of Aboriginal and Torres Strait Islander Peoples" in Pritchard, S ed *Indigenous Peoples, the United Nations and Human Rights* (1998) p18 at 21.

²² At 20

²³ *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831)

peoples in refusing to accept a "domestic" status.²⁴ When he states that "[I]ndigenous questions have re-emerged as questions of international law and policy"²⁵, Sanders is alluding to the tradition of recognition of indigenous rights in international law, identified by Lindley and Berman. Sanders traces this tradition back to the early sixteenth century contact between the Spaniards and the Indians, noting in particular the doctrinal contribution of Vitoria, whom he describes as "one of the fathers of international law",²⁶ and the role of Bartolome de Las Casas who "was the greatest publicist",²⁷ in support of the rights of Indians.

In this perspective, the contemporary emergence of indigenous rights is not so much the progressive development of new law, but rather the restoration of existing rights previously acknowledged. Thus Doubleday, discussing Inuit hunting rights, argues that the relationship between historical authority (as evidenced in the work of Vitoria, Grotius and Pufendorf) and the progressive development of international law can provide the necessary basis and elements to develop indigenous rights fully at law:

"Early publicists provide authority and theoretical roots. Existing international agreements provide materials for revision and inclusion. Processes like that of the Working Group on Indigenous Populations provide opportunities."²⁸

Some writers contend that indigenous rights arise, in fact, outside of the positive law system of the nation states altogether. Berman sees such rights as:

"...pre-existing rights in the sense that they are not developed from the legal system of surrounding states but arise *sui generis* from the historical condition of indigenous peoples as distinctive societies with the aspiration to survive as such"²⁹

In a couple of ways the advancement of indigenous claims is a challenge to the state-centred system of positive international law. Firstly, indigenous rights claims, like human rights claims generally, are often, although not necessarily, advanced in terms of some higher universal law or authority, some moral claim superior to the law created by the consent of sovereign states.

Secondly, by positing a collectivity, *viz* the indigenous people, as a bearer of international rights, the "statism" of the contemporary international legal order is challenged. Crawford has noted how even the most basic claims of indigenous peoples - passive claims to be

²⁴ Sanders, *supra* n 21 at 13

²⁵ At 30

²⁶ At 5

²⁷ At 5. See also Marks, G C . "Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de Las Casas" 13 *Australian Year Book of International Law* 13. (1992) 1-51

²⁸ Doubleday, W C. "Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environment Law" 17 *Denver Journal of International Law and Policy* (1983) No 2 373 at 384.

²⁹ Berman, *supra* n 20 . 190

simply left alone to live their own lives - inherently represent claims against the states in which they live. Crawford observes:

"The first thing to notice then is statism. Discussion of Aborigines takes place against the background of the division of the world into states or state areas, and the assumption that the primary human collective, above the family, is the state."³⁰

It is this tension between statism and the assertion of indigenous rights at international law which, as noted above, is clearly evident in Australia today. As Mick Dodson has observed:

"...when it comes to human rights scrutiny, this country takes full advantage of its geographic isolation. It hides away at the bottom of the South Pacific convinced and insisting that Indigenous affairs are an entirely domestic matter and no one else's business".³¹

In contrast, he asserts that:

"As members of the world's peoples, we [indigenous peoples] are the subjects of international law. We are entitled to be the full and equal beneficiaries of that law and make claims over our rights"³²

Thus the interest in the early international law publicists is not only one of legal history. There is an assumption amongst a number of commentators that these early texts remain coherent and valuable passages in the body of international law and that they bear on the present situation. Whilst not all commentators view international law as being historically favourable to indigenous rights, a number of commentators assert that the early theorists validate the assertion that indigenous peoples have rights in international law.

In particular, the discussion of indigenous rights in sixteenth century Spain is a significant part of this process of validation. The Spanish theorists of the sixteenth century have been collectively referred to as the "Spanish School." The Spanish School was largely contemporaneous with the discovery and conquest of the Americas by Spain. They considered the legitimacy of the Spanish presence in America and subjugation of the Indians. Most renowned was Vitoria, professor of theology at the University of Salamanca. The Spanish School may also be considered to have included Domingo de Soto, Francisco Suarez and Bartolome de Las Casas. Las Casas, in particular, was a noted defender of the rights of the Indians.

Whilst a number of writers assume that the Spanish School represents a strong and consistent advocacy of Indian rights, other writers have noted ambivalence within the

³⁰ Crawford, J. "The Aborigine in Comparative Law", (1987) 2 Law and Anthropology 5 at 14.

³¹ Dodson *supra* n 22 at 19

³² At 19

texts, even to the extent of finding theoretical support for colonialism in them. This is especially so in respect of Francisco de Vitoria. Indeed, Fitzpatrick in a paper presented to the 1998 18th Annual Conference of the Australia and New Zealand Law and History Society, noted that:

"There could hardly be two more divergent views of the primal text of international law than those which have come to accompany Vitoria's *De Indis*. In one view, Vitoria is seen as getting international law off to an aptly exalted start in the early sixteenth century with his universalist, humanitarian espousal of the interests of the Indian during Spanish colonization of the Americas. With the other view, Vitoria certainly did bequeath the enduring lineaments of international law, but he did so by way of providing a refined framework and justification for colonial oppression."³³

Fitzpatrick argues that these two views are compatible. He states that the Thomist bases of Vitorian doctrine at the one time allow indigenous societies dominion and a place within the *ius gentium*, the law of nations, while at the same time deeming such societies as inevitably inferior and therefore liable to subjugation and tutelage by the colonial powers. It is not the intention here to consider the argument about the legacy of Vitoria, which has been carried on by a number of commentators³⁴. However, it is noted that this interpretation of the ambivalence of Vitoria's doctrine, as being rooted in its assumptions, was not in fact shared by Vitoria's contemporary, Bartolome de Las Casas. By contrast, Las Casas in fact suggested that Vitoria had temporized in his support of the legal position of the Indians. According to Las Casas, this was not on the basis of doctrine but rather for reasons of political expediency, in that having criticised the usual grounds by which the Spanish justified their subjugation of the Indians, Vitoria needed to find some grounds to justify Spain's continued presence in the Americas.³⁵

A balanced view is given by James Anaya when he notes:

'What we now call international law can be traced back to the natural law philosophies of Renaissance European theorists, which were in some measure, although not entirely, sympathetic to indigenous peoples' existence as self-determining communities in the face of imperial onslaught"³⁶

³³ Fitzpatrick, P. "Terminal Legality: Imperialism and the (De)composition of Legal Culture" presented at the 17th Annual Conference of the Australian and New Zealand Law and History Society 1998 p3

³⁴ See for example Anghie, A. (1998). "Francisco de Vitoria and the Colonial Origins of International Law", in E Darian-Smith and P Fitzpatrick (eds.), *Laws of the Postcolonial*; Pagden, A. (1993), *European Encounters with the New World: From Renaissance to Romanticism*.

³⁵ Las Casas, B de. *The Defence of the Most Reverend Lord, Don Fray Bartolome de Las Casas, of the Order of Preachers, Late Bishop of Chiapas, Against the Persecutors and Slanderers of the Peoples of the New World Discovered Across the Seas* (circa 1552: unpublished Latin manuscript. Trans and ed Poole, S 1974) p 341

³⁶ Anaya *supra* n10 at 9

He goes on to note that:

"Within a frame of thinking traditionally linked to the rise of modern international law, prominent European theorists questioned the legality and morality of claims to the 'New World' and of the ensuing, often brutal, settlement patterns"³⁷

The common origins of international law and indigenous rights have important implications. They explain some of the contradictions and tensions within the practice of international law today. They provide a fuller understanding of the nature of international law and lead away from the simplistic positivist conception of international law as a self-serving arrangement between established states in a Euro-centric world order. They are a reminder of the natural law inheritance of international law.

Whilst the legacy of the sixteenth century jurists may, to some extent, be problematic for claims of indigenous equality and international status, especially in the work of Vitoria, at the same time the assertion of the international status and the consequent rights of indigenous peoples contained in these early doctrines confirms, justifies and supports the claims of indigenous peoples today.

As Anaya has observed:

"...just as international law once moved away from natural law thinking that was to some extent supportive of indigenous peoples' survival as distinct autonomous communities, international law is again shifting. But this time the shift is in retreat from the orientation that would divorce law and morality, and deny international rights to all but states, or that would regard non-Westernized peoples as necessarily inferior.....this latest shift, although fraught with tension, carries a reformed body of international law concerning indigenous peoples"³⁸

The future of indigenous affairs in Australia today must be seen in the context of a system of international law and its consequent rights and obligations which, once again, tentatively and with many contradictions, is learning to find a place for indigenous societies in the international community. It is better to recognise this fact, and to seek a domestic reconciliation which accords with international standards and principles, which stretch back to the origins of international law, than to adhere to an exclusive view of sovereignty which fails to acknowledge the international dimension of indigenous rights.

Indigenous rights and international law may not be synonymous, but their common origins are relevant in responding to contemporary claims of indigenous peoples for recognition in international and domestic law.

³⁷ At 10

³⁸ At 26