CHAPTER XI

HOW LONG CAN MIGHT BE RIGHT?

For the Aboriginal Treaty Committee, the conference on Aborigines and International Law provided not only a culmination of the work we had done, but a pointer to the direction which Aborigines and Australian governments might take in future. Since that April of 1979 when the Committee had begun work, there had been great changes and developments in international legal thinking on the situation and future of indigenous peoples — developments of which we ourselves then had little knowledge. The setting up of the Human Rights Commission's Working Group on Indigenous Populations in 1981 and its successive meetings in 1982 and 1983 had been little noticed in the Australian media. Like the Canberra Assembly of the World Council of Indigenous Peoples, such developments were either poorly reported or generally ignored. But the thinking of Aborigines themselves was being reoriented, and their priorities were for the most part changing.

Where in 1979 and 1980, the idea of a treaty or series of

treaties between Aborigines and the Commonwealth had seemed an objective providing some hope for them, the following years had been deeply disillusioning. Though they had not abandoned the idea of a treaty as a binding instrument, many had now relegated it to a long-term objective. For the Federation of Aboriginal Land Councils formed late in 1981, three main issues must first be settled before any Australian government could be trusted to treat fairly with Aboriginal representatives. These issues — land rights as a first priority, self-determination as an essential corollary of their territorial base, and a recognition of sovereignty as first owners of the country who had never relinquished their claim to it or ceased to oppose the European-Australian occupation — now agreed with the priorities being set by the World Council of Indigenous Peoples and other non-governmental organizations recognized by the Human Rights Commission as representing the interests of indigenous peoples.

Some of us had not been able to see how the 'sovereignty' concept might be usefully defined and asserted in the Australian context. While we agreed that a people who had been and indeed still were being invaded and dispossessed of land and culture, and who had never conceded defeat or sold or bargained land away, had a clear claim to ownership on the moral level, claims involving the acknowledgement of sovereignty would give rise to many problems. As Professor Morse, among others, had emphasized, Australia was the most racist of former British colonies (with the exception of South Africa); where the status and rights of Aborigines were concerned, it was also one of the most ignorant and prejudiced. Even the word 'sovereign', associated as it was for most people with a vague image of crowns, kings and queens, palaces and British history, could spring the trap of that racism. The term 'self-determination', as bearing no such connotations, seemed more hopeful and less inflammatory; and it also seemed little if at all less

meaningful. What appeared to stand most obstinately in the way of Aboriginal self-determination remained the concepts of the common law which had already been produced in the two Aboriginal cases. These legal constructs seemed deeply embedded in Australian legal precedent. They consisted of three main concepts.

The first, prescription, was the notion cited by the Aboriginal Legal Service itself in its submission to the Senate Committee, that if the seizure of a land and the forcible submission of a people, however illegal it may have been in the view of international law, has been an accomplished fact for so long as to be accepted by the community of nations, it has thereby become legal in the effluxion of time.

The second, Act of State, was the argument cited among others in the Coe case, that acts by a sovereign government cannot be questioned by a lower authority. This implied that the occupation of Australia is now beyond the power of modern legal cases to debate, much less to reverse.

The third, intertemporal law, was the principle that the law which prevailed at the time of the occupation of a colony is the law which prevails in that context today, even if it is now superseded. This implies that the assertion of British common law in its refusal to recognize the validity of Aboriginal law and custom at the time of occupation remains the dominant legal authority today in the matter of law as it applies to Aborigines, and cannot be overturned in favour of Aboriginal law. It also implies that although today the occupation of Australia by any invading power would be contrary to international law, the law (such as it was) which applied in 1788 continues to apply today. The facts that the *terra nullius* argument is now discredited internationally, and that in any case it did not apply in 1788 in so far as Aboriginal law and land-use were disregarded or not recognized by the occupying power, are thus not applicable, or so Australian lawyers might argue.

In the Report of the Senate Committee on Constitutional and Legal Affairs, *Two Hundred Years Later* ... the Committee considered that, however lamentable and mistaken the British view of Aboriginal culture, law and land use may have been, it is now a matter of past history and its result in the loss of sovereign power to Aborigines cannot be remedied by post facto recognition. This view depended on the notions outlined above for validity. But in so far as this accepts a *fait accompli* and places all the blame in the past, it is hypocritical. For in the Kimberleys, in the Roxby Downs mining takeover, in Mornington Island and Aurukun, to quote modern instances, indeed everywhere where Aborigines had recently been or were being subject to takeover of land they had occupied since 'time immemorial', exactly the same conditions apply today as applied in the first dispossession, and in no case have Aborigines bargained over or conceded the loss of land. All such invasions rely on the *terra nullius* principle and on the result of the two cases, Coe and Gove, and on the interpretations of the common law on which they rely.

The question seemed to stand out nakedly: were these new dispossessions simply a reassertion of the *terra nullius* principle and of the 'might is right' argument, now internationally discredited? It seemed at least possible that the continued Aboriginal refusal to recognize our right to take over their land constituted a continuance also of the physical resistance and therefore placed European Australia in the position of an international delinquent. It was not a conclusion which European Australians like ourselves would care to contemplate.

On the *terra nullius* question, a further advisory opinion had now come from the International Court of Justice (ICJ) in the case of Namibia. Here, South Africa claimed the colony on the grounds that Namibia, as a neighbouring border region, not a blue-water colony, was not subject to the decolonization imperative, and also that, since it had

been occupied before the application of human rights international law, it was not subject to question because of the application of the intertemporal principle. With the further appeal by Namibia to the ICJ, the opinion again went against South Africa's claim. It appeared that to attempt to justify the occupation of Australia under the *terra nullius* rule would now be highly risky under the new international legal perspective.

The report of the World Council of Churches to the Human Rights Commission: *Continuing the Journey: Justice for Aboriginal Australians* indicated that the report on the case of Australia adopted in July 1982 had resulted in the setting up of a continuing group by the Australian Council of Churches to monitor events.[1] The International Commission of Justice, the United Nations Human Rights Commission itself and Amnesty International were all said to have shown 'substantial interest' in the first report, and intended 'to take notice of the issues raised according to their own style and procedures'.[2]

The Hon. Thomas Berger sent us in advance a copy of his address to the Inuit Circumpolar Conference (ICC) as chairman of the Alaska Native Review Commission, at the time when he was still hoping to be present at the Conference in November. This address had a good deal of bearing on the Australian situation in so far as the ICC's inquiry, set up independently of the Canadian and US Governments without government funding, would be held in a similar context of demands for industrial development in previously little-industrialized and remote areas where

1 See also UN Economic and Social Council, Commission of Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Working Group on Indigenous Populations. Second Session, 30 May 1983: World Council of Churches, Land Rights for Indigenous People. Statement adopted by the Central Committee of the WCC, July 1982, pp.5–8.

2 UN Economic and Social Council, E/CN.4/Sub.2/Ac.4/1983/5, p.23.

indigenous peoples still subsisted on renewable resources. Like the Mackenzie Valley Pipeline Inquiry which Berger had earlier chaired, it would require him to deal with the social and economic issues of such development.

The parallel of this situation with developments in the Australian uranium province, the bauxite leases both active and pending in northern Australia, the diamond project at Argyle in the Kimberleys and the other mining projects in Aboriginal Australia, was clear; and the outcome of Justice Berger's earlier report with its ten-year moratorium on development, was a reminder of the situation of the Australian Aborigines of the north in contrast with the outcome of that inquiry. Berger's address now, in 1983, referred back to his conclusions in *Northern Frontier Northern Homeland:*

> We in Canada had been committed to the view that the economic future of the North lay in large-scale industrial development. There had always been a traditional renewable resource sector in the North, but instead of trying to strengthen it we had for a decade or more followed policies whereby it could only be weakened or even destroyed. We believed in large-scale industrial development and depreciated the existing economic base. Indeed, people who tried to earn a living by hunting, trapping and fishing had often been regarded as unemployed ...
>
> I found ... that the development of the non-renewable resources of a region can bring serious pressures to bear on its population ... If the neglected sector of the economy represents a preferred or culturally important way of life, if it is a means of self-identification and a source of self-respect, the devaluation of that way of life can have widespread and dismaying consequences. These consequences are exacerbated if the industrialized economy offers rewards that are only short-term.[3]

3 Draft of an address by the Hon. Thomas Berger to the Inuit Circumpolar Conference at Frobisher Bay, Northwest Territories, Canada, on 25 July 1983, pp. 8–9.

The Canadian Government's acceptance of the need to postpone the construction of the Mackenzie Valley Pipeline for ten years 'in order to strengthen Native society, the Native economy — indeed the whole renewable resource sector — and to enable Native claims to be settled' had now been recognized by Canadian and US people as wise.[4] Meanwhile, an understanding had emerged of the need to conserve the North American environment and renewable resource sector, and the environmental movement was working together with native people on the task. 'Both have an interest in the protection of the environment', Berger said, 'and both agree that any measures to protect the environment must be subject to Native hunting and fishing rights'.[5]

The contrast with the Australian situation was sad. It was sadder yet in the matter of progress towards the principle of self-determination for indigenous Aboriginal peoples. As Berger said:

> In the past decade, the principle of Native self-determination has been recognized in Canada, and not only in the North. No-one can be sure exactly how it will all turn out but one thing is already apparent: the Native peoples are a political force to be reckoned with in the North and throughout the country. Their rights have been recognized in the Canadian Constitution and Charter of Rights, and a series of national conferences ... has now begun.[6]

In Australia, Aborigines were in search of similar recognition and consultation on an equal basis over their future. The Canadian Government's recognition of the rights of the indigenous peoples of the north was certainly a new factor and had been influenced by other considerations

4 ibid. p. 11.
5 ibid. p. 12.
6 ibid. p. 14.

than those at work in Australia; but it provided a powerful example. In December 1982, the House of Commons had set up a special committee, The Parliamentary Task Force on Indian Self-Government, 'to review all legal and related institutional factors affecting the status, development and responsibilities of Band Governments on Indian reserves', with a wide basis of reference and with an ex-officio member from the Assembly of First Nations and co-operation in research and writing of the report by liaison officers from other Indian organizations. This committee (the Penner Committee) issued its second report in late October 1983, a month before the holding of the Canberra conference. Here again was a reminder of how far Canada had gone, in comparison with this privately organized, privately funded, first attempt at setting the issues of international law and of self-determination before the Australian people on a public basis, and perhaps pointing for both the Australian communities to some further possibilities for exploration and reconciliation.

For us, at the beginning of the conference, these possibilities seemed to centre round the work of the Human Rights Commission's working group, the draft International Covenant on the Rights of Indigenous Peoples put forward to it by the World Council of Indigenous Peoples, the fact that these new international initiatives were already pointing to the urgency of the need for the dominant Australian community to set its house in order by negotiating on a genuine basis with the Aboriginal people, and the initiatives of Aborigines themselves towards self-determination as defined by the international human rights conventions. The fact that these conventions did not allow for application in the case of peoples, rather than individuals, and that the lingering remnants of the 'blue-water principle' stood in the way of such recognition in the case of indigenous enclave populations, remained as problems to be solved. We hoped some light would be

thrown on these and other questions by the papers presented at the conference.

The Canadian recognition of the rights of indigenous *peoples* to self-determination marked a big step forward. At the August 1983 Geneva meeting of the Working Group on Indigenous Peoples, the Federation of Aboriginal Land Councils had complained that the Australian Government's reports to the Human Rights Commission persistently referred to 'the Aboriginal population' rather than 'people' — a distinction difficult to grasp until one realized that in the case of Australia, the Commonwealth Government had continued in its communications with the United Nations to emphasize that Australia was one united people.[7] This emphasis was not merely semantic but had legal implications. There was an emerging and important distinction between the terms in international legal terminology as the deliberations of the Working Group proceeded.

In August 1983, the American Indian Four Directions Council, which had non-governmental organization status in Category II with the Economic and Social Council of the United Nations, had submitted to the Working Group on Indigenous Populations a Statement on Legal Standards. This statement began by declaring that as the foundation for the future work of the Group, 'the essential jural equality of indigenous and other peoples [should] be declared unambiguously'. This was a step towards applying the International Conventions on Human Rights to indigenous enclave peoples *as such*, where previously the Conventions had been applicable only to individuals and not to groups. The right to self-determination, unambiguously declared as a first principle in the Conventions, was now to be moved

7 G. Nettheim, 'International Law and Aborigines' in P. Hanks and B. Keon-Cohen (eds), *Aborigines and the Law: Essays in Memory of Elizabeth Eggleston*. George Allen & Unwin, 1984, p. 12 of draft.

further towards the recognition of indigenous peoples as having a right of self-determination in their own right.

The Four Directions Council attached to its Statement a Draft Resolution Declaring the Universality of all Human Rights. This set out the recommendation that indigenous populations be now regarded as 'peoples' within the meaning of the International Covenants on Human Rights unless and until they 'freely and unambiguously' chose to 'incorporate themselves with other States or Peoples by democratic means'.

This was an attempt to address the problem set out by Professor D. Sanders in his paper, submitted at the same time to the Working Group by the World Council of Indigenous Peoples, that:

> The framework of human rights and minority rights in international law seems unable to deal with the issues of a distinctive land base or of collective political rights ... colonialism is rejected (in the international legal order), but no remedy is offered to indigenous enclave populations.[8]

The definition of an 'indigenous people' would be of importance in this attempt. In a Statement Concerning Racism in the Application of the Principles of Self-Determination and Legal Equality of States[9], the following definition was offered of a 'people' recognizable as such for the purpose of international law, as having 'a common history, language, culture and geography, whether or not it has acted or been recognized as an independent state'.[10] In relation to the American situation, the Statement pointed out that the now-discredited *terra nullius* principle formed 'the entire legal basis of colonizing powers' claims to the North American Arctic and to roughly one-fifth of the rest

8 Sanders, 'The Re-emergence of Indigenous Questions in Intermediate Law', draft, p. 34.
9 UN Economic and Social Council, E/CN..4/Sub. 2/AC 4/1983.
10 ibid. p. 1.

of that continent', and declared further that 'colonized or lawlessly annexed peoples should never be denied the right to self-determination on the pretence that they must become 'equal' with citizens of the colonizing State'.[11]

Clearly, there might be problems in the inclusion of Australian Aborigines under this proposed definition, so far as the question of a common language went, at least, unless each separate 'tribe' (that is, linguistic unit) were taken to be a 'people' in its own right.[12] But the Australian position was very shaky in other respects. In spite of a large body of state and Federal legislation directed to Aborigines, the various governments continued in effect to declare the legality of a *terra nullius* annexation, and at the same time to refer to an Aboriginal population which could not be allowed the status of a people. Yet the government had representatives of a National Aboriginal Conference attending the UN Working Group meetings as well as the representative of a Federation of Aboriginal Land Councils — who declared that the Australian Government, in its attempt to dismiss the Aboriginal struggle for self-determination, refused to admit the existence and responsibility of the FALC while at the same time using its capabilities and its recognition by Aborigines themselves for the government's own purposes.[13]

Some of the ambiguities, evasions and difficulties of the Australian position were highlighted in the first session of the Conference, in Professor Garth Nettheim's paper on International Law and Aborigines.[14]

While the International Convention on the Elimination of All Forms of Racial Discrimination had been ratified by

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11 ibid. pp. 2–3.

12 For information on the indigenous languages of Australia see, for example, R. M. W. Dixon, *The Languages of Australia*. Cambridge, Cambridge University Press, 1980.

13 UN Economic and Social council, E.CN.4/Sub. 2/AC. 4/1983.

14 Nettheim, in Hanks and Keon-Cohen (eds), *Aborigines and the Law*, ch. 3.

Australia and the (now much criticized) Racial Discrimination Act 1975 had been passed by the Commonwealth to fulfil its obligations under the Convention (with some states also passing their own Acts), Australia had not made a declaration to allow a right of individual petition to the Human Rights Commission under Article 14 of the Racial Discrimination Convention. This was undoubtedly one result of the coalition government's emphasis on federalism and the opposition of certain of the states. This factor was also behind other reservations and failures in the field of the Conventions, including the failure to ratify the Optional Protocol to the International Covenant on Civil and Political Rights, which would allow a right of individual petition to the Commission; nor had Australia accepted the optional system under that Convention whereby one state may complain of the conduct of another. Its ratification of the three human rights conventions (International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights — under which the Human Rights Committee operates — and International Convention on the Elimination of all Forms of Racial Discrimination) was therefore incomplete. The Commonwealth's own Human Rights Commission Act under which the Australian Human Rights Commission now operates became law in 1982 but does not bind the states and does not establish enforceable rights, and therefore is no more than a step towards fulfulling the nation's obligations under the Covenant on Civil and Political Rights.

Said Professor Nettheim:

> The Bill itself was drafted as a result of long drawn out consultation with State governments, and the same consultative process led to the drafting of a series of reservations, declarations and interpretations to accompany Australian ratification of the Covenant. For such reasons when enactment of the Bill failed in 1980 because of irreconcilable

> differences between the Senate and the House of Representatives, the Government felt little difficulty in proceeding to ratify the Covenant.[15]

As Professor Nettheim comments, though Australia's record in the matter of human rights is relatively good, 'there is one exception, one which has already been raised in Geneva: the situation of Aborigines and Torres Strait Islanders. This is the one human rights issue on which Australia is peculiarly vulnerable'. And the Fraser Government's attempts to make the 'new federalism' work failed most obviously on this particular issue. Yet, as Nettheim observes, it might not have been possible to get the agreement of the states to ratification of the International Covenant on Civil and Political Rights at all, but for Australia's inclusion of a reservation on state rights and responsibilities[16] whereby:

> the implementation of those provisions of the Covenant over whose subject matter the authorities of the constituent States exercise legislative, executive and judicial jurisdiction will be a matter for those authorities ...[17]

The government's initial report to the Human Rights Committee under the Covenant's Article 40, reiterated this, and also the assertion that Australians were 'one people'. The attempt to develop 'co-operative arrangements to co-ordinate and facilitate the implementation of the Covenant', as set out in the reservation, has apparently had little success, however; and as Nettheim asks: 'Can Commonwealth–State co-operation be expected when the subject-matter is human rights, particularly the human rights of Aboriginal people in Queensland, or Western

15 Nettheim, draft, p. 10.
16 Australia's Initial Report under Article 40 to the Human Rights Committee, CCPR/C14 Add. 1 (11 December 1981), p. 16.
17 Nettheim, draft, p. 12.

Australia, or elsewhere?'[18] He refers to the completely ineffective Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management Act) 1978, which after five years of operation has never been put into practice because of the failure of the Commonwealth and Queensland Governments to agree. Again the Queensland Government's 'grants in trust' legislation for Aboriginal and Torres Strait Islander principal reserves, after long negotiation between state and Commonwealth, offered, in fact, so little security of ownership that the Commonwealth had to back down on its support and to guarantee intervention if the state used them 'to the detriment of reserve residents'. Nettheim concludes that the recent High Court decisions in the Koowarta and Franklin Dam cases, though clearly endorsing the Commonwealth's powers under the 'external affairs' treaties to override states' opposition, have practical weaknesses. 'No Commonwealth Government, of whatever political persuasion, will lightly undertake a confrontation with State Governments,' he opines — a conclusion which seems to have been correct.

The new developments in international law, however, may provide opportunities for Aborigines. Nettheim points out that ILO Convention 107 might now be ratified, since in 1977 the opposition of Queensland to its ratification was apparently (and surprisingly) withdrawn, and that the Hawke Government might be more inclined to ratify it. 'The themes of protection and integration would probably be unacceptable today ... and there are moves to revise the terms of the Convention', but since it did affirm the principle of land rights, its ratification now could be useful as the Hawke Government moved to introduce overriding land rights legislation. But by the time of our 1983 Conference, no moves in that direction were apparent.

18 Nettheim, draft, p. 13.

Nettheim's view, however, was that the continued ventilation of Aboriginal grievances in Geneva, and the Human Rights Commission and Sub-Commission's interest in devising or accepting the new Convention on Indigenous Populations

> may well establish, in time, enough legal basis to support Commonwealth legislation through the external-affairs power on the core issues of Aboriginal claims on Australian society such as land rights, cultural identity and self-management ... But they may also serve a political purpose in persuading Australian governments, Commonwealth and State, to use their legal powers in an attempt to meet the major claims of Aboriginal people; or in persuading Commonwealth governments to assert their legal powers against less enthusiastic State governments.[19]

Since there was no channel for Aborigines' complaints to the Economic and Social Council over non-compliance of Australia with the Covenant on Economic, Social and Cultural Rights, their ventilation of grievances was much limited by Australia's refusal to ratify the Option Protocol or to accept the right of individual petition under Article 14. As Nettheim pointed out, though a state v. state complaint procedure could be employed under Article 11 of the Racial Discrimination Convention, such complaints were rare. He took the view that a more hopeful avenue of complaint was through the Working Group on Indigenous Populations; and though the Covenants failed to recognize adequately the needs of indigenous enclave people, the fact that Australia had ratified them placed it under obligations in the field of international human rights. The decisions in both the Koowarta and Franklin Dam cases removed any doubts on the Commonwealth's powers, but

> politically, within Australia, the issue of Aboriginal rights is one on which co-operation from some States is least likely. The

19 ibid. p. 22.

> Commonwealth Government may, then, be faced with a conflict between its international political relationships and its internal political relationships ... If it prefers the former, its problems are likely to be political rather than legal.[20]

The Conference also heard a paper on International Law and Sovereign Rights of Indigenous Peoples by Dr Rosalie Schaffer of the Commonwealth Ombudsman's Office, which outlined the concept of sovereignty in terms of international law as it then stood. She referred to the difficulty of definition of this 'multifaceted [and] politically charged term', but concluded that the concept of a *territory* was essential as 'one of the cornerstones of international law and inter-state relations'. She maintained that in terms of contemporary international law, the concept of sovereignty could only relate to a 'singular and exclusive power of government', which could not allow for the recognition of competing sovereign claims within a state. Thus the kind of claim made in the Coe case for the recognition of sovereignty within the Aboriginal community was not sustainable. This reiteration of the conclusion in Coe and the views of the Senate Committee on Constitutional and Legal Affairs led her to the question whether the Australian Aboriginal community could appeal beyond the local authority to an international authority in the International Court of Justice for a decision on the sovereignty question. Since there was no provision in the human rights treaties for any lower group than the states themselves to participate in proceedings before the court, and individuals had no *locus standi* at all, she concluded that it would only be by the aid of the General Assembly itself that an advisory opinion could be requested from the World Court.

> In the absence of any challenge to Australian sovereignty *per se* by a third State and in view of the fact that Australia has been

20 Nettheim, draft, p. 31.

> recognized as a member of the world community of nations, and is a member of the United Nations in its own right, there would appear to be little political or legal mileage to be gained by requesting an advisory opinion on the primary question whether the Australian Government did in fact acquire sovereignty over the territory. It is doubtful whether the International Court would consider entertaining such a question, even were it competent to do so . . . In any event it is difficult to see how any court could hold that sovereignty as such was never acquired over Australia by the Australian Government, for if not by occupation of *terra nullius* then it certainly was acquired either by conquest or by prescription.[21]

The *prescription* rule, Dr Schaffer explained, was 'dependent on the peaceful and undisturbed exercise of sovereignty' which after an undefined length of time resulted in recognition as part of the international order.

> In none of [the] cases dealing with the question of prescription has the viewpoint ever been mooted that prescription did not operate due to the protests and opposition of the indigenous population. It is always the protests by other States that have been taken into account.

Hence she inferred that 'the protests of indigenous inhabitants, at least in so far as prescription is concerned, would not operate to create a bar to the title of the claimant' and that little could therefore be gained from any Aboriginal attempt to challenge Commonwealth sovereignty *per se* in either an Australian court or the ICJ.[22] On the other hand, she considered that the question of *how* the territory had been acquired might be a more useful question to pursue in the context of international law. 'Put in the context of the Australian continent, the question would be whether at the time of colonization, Australia was *terra nullius* . . .'

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21 R. Schaffer, 'International Law and Sovereign Rights of Indigenous Peoples', draft, p. 24.
22 ibid. p. 25.

The Senate Committee had suggested that the intertemporal theory of law would apply in any such question — that is, that the occupation could not now be contested because of its having been carried out 'in the light of the law prevailing at the time of the original claim and not in terms of the law in force at the time when a dispute regarding the original claim arises'.[23] But Dr Schaffer argued that an examination by the ICJ at this stage of the question whether the British Government had been mistaken in its judgment of the character of Aboriginal life and organization would not be impossible.

> There is nothing in [the intertemporal theory] which implies that inaccurate perceptions of historical facts cannot be corrected ... The idea of *terra nullius* merely meant that a territory lacked [a socially and politically organized society]... if it could be proved that a particular territory did in fact possess this type of society, the simple fact is that it cannot be classified as *terra nullius*.[24]

Dr Schaffer did not pursue the question of what consequences might flow from such an analysis and judgment, either nationally or internationally.

Professor James Crawford's paper dealing with the Australian Law Reform Commission's examination of the question of the recognition of Aboriginal Customary Law[25], also dealt with the relevance of the International Covenant on Civil and Political Rights of 1966, and the Convention on the Elimination of all Forms of Racial Discrimination (also of 1966) to the Aboriginal situation. Though the terms of reference laid down for the Law Reform Commission's examination of Aboriginal

23 *Two Hundred Years Later*..., p. 26.
24 Schaffer, draft, p. 27.
25 'International Law and the Recognition of Aboriginal Law', Professor James Crawford, Commission in Charge, Reference on Aboriginal Customary Law, Law Reform Commission, Ref. 5642a.

customary law were criticized as 'in some respects extraordinarily wide, but in others apparently rather narrow and restrictive'[26] Professor Crawford concluded that the relevance of human rights standards to the treatment of Aborigines, both by the occupying power and by the general legal system, was undoubted. He quoted the words of Mr Justice Brennan, in the Franklin Dam case[27], on the result of the 1967 referendum which gave the Commonwealth the power to legislate for Aboriginal people, affirming that this 'was an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end'. Professor Crawford pointed out the special relevance of the Covenants as possibly providing light on the 'fundamental problem of balancing insistence on fundamental rights with an acknowledgement of the legitimate diversity of peoples', which was important in the Commission's task of considering how far Aboriginal customary law could be recognized by the general legal system. He drew on the Aboriginal Customary Law Research papers already issued by the Commission, for summaries of their conclusions to date:

> Research Paper 9 concluded that the recognition of Aboriginal laws was 'entirely consistent with basic values of equality and non-discrimination'.
>
> Research Paper 10, after discussing the international instruments with a bearing on the recognition of customary law, concluded that 'appropriate forms of recognition of Aboriginal customary law and tradition are consistent with these instruments'.

There could, however, be difficulties with '*some* formal recognition' of traditional punishments for law-breaking, and with the recognition of underage marriages.

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26 ibid. draft, p. 2.

27 *Commonwealth* v. *Tasmania* (1983) 45 ALR 625, 737.

Professor Crawford referred to the usual arguments put forward against legislative change towards recognition of 'customary law' — that this would violate the principle of 'one law for all' and be discriminatory. While in his opinion these views were powerful, so far as they reflected basic standards of human rights, he argued that the 'notion of equality' could not be applied without reservations in such cases. 'Crass versions of the notion of equality were an important factor underlying previous policies of integration and assimilation ... Such views continue to appeal to officials and lawyers brought up in a common law tradition ...'

> One can readily accept that Australia's international obligations, both under the Racial Discrimination Convention and the International Covenant on Civil and Political Rights, require that Australian legislation should not discriminate on grounds of 'race, colour, descent, or national or ethnic origin'. But 'discrimination' is carefully defined. It does not include reasonable, as distinct from arbitrary, measures distinguishing particular groups and recognizing and responding to their special characteristics, provided that an appropriate definition of the group is adopted, and that basic rights and freedoms are assured to members of such groups.

Crawford concluded that:

> Applying the standards of non-discrimination and equality ... it is possible therefore to suggest that special measures for the recognition of Aboriginal customary law will not be racially discriminatory, or involve a denial of equality before the law or of equal protection, if these measures:
> are reasonable responses to the special needs of those Aboriginal people affected by them;
> are generally accepted by those people;
> do not deprive individual Aborigines of basic human rights or of access to the general legal system and its institutions.[28]

28 Crawford, 'International Law and Recognition of Aboriginal Law', draft, p. 5-6.

This brief summary of the interim conclusions of the Law Reform Commission's brief on Aboriginal Customary Law seemed to indicate that one of the most emphasized problems of the Aborigines in dealing with the legal system of the occupying power, and therefore with the idea of concluding a treaty or treaties, might be on the way to being overcome. The law that could not be changed might somehow be brought into agreement with the laws that — as Aborigines commented — were constantly being changed and amended; this time, not to oppress but to recognize the special case of Aboriginal rights.

Professor Crawford indicated his agreement with the view expressed by Professor Nettheim and N. Rees in a paper published in 1983 that the Commonwealth's Racial Discrimination Act should be reviewed.

> It is based upon a Convention which is unclear. It may be argued that it is assimilationist in tone. The Convention does not clearly address the claims of indigenous populations for differential status on a long-term basis. If the Convention does not permit separate development of indigenous peoples in accordance with their wishes it is contrary to federal policy of self-determination for Aboriginal people.[29]

The whole question of 'legal pluralism' in regard to Aboriginal customary law has raised, and still raises, the somewhat specious counter that to recognize Aboriginal rights separately from those of the wider community constitutes a form of 'apartheid'. This muddled argument has too long been used as a support for the 'one people' argument in Australia. An incisive definition of 'apartheid' is needed to separate the case of South Africa from those of countries which, like Canada, are moving towards the proper recognition of the rights of indigenous peoples

[29] G. Nettheim and N. Rees, 'Discrimination and Human Rights (1983)'. *Aboriginal Law Bulletin* 9, 2–3.

which will allow them self-determination within a wider community. This was provided by Professor Crawford: 'Apartheid is the involuntary separation of a racial group, especially by coercive means, depriving the members of that group of the right to participate in public affairs'. As he commented in his paper:

> we should not concede that the principle of human equality and non-discrimination is a purely arithmetical one, with the potential only to prise open and destroy local communities whose need for protection is generally recognized.[30]

Thus far, in the Conference, it was clear that a certain shift in thinking was taking place in Australia, as well as overseas. But blockages in Australian legal thought were obvious in the continued defence of the *terra nullius* principle which underlay the Senate Committee report, the refusal to concede the real bearing of international law and World Court opinions, and the defensive attitude on the legal principles of 'prescription', 'act of state' and 'intertemporal law'. These blockages would not be overcome by acceptable legal thinking within the country as long as any Commonwealth government felt itself appointed to protect the claims of the occupying people whom it represented. The mandate, on the other hand, to protect and represent the rights of Aborigines, which had never been taken up as yet, would remain something of a dead letter — unless the force of international opinion and the shift towards recognition of the rights of enclave indigenous peoples became irresistible.

The paper to be presented by Professor Russel Barsh was of crucial interest in this regard.

Russel Lawrence Barsh, Associate Professor of Business, Government and Society at the University of Washington

30 Crawford, 'International Law and Recognition of Aboriginal Law', draft, p. 19.

Graduate School of Business Administration and member of the Washington State Bar, had already sent us a seminal paper he had published in the *Oregon Law Review* on 'Indigenous North America and Contemporary International Law'.[31] This paper was a wide-ranging and advanced examination of the situation in the US and Canada in relation to the evolving international legal thinking on the rights of indigenous peoples. Among its more trenchant statements, we had noted several which seemed to throw the light of hope on the situation of Australian Aborigines. Among them, for example, were the suggestions that 'the principles presently bandied about in American courts are antiquated, and a growing embarrassment to American credibility among nations' (p. 64); and that though the covenants on human rights were at that time not available for use by indigenous peoples,

> if the distinction — in the covenants — between ethnic minorities and peoples can be adequately defined and the conflict between the principles of territorial integrity and self-determination resolved, the covenants could be used by indigenous peoples to assert their collective rights. (pp. 91–92)

Barsh drew attention to the 1970 declaration of the United Nations General Assembly on the 'principles of international law concerning friendly relations and co-operation among states' (p. 88). The significance of the phrasing in the 1970 Resolution[32], Barsh declared, was plain:

> This new phrasing while it discouraged any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign states conducting themselves in

31 vol. 62, no. 1, 1983.

32 General Assembly Resolution 2625, 25 UN GAOR Supp. (no. 28) at 121, UN Doc. A/8082 (1970).

> compliance with the principle of equal rights and self-determination of peoples ... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour,

introduced a different principle with an obvious application to indigenous peoples in enclave situations:

> Once lawfully incorporated within a state and represented equally in its government, a group can no longer assert a right to independence. This might seem to thwart attempts at self-determination by indigenous peoples in encircled territories. To assert the territorial defense, however, a state must first demonstrate that its territory was lawfully acquired. This qualification may be particularly difficult to overcome for states in the Americas.[33]

This seemed to pose a challenge to the continued assertion of the *terra nullius* principle in Australia as well, in view of the World Court advisory opinion in 1975.

In addition to his university post, Professor Barsh held the position of Foreign Affairs Counsel to the Mikmaq Grand Council. The Mikmaq, a Canadian Indian treaty people whose territory lies mainly in the province of Nova Scotia, were contesting Canadian actions over their land, and in the course of attempting to find an avenue to appeal to the International Court of Justice through the United Nations Assembly. They had met with the ambiguity of the definition of a 'people', as against a 'minority' or a 'population', as part of the difficulty of their case.

The UN Commission on Human Rights had had reports prepared for it on the problem of definition of a 'people', a sensitive and difficult question since the human rights treaties (which both came into force in 1976) had implications which could be embarrassing both to the

33 Barsh, 'Indigenous North America', p. 88.

Soviets and to North American and South American countries. Under the Declaration of Human Rights of 1948, no distinction is to be made

> on the basis of the political, jurisdictional, or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.[34]

This wording referred only to a 'person'. Barsh writes:

> Compared to the declaration, the covenants are more precise and emphatic in addressing collective political and territorial rights. The first article of each covenant declares that:
> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
> 3. The States Parties to the present Covenant, including those having responsibilities for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.
>
> A fundamental distinction is drawn between 'peoples', who enjoy the rights of self-determination and territorial security, and 'ethnic, religious, or linguistic minorities' within states, who enjoy only freedom from discrimination and 'the right in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, and to use their own language'. Because no definition of 'peoples' is attempted, a perplexing problem

34 General Assembly Resolution 217a, UN Doc. 74–75 at arts. 15, 21(i), 1948.

> of interpretation and application results: how can 'indigenous peoples' be adequately distinguished from minorities?[35]

In a submission made by the Grand Council of the Mikmaq in 1982 to the UN Commission on Human Rights, the following definition was put forward:

> If a people exercise their right to self-determination by incorporating themselves freely into another people — by immigration or voluntary cession — they surrender their separate status and become one, politically, with the host State. The right to self-determination persists, but ever after must be exercised in common with the host as one people with one voice. As a minority they may justly demand both non-discriminatory treatment under the host's laws, and freedom to preserve and develop their culture within its general framework of laws and responsibilities . . .
>
> The situation is different where no voluntary incorporation of peoples has occurred and there has been no free consolidation of two peoples' political rights. A people lawlessly annexed or taken from their country by force do not thereby lose their separate voice or choice of destiny, but retain it until given an unrestrained opportunity for its exercise. They do not become, by force of seizure, colonization or enslavement, a minority, but remain a people still.
>
> The distinction therefore between a minority and a people, in our conception flows from the quality of consent. A people can become a minority, if it chooses. Minorities cannot be made by violence or oppression, however.[36]

Moreover, if the Mikmaq thesis on the definition of a 'people' were to be accepted by the Human Rights Commission, any challenge by states administering their destiny would require that state to show 'how and when they lawfully annexed or assumed control over an aggrieved

35 Barsh, 'Indigenous North America,' p. 91.
36 ibid. p. 94.

group. If no lawful incorporation, such as by treaty or immigration, can be shown, it is to be presumed that the group is a separate people that has yet to exercise its right of self-determination'.[37]

Since the Mikmaq approach to the United Nations was certainly to prove a test case both for the definition of a 'people' which might be used in the situation of Aborigines (as against the Federal Government's reiteration of the 'one people' principle, and their refusal to use the word in relation to Aborigines), and for the definition of those peoples who were entitled to self-determination whatever their history, Professor Barsh's address would take the Conference's participants into the forefront of the evolving international law in relation to enclave indigenous peoples. But the 'blue-water principle' appeared still to be a lingering block in the way.

So, of course, would be the mounting resistance of those states — the USA, Brazil, Canada (in spite of its advanced new attitude to the rights of Canadian Indians), Australia and the Soviet Bloc. These were all states which had a vested interest in continuing to control the land, the destiny and the resources of annexed peoples, especially of those whose territorial claims included still unexploited minerals and energy sources.

Professor Barsh's address on 21 November to the International Law Conference took us a little further along the road to understanding both the blockages and the emerging possibilities.[38] It was simply and forcefully spoken, and its avoidance of legal and technical terms made it accessible not only to the European Australians in the audience but to Aborigines and Islanders, of whom there were many.

The first surprise, from our point of view, was Barsh's

37 ibid. p. 95.

38 I am quoting from the transcript of the address as given.

view that no new international convention or law was necessary to solve the situation of indigenous enclave peoples, but 'simply the uniform application of existing norms of international law'. The various peoples, who, with the Mikmaq Grand Council, had been working towards the solution of the problem, said Barsh, actually strongly opposed the idea of a new formulation such as the proposed convention put forward by the World Council of Indigenous Peoples. Such a formulation of new separate terms and standards, they considered, was another form of racial discrimination, and the United States and Canada at least were encouraging this by efforts to create such special legislation which would form an exception to the general laws of human rights. Existing norms and conventions already, he said, contained all the conditions necessary for self-determination by indigenous peoples — the key issue in the whole problem.

'All other human rights', Barsh said, 'are subordinate to the right of self-determination'; peoples with their own self-chosen governments could control their own future and protect their own freedoms without the necessity of consent by an alien government.

International evolving concepts, he said, were working towards a three-tier concept of human rights, reflecting the primacy of the principle of self-determination as not only a right in itself, but 'the way in which all other rights can be secured'.

These three levels related first to minorities within states. Here, in cases where minorities were no longer 'geographically identifiable' within territories, historically, the United Nations' human-rights conventions had dealt with such cases through the concepts of protection of cultural, linguistic, and religious rights (beyond the more general principles), that is, through a protection of cultural autonomy. A 'minority', that is, consisted of people whose communities could not be identified territorially and

'consequently could not be readily reassembled into a self-governing geographical unit'. A 'minority' whether formed by immigration into another society or state, or by dispersal beyond possibility of identification with a people and a territorial base, could not qualify for self-determination.

The second level, of course, was that of a 'people' as defined by the Mikmaq Thesis in which the right of self-determination was now to be asserted as essential. Only at the third level, that of the single 'metropolitan' state, were the Conventions operative solely at the individual level as an assertion of equality of human rights.

The emergent primacy of the concept of self-determination in international human rights law, Barsh said, arose from the growing conviction of international jurists and political scientists that the major cause of tension and warfare in the world over the past two hundred years was simply the denial of that right. Culturally distinct communities which could not create their own institutions or determine their own forms of law and government, because of the expansionist imperialism and domination which had characterized the past couple of centuries, were a continuing source of such conflict and tension. Therefore, peace and the reduction of world tension depended upon the emancipation and self-determination of captive communities around the world.

Whether in fact this redrawing of the world map, following on the successful decolonization programme on 'blue-water' principles, could succeed without creating new tensions and problems was not certain, but in Barsh's view the policy was gaining much more acceptance as the argument proceeded.

As to land rights, he argued that the human-rights conventions and covenants where the first article declared the right to self-determination, the right to land as territorial integrity and the rights of disposal of its resources were actually part of the concept of self-determination.

Though there was as yet no specific legal policy and set of rules on the evolving concept of self-determination, these were now beginning to fall into place. The major points were that self-determination implied the right to a full range of choices for indigenous peoples, all the way from complete independence 'as a state', to the choice of assimilation with another state. Within the range were many possibilities, such as the federal systems which Canadian discussions were throwing up which he described as 'layers of an existing federal system' under a national constitution, but retaining a separate state-like character. Any form freely chosen by such a people under options which imposed no limitations on their choice would be recognizable under international law.

Barsh emphasized, however, that the problem for the emerging international law on self-determination would be the monitoring of whether, in fact, the choices offered were complete in their range and the choice made was free and uninfluenced.

It would be here, of course, that the problem for the negotiation of any treaty or treaties between Australian Aborigines and the Commonwealth would lie. Barsh pointed out that negotiated settlements between states and peoples were no longer favoured — not because negotiation was not seen as valuable, but because of the imbalance in bargaining power and the likelihood that inordinate concessions would be exacted, as was then happening in negotiations between the USA and certain of its overseas territories such as Micronesia. Where a state was a partner actually financing negotiations, the weaker side would be vulnerable.

However, international monitoring processes could be an equalizing factor. So far, international supervision emphasized the need for full information on all the available options of choice, and a full range of such options in democratic plebiscites for decision, with international

supervision such that a check was kept by a number of countries on both the information offered and the range of choices presented. Such supervision would provide a framework for the self-determination process among indigenous enclave populations.

As to the legal obstacles, Barsh was refreshingly irreverent. The legal historical perspectives, he declared, were now simply not relevant. Arguments as to the original sovereignty of enclave peoples, their original independence, were quite inappropriate under the new terms. The question was simply whether they had a right to independence or to choice of what form of political association they wanted with the occupying powers. 'Choice', he declared, 'is the international issue, not historical status but the existence and exercise of free choice'.

As to the 'blue-water' thesis, he called this an 'absurd distinction' between colonies, which had simply been used to slow down the decolonization process for political purposes, and one which was now ceasing to be useful. Since the United Nations had turned its attention to the problem of internal decolonization, he said, the first meeting of the Working Group on Indigenous Populations in 1982 had argued it but in the following year it had scarcely been mentioned; and no country attempted to argue that self-determination for indigenous peoples was not an issue because of the blue-water principle.

The principle of equality, which had seemed to stand in the way of self-determination of internal enclave peoples (and was asserted by the Commonwealth in the 'one-people' claim), should, Barsh argued, in fact be applied not only to the rights of individuals but to the rights of peoples. The right of self-determination belonged to distinct cultural communities as well as to all individuals, within a single state. There could and should be no discrimination against any geographic and cultural entity on the grounds that it is not technologically advanced, or culturally adapted,

enough for self-determination. This view, Barsh said, was being put at the United Nations by the group with which he was working: racism and discrimination underlay such assumptions.

Turning to the internal legal arguments which stood between Australian Aborigines and the recognition of their status as a people, Barsh pointed out that international legal principles had now far outdated them. The 'settled colony' principle, basic in Australian legal arguments, he pointed out, depended on the acceptance of the *terra nullius* principle in relation to any 'settled colony', but that principle, more especially in and since the World Court's 1975 advisory opinion in the Western Sahara case, was now rejected as 'an archaic vestige of colonialism'. It would no longer be an acceptable argument either in a case between two nations each claiming title from the indigenous people, or against the indigenous people themselves.

The 'intertemporal principle' employed in legal arguments in Australia, he brusquely dismissed as nonsense: 'the International Court of Justice has repeatedly stated in the last fifteen years that the right of self-determination is not subject to intertemporal principles'. Both in the Western Sahara case and in that of the Namibian advisory opinion, the Court had decisively rejected it as an argument for the continuance or defence of 'historical aggression'. Contemporary cases did not permit of the use of the argument that the law applicable in the time of Captain Cook still applied in the case of indigenous peoples today.

As to the principle of 'prescription' — the idea that 'it's been happening for a long time so it's probably legal now' as Barsh put it — he pointed out that even in Commonwealth law, as a principle of the nations of the British Commonwealth, 'prescription' required for political and legal effect that the people concerned acquiesced in their situation and that there was no continuing resistance.

Arguments now put forward by the Mikmaq and their companion peoples were, Barsh thought, likely to prevail: the length of time during which a people had been subject to alien domination was not relevant if they had continued to oppose and resist domination, and there had been no formal acceptance of and acquiescence in that domination.

On the 'Act of State' doctrine that no court could question a sovereign's action in extending sovereignty over another territory, Barsh instanced the same doctrine in Canada and the 'plenary power of Congress' principle in the US, as parallel with the Australian doctrine. This too, he argued, had been abrogated by the new human rights laws: countries such as Australia and Canada which had ratified the UN Charter and the international covenants were now in contradiction of their principles in asserting the Act of State doctrine against their indigenous peoples. The doctrine in effect continued to assert a principle of unrestricted power to annex other territories in violation of the principle of self-determination asserted in the Charter and in both human-rights Covenants.

Barsh defined another factor, which though it had not been identified as a legal doctrine, he described as 'the course of dealings doctrine'. The argument related to situations in which colonists either had no legislative authority from the metropolitan government to dispossess the indigenes, or where they had been forbidden to do so but in fact overrode the instruction. Both in Australia and in Canada these situations had arisen, and cases had been heard in both countries in the same year in which the question was argued (the Gove case and, in Canada, the Nishga or Calder case, both of 1971).

> **Basically what both legal systems have concluded is that a consistent pattern of violating imperial law becomes law . . . not only is it not relevant that these actions are violations of contemporary international human rights law but that the**

> course of dealings, while illegal when they began, have created new law over time. (Transcript, p. 22).

But this too, Barsh declared, was an irrelevant judgment from the point of view of international law; where commitments have been made both by Canada and Australia to the principles of self-determination and of non-aggression, the judgments in the two cases cannot be justified internationally.

Barsh dealt also with the question of the dismissal of the whole problem as being merely a matter of past misdemeanour (as had been done in the case of the Senate Committee's report). Both in Australia and in North America, he pointed out, the process of territorial aggression continued in violation of the wishes of the indigenous inhabitants. The process of expansion in fact was a continuing one, comparable in its nature to modern aggressions in Afghanistan, Palestine, Namibia and elsewhere such as Brazil.

It was, he said, difficult therefore to conclude either that these expansions were legally justifiable, or that they were different in nature from those which were internationally criticized in the cases of South Africa and the USSR. This being the case, the sole legal justification under which courts and governments in Canada, Australia and elsewhere continued to operate could be characterized simply as an assertion that 'might is right'.

> It's barbaric to build a modern nation, and one that purports to agree with and be a part of the United Nations Charter and the international human rights agreements . . . on the principle that might is right and that what you can get away with is just, for that in the end is what the legal arguments in all three countries come down to.

Barsh pointed out further that every nation's standing internationally is now closely associated with its record on

human rights, and that the declarations by the various UN agencies are the main basis for establishing such standards of credibility. The forthcoming resolutions of the Commission on Human Rights on the question of indigenous peoples might, Barsh hoped, clarify the application of the laws on human rights to those peoples as having the same collective rights as other peoples. The Mikmaq application against occupation of Mikmaq territory as a violation of the principle of self-determination and of the individual human rights of the Mikmaq seemed likely, he said, to become a test case on the self-determination issue. While it was neither to be expected nor desired that an international force should intervene in such cases, the establishment of moral and intellectual principles on what constituted violation of international law and justice could result in change through pressures from other countries and moral condemnation.

The question of direct litigation in the International Court of Justice was being pursued by the Mikmaq and other peoples. Since only states could have direct access to the Court, this was a problem for indigenous peoples under present circumstances. However, there were possibilities for such peoples as were not in fact enclave but contiguous to the state claiming sovereignty, as in the case of the Mikmaq, and the General Assembly itself could submit a question to the World Court for an advisory opinion. Such questions might include territorial rights, how far the sovereign state has permitted indigenous peoples to exercise the right of self-determination, and whether contiguous peoples were in fact subject to claims of sovereignty by such states as Canada.

Barsh pointed to the recent Canadian Government moves and the commissioning of a Parliamentary Report (the Penner Report), on a new approach to the Canadian Indian situation. This new and radical approach seemed to reflect the kind of pressures coming on nations like Canada and the

US to rethink their dealings with indigenous peoples in the light of international evolving legal norms on human rights. Though as yet Australia had not reached such a point, he felt the incentives from such factors would increase.

Finally, he pointed to the various attempts in North America to 'so-calledly *settle* indigenous peoples' situations' — 'pay people off and close the book'. The Indian Claims Commission, the Alaskan Native Claim Settlement, the James Bay Agreement were examples of such attempts to gloss over the actualities of oppression. He considered these attempts as failures, for 'the right of self-determination as an international norm is that self-determination is a dynamic process ... it's the idea that there is a present and continuing right of choice ... The idea of final settlement, as opposed to a continuing process of self-determination', and the idea that indigenous groups were somehow legally different in the matter of human rights, he concluded, were the two main obstacles to the achievement of real and meaningful human rights in the international context.

Though in the course of a very lively and evolving discussion over the two-day Conference much else was said which bore on the possibilities for the future and the problems of the present for Aborigines[39], Professor Barsh's contribution put the issues in a new light for most of the Aboriginal and Islander participants and for ourselves (and incidentally for some of the lawyers present). The Minister's outline, later in the day, of the Hawke Government's proposals (enactment of general land rights legislation, and the conceding of self-determination in medical and legal services but nowhere else) clearly went a very little way towards answering the propositions that Barsh had put forward.

As the guest of the Aboriginal Treaty Committee,

39 The Conference's proceedings are to be edited by Dr Barbara Hocking and published by Croom Helm, Australia.

Professor Barsh remained in Australia for some weeks and travelled fairly widely in Aboriginal Australia. He later sent us a report on his conclusions.[40]

Briefly, what had most struck him in the Australian situation as compared with that of North America was the relative isolation in which Australia was operating by international standards. Its legal norms of dealing with Aboriginal questions, and its resulting policy, were either already obsolete or on the way to being so.

While the demand for territorial self-determination was increasing among Aborigines and Islanders, it was being answered by methods already outdated and disproved elsewhere — those of incorporating indigenous leaders into a supervisory bureaucracy under the guise of self-government. This allowed a fiction of land rights 'settlement' which in fact resulted in the loss of land and of political autonomy. This was accompanied by a very intense degree of racism which stereotyped Aborigines hurtfully — more especially so in the 'frontier areas' where opposition to indigenous rights was high, and, he judged, would increase if 'frontier' population was allowed to grow, until economic opportunities levelled off, by which time little would be left for Aborigines.

Comparing Australian and North American situations, Barsh considered that Canadian, US and Australian governments had chosen to patronize and set up conservative indigenous organizations or leaders, weakening diversity and opposition; but Australia's relatively early stage of industrialization and development contributed to Aborigines' lack of politicization and knowledge of their legal situation. Therefore policies such as even the low degree of 'self-management' in practice were relatively new, and many which had failed elsewhere were

40 Report on Indigenous Policy in Australia and North America (draft), Seattle, 1983.

only now being considered here.

Relatively to North America, there was also a high degree of recent as well as early disruption and dispersal of Aboriginal communities, because of the expansion of mining, which 'compared to agrarian settlement' moved at a gallop in the process of dispossession. Australia's dependence on external capital and on Asian and Third World markets and its problems in military defence made it especially important to avoid the stigma of being 'another South Africa' and to commit itself to a 'model' indigenous policy. But both in governmental and legal circles he judged that little attention was being paid to this and that even the international human rights instruments Australia had ratified or signed were scarcely understood or applied. 'That is, Australia expects to be praised for the little it does, when it has not yet even begun to acknowledge the full range of rights to which Aborigines are entitled by law. This is shortsighted policy'.[41]

Turning to the Makarrata idea, he judged that 'in international law terms, it would represent an exercise of self-determination by Aboriginal people incorporating themselves, on stated conditions, with the Commonwealth'.

This Makarrata he compared with the Alaskan US 1971 agreement, and with the James Bay 1976 agreement. He argued that 'Both regional settlements have been repudiated by most of the native peoples affected, and a growing number of native groups are withdrawing from the Canadian constitutional talks'.[42]

After examining the reasons for this and the traps inherent in negotiation by a single organization on behalf of a diverse group of peoples, especially when the organization and the negotiations are funded by one of the parties, he

41 Report on Indigenous Policy in Australia and North America (draft), p. 5.
42 ibid. p. 5. Other recent studies of Canadian Indian affairs do not necessarily agree with Barsh's views.

urged Australia to avoid the mistakes already made overseas, and the suppression of diversity in the interests of a rigidifying settlement which would not work here any better than it had done elsewhere.

> The diversity of Aboriginal cultures, demographic conditions and aspirations is an inescapable fact, and sufficient reason to reject any attempt to formulate Australia's national policy solely on the basis of consultation with national Aboriginal organizations. Inadequately representative negotiations are undemocratic and would, in the long run, fail to achieve any general reconciliation ... Aboriginal people must have an opportunity to regroup themselves by democratic means into real communities of shared values and interests — and every community must be accorded an equal opportunity to speak for itself...
>
> What is needed is not a final accounting, like a proceeding in bankruptcy, but a process of political empowerment giving Aboriginal communities some time and security to establish for themselves who they are, what they want to achieve, and what kind of relationship they feel they can have in Australia. The worst thing Governments can do is rush Aboriginal people into irreversible commitments they will learn to regret later.

Finally, Barsh's report pointed out the need for 'a significant improvement in the distribution of information', both to Aboriginal people and to the European Australian community — a need in which organizations such as the Aboriginal Treaty Committee could play an important role, as against government-sponsored conferences and meetings 'which tend to promote Government views'. The need to raise moral consciousness in the dominant community was crucial.

> In the final analysis, nothing will change permanently for Aboriginal people in Australia until there is a change in Euro-Australians. Until then, there will only be changes in Governments and changes in Government policies.[43]

43 ibid. p. 12.

If private organizations such as the Aboriginal Treaty Committee, together with churches, universities and others, failed to stimulate this change

> every future Government in Canberra will have the same answer to Aboriginal rights offered by Mr Holding at the Australian National University last November: we would like to recognize all your rights, but our white constituents won't let us.[44]

That dusty answer had emerged during the Conference when the Minister outlined the Federal Government's proposals to deal with the land-rights situation and to offer so-called 'self-determination' only in control of legal and medical services. The government would evidently continue to maintain, in its reports to the United Nations, the fiction of the unity of the nation.

Soon after the Conference ended, we received copies of the Canadian Report of the Special Committee of the House of Commons, *Indian Self-government in Canada*, known also as the Penner Report from the name of its chairman. The report, which dealt only with Canadian Indians subject to the operation of the *Indian Act* and not with Metis or Inuit peoples, was a separate process from the ongoing talks on the Constitution undertaken in March 1983. Unlike the hasty and summary inquiry by the Senate Committee in Australia, the terms of reference were wide, and the Committee had been upgraded in December 1982 to the title of 'The Parliamentary Task Force on Indian Self-Government'. It was, as previously stated, 'to review all legal and institutional factors affecting the status, development and responsibilities of Band Governments on Indian reserves' — a mandate which it interpreted widely. Its composition was not, like that of the Senate Committee, confined to Members of Parliament, but since there were no

44 Report on Indigenous Policy in Australia and North America (draft), p. 13.

Indian members of the House of Commons, it called upon national indigenous organizations to work with it and upon the Assembly of First Nations to provide a representative who acted as an *ex officio* member of the inquiry. Other liaison members came from the Native Council of Canada and the Native Women's Association of Canada; researchers also were employed from these organizations on the Committee's staff.

At the November Conference it had been notable in the outline given by the Minister for Aboriginal Affairs that it was the state of Aborigines' health and their high rate of imprisonment which had apparently prompted the concession on 'self-determination' in the Aboriginal legal and medical services — two glaringly obvious factors in the report of the World Council of Churches' team to the United Nations in 1982. Similarly, the Penner Report emphasized the social conditions of Canadian Indians, quoting a 1980 report by the Canadian Department of Indian Affairs and Northern Development — conditions which were no better by 1983. The similarities were striking between Canadian Indian and Australian Aboriginal social conditions, though on the whole Canadian Indians appear a good deal better off than Aborigines here. Yet with a death rate of two to four times the rate for non-Indians, violent deaths constituting more than three times the national average, child mortality in the first month of life 60 per cent higher than the national average and life expectancy thereafter ten years below that of non-Indian Canadians, high rates of imprisonment and juvenile delinquency, and incomes half to two-thirds those of the working age population among other Canadians, it was easy to see that the Canadian Government, under much more international inspection and pressure than that of Australia, was anxious to find solutions.

After a far more intensive and better-organized and funded examination of the Canadian Indian situation than

has ever been ordered by any government in Australia, the Penner Committee recommended first of all that 'the Federal Government establish a new relationship with Indian First Nations and that an essential element of this relationship be recognition of Indian self-government'.[45] This was to be achieved by a constitutional amendment, providing that Indian First National governments 'would form a distinct order of government in Canada, with their jurisdiction defined'.

The list of recommendations which followed covered legislation, the definition of band membership, and the continuing responsibilities of the Federal Government toward all Indian people, whether or not they were or chose to become members of Indian First Nations, and various other questions on economic, political, funding and land matters. But the chief point, for us in Australia, was the emphasis laid in the Report, firstly upon the need for a new relationship between the Canadian Government and the Canadian Indians to overcome what many witnesses spoke of as 'a legacy of injustice, exploitation, bureaucratic insensitivity and non-Indian self-interest' and the effect of this legacy in abject Indian poverty, dependence, unemployment, poor health, economic underdevelopment, imprisonment and minimal education.[46]

Most significantly, the Committee declared that

> Indian peoples in Canada must control their own affairs. A new relationship is urgently needed that respects the diversity, the rights and the traditions of Indian First Nations ...
>
> A new relationship would be beneficial to Canada; it would eliminate the tensions, the inefficient use of funds and the unacceptable social conditions ... In a democratic age it is

45 Minutes of Proceedings of the Special Committee on *Indian Self-government*. House of Commons Issue no. 40, First Session of the Thirty-second Parliament, 1980–81–82–83, p. 141.

46 ibid. p. 40.

incongruous to maintain any people in a state of dependency ...

Indian people would likewise benefit ... Ending dependency would stimulate self-confidence and social regeneration ...[47]

And the effect, now for the first time fully taken into account, of the Declaration of Human Rights and its instruments to which Canada is a signatory, was visible especially in the final sections of the Report:

Canada is obliged to protect and promote the rights of the peoples of the Indian First Nations in a manner consistent with the rights guaranteed in the international covenants Canada has signed — the United Nations Covenant on *Economic, Social and Cultural Rights,* the Covenant on *Civil and Political Rights*, and the *Helsinki Final Act of 1975* ...

The Committee has concluded that the implementation of this report in its entirety, legislatively and constitutionally, is the best means of satisfying international standards in relation to Indian First Nations ...

Internationally, there is an increasing awareness that the old approaches to indigenous peoples have failed. The colonial mentality is being replaced with a recognition of fundamental human rights ... Canada can resist this movement or it can offer leadership.[48]

Which way Canada would choose was then still in question. Whether Australian governments, with their generally ignorant and prejudiced constituency, their reluctance to spend money on education or on the welfare and health of Aborigines, their insistence on the actual non-existence of an Aboriginal people or peoples and their emphasis on the one-nation principle, would follow Canadian example, if Canada in fact accepted the principles and recommendations of the Penner Report, was much more in question. But the signs were not good.

47 ibid. p. 41.
48 ibid. p. 136.

On 8 December 1983, the Minister for Aboriginal Affairs moved in the House of Representatives a resolution to be debated during 1984.[49] Its emphasis was innovative in that it acknowledged prior occupation and ownership, an Aboriginal system of laws, the lack of any settlement (agreement) and a need for the development of effective processes of consultation 'so that the Aboriginal people may assert control of all aspects of their lives'. It elevated the role of the NAC to one of responsibility to represent and present the views of Aboriginal and Islander people throughout Australia (as against the previous role of merely advising the Minister when called upon); it went some way towards answering Aboriginal needs in other areas; but it did not touch the basic questions of freedom of choice in all areas, decision on what relationship the Aboriginal and Islander people might choose to have with the occupying power, or self-determination beyond what small measure already existed.

It was essentially an *ex-cathedra* pronouncement, paternalistic in essence, proposing special measures to be taken not by Aborigines and Islanders themselves but by government. Its final clauses took the view that 'the Australian people will be truly free and united only when the Aboriginal and Torres Strait Islander people of this nation are free of the distress, the poverty and the alienation that has been their lot . . .' and relied on the bicentennial year of 1988 as 'an immediate focus point towards which all Australians can work together to achieve the objectives set out in this resolution'.

From our point of view, and from the point of view taken by the new international legal evolution and by Aboriginal leaders, the emphasis laid on the unity of the 'Australian people' — which in fact precluded a treaty or treaties on the kind of level of equality which alone would satisfy the needs

49 See Appendix.

of the Aborigines and Torres Strait Islanders — was another attempt to avoid the issue of the rights of indigenous peoples to determine their own relationship with the rest of the community and to exercise true self-determination.

True self-determination, however, would entail not just a permitted degree of consultation with a government which still regarded itself as the arbiter of Aboriginal destinies, within a fiction of unity within the nation. The self-contradiction inherent in the whole approach to the Aboriginal question remained. For self-determination to be initiated and controlled by Aborigines themselves, and for this to be regarded by the dominant community as not a concession, but a right guaranteed by Australia's participation in international instruments on human rights, much change in the thinking of European-Australian electorates would have to take place.

Nor, it seemed, was it likely in the near future that Aborigines and Torres Strait Islanders would concede either that they had been conquered, or that the nation was 'one people', or that its land had been justly acquired.