

Linking international standards with contemporary concerns of Aboriginal and Torres Strait Islander peoples

—→ *Mick Dodson*

Before we move headlong into the technicalities of international law, I would like to bring right to the forefront of our minds the ultimate meaning of human rights. Not the laws and provisions and mechanisms. Not even the statistics of death, disease and inequality. But the runny eyes, the angry, frustrated faces, the lost knowledge, the desecrated land and the hopelessness.

This is the bottom line – one you all know: our peoples are facing such dire problems that our very survival is seriously under threat.

Two – you also know: the promises that Australian governments have for two hundred years shown consistent reluctance and apparent inability to fully respect and uphold our rights.

This failure becomes even more offensive when one considers how Australia postures on the international stage as a great champion of human rights. Since the inception of the UN, Australian diplomats and politicians have played key roles in developing human rights standards and mechanisms, and have strongly advocated the importance of all governments respecting human rights. The double standards are glaringly obvious, and frankly I'm tired of regaling governments for their domestic failures. Now is the time for us to take their words and commitments at face value and insist that they are translated into realities that we can live and not just hear about.

Three: it makes absolute sense for us to take our grievances beyond this country to a higher authority. My first session at the UN Working Group on Indigenous Populations was a moment of tremendous insight

and recognition. I was sitting in a room, 12,000 miles away from home, but if I'd closed my eyes I could just about have been in Maningrida or Doomadgee or Flinders Island. The people wore different clothes, spoke in different languages or with different accents, and their homes had different names. But the stories and the sufferings were the same. We were all part of a world community of Indigenous peoples spanning the planet; experiencing the same problems and struggling against the same alienation, marginalisation and sense of powerlessness. We had gathered there united by our shared frustration with the dominant systems in our own countries and their consistent failure to deliver justice. We were all looking for, and demanding, justice from a higher authority. That famous phrase at the beginning of the UN Charter, "We the people of the United Nations", started to take form for me. I recognised that the people back home were part of the peoples of the world who are the subjects of universal human rights.

As members of the world's peoples, we 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. That holds true whether we live in New York or Bolivia or Murray Bridge. Moreover, when Australia joined the UN and ratified the relevant instruments it explicitly accepted that this is the case. Unfortunately this fact seems to upset some of the more reactionary sectors of Australian society which insist that our appeals to international protection of our human rights threaten Australia's sovereignty. The strange thing is, these very same people are desperate to keep up with the latest international developments in technology, television and takeaway. It strikes me as a strangely convenient irony that these all too keen internationalists suddenly discover their national pride when it comes to the abuse of human rights. But their arguments are as feeble as their morality and thinly hide the real sentiment behind their resistance. That is: "No one tells us how to run our country. And if we want to bash our poofers and vilify our coons, that's our sovereign right." Both the sentiment and its manifestations must be firmly rejected. "Sovereign right" does not mean, and must never be permitted to mean, an unfettered licence to abuse or neglect the rights of minorities or the marginalised.

Despite its aspirations to the latest and the best, 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. We are not convinced. And nor is the international

human rights régime. Now we must make it our work to ensure that Australia's human rights business is the world's business. Our governments may be desperate for Australian products to export and to lower the budget deficit. However, the ugly truth about this country's underbelly is one thing that they are not so keen to export – and if we hit the market in the right way, they might actually start trying to stop manufacturing human rights abuses.

This project of fully utilising the international human rights system is hampered by several myths about international law and the jurisdiction of the UN. I would like to take this opportunity to dispel the most harmful of those myths.

Myth number one: the UN imposes alien and foreign laws on Australians.

Fact: the only international instruments to which any Australian can appeal are those which Australia has formally agreed to uphold. The only provisions of international instruments which have any bearing in Australia are those which Australia has said will be matched by Australian law and practice. Before complaints can be taken to the UN, Australia has ample opportunity to meet its commitments to ensure that domestic laws and policies are adequate to the standards set in international instruments to which it is a party. In all instances complaints can only be taken where domestic laws and practices fall short of such standards and all domestic remedies have failed. In other words, where Australia has failed to meet its own commitments. There is no question of appealing to some particularly radical standards beyond those already deemed acceptable by the Australian Government. This is not a matter of calling in some strange and alien body.

Myth number two: international law is the panacea to all our problems.

Hopeful, but one to be quickly dispelled. One need look no further than to the limited powers which the international community actually has to enforce its findings. Or look to who it is that makes up the UN: it is nation States. And that means that its operations are, in the main, guided by the interests of nation States and their interpretation of correct and proper action or intervention. It takes little imagination to realise that few States are going to initiate criticisms of other States which may well be reflected back at their own practices. There is no better or more tragic illustration of these limitations than the UN's 50-year failure to adequately address the specific concerns of the world's Indigenous peoples or the violation of our rights. If there exists a magic wand which

could be waved over domestic governments to cure all evils and make them good, it is certainly not international law. Or at least not yet. That is why NGOs have to keep on pushing and agitating through their governments, and directly through international fora, and insist that the body of international law does what it set out to do: protect and promote the rights of all peoples. The Working Group on Indigenous Populations, and the Draft Declaration on the Rights of Indigenous Peoples, are two of the key avenues to pursue this course. In addition, we have to get a lot wiser about accessing the spectrum of the international system, whether they be the treaty bodies, the World Bank, General Agreement on Tariffs and Trade, or the Security Council.

The third myth is the other side of the coin to the second. It is that international human rights law is variously: a fancy waste of time; incomprehensible gibberish designed by international lawyers and bureaucrats to fill up resolutions; good for a dinner speech, and a nod and a wink if you're a foreign minister; and good for a junket to Geneva if you're an Indigenous person.

Well, the fact is that with all its many imperfections, international law is the most highly developed body of human rights law that exists. Or perhaps more accurately, the most highly developed body which is recognised by the Australian State. Fifty years ago the nations of the world decided to try to create a system which would safeguard future generations from the scourge of war which they had known. And since then countless people have turned their minds and hearts to developing that system with the hope that it would free the world not only from war and genocide, but from the gamut of systematic human rights violations. You could say it's an ambitious plan. Nevertheless, we already have some proof of the positive influence which international law can have on the way in which Australia conducts its domestic affairs.

Just scan some of the "better moments" in Australian law – I refrain from saying the great moments, because I do not actually believe that from our point of view there have been any. That aside, the *Racial Discrimination Act 1975* (Cth), the *Land Rights (Northern Territory) Act 1976* (Cth), the High Court's 1992 decision on native title – all of them were firmly grounded in, if not derived from, international law. This is all about strategy, and using every tool available to do what every Indigenous Australian knows has to be done. To get our kids well and educated and housed; to get our young adults out of detention centres and our men and women out of lock-ups and prisons; to get us off the front pages as sensationalist news and into our own lives and living healthy cultures.

So let's get pragmatic. The system of international law is not perfect – far from it. But while we agitate for improvement we're fools if we don't get on with the business of making maximum use of what are some potentially very powerful tools. And the first step towards that is to know them, understand them, and link them to what is most close to home.

Which is what I'd like to do now. I'd like to indicate a few points where peoples' grievances might be picked up in the provisions of international instruments.

You may be an Aboriginal woman. As a woman at some time you might expect a baby. As an Aboriginal woman, you might expect that your baby will be three times more likely to die than the baby of any other Australian woman. You may be an Aboriginal man. You can plan on living 20 years less than other Australian men. You may be one of the 20 percent of Aboriginal children in the Northern Territory who is malnourished.¹ Or if you are a four-month-old Torres Strait Islander baby, you will by now have begun to suffer hearing impediments. I could continue by detailing the statistics on diabetes, heart disease, suicide, kidney failure or alcohol-related death. If you are, or know any one of these people, you might want to have a look at one of the following.

Start with the most fundamental human right. The right to life. Because what we are talking about are unambiguous violations of that right. Article 6 of the International Covenant on Civil and Political Rights (ICCPR) states that "every human being has the inherent right to life". Where an individual believes their rights under the ICCPR have been violated and the government of the country in which they live has failed to address the violation, they can lodge a complaint to the UN Human Rights Committee (HRC) under the First Optional Protocol to the ICCPR.

After 25 years of reports observing the same, if not worsening, conditions, parroting the same recommendations, and receiving the same shocked reaction and promises, we have given "exhausting domestic remedies" a new meaning. If the diseases don't kill us then trying to get some action most likely will. In its comment on the meaning of Article 6, the HRC has made it clear that the right to life is not limited in its meaning to arbitrary killing, but places an obligation on the State to establish conditions consistent with respect for the right to life. I would

1 Findings based on a study of infants under two by paediatricians Dr Alan Ruben and Dr Alan Walker of the Royal Darwin Hospital and cited in "AMA demands action over black children famine" *Australian*, 18 April 1994.

say that the 20,000 or more Aboriginal people who live in communities with totally inadequate or contaminated water supplies do not enjoy such conditions.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides that everyone has the right "to the enjoyment of the highest attainable standard of physical and mental health".² In fact, the section dealing with health could have been written for the very problems I am talking about. It provides that States must take steps to reduce the stillbirth and infant mortality rate, and ensure the healthy development of the child; they must take steps to improve environmental health, to prevent, treat and control endemic and epidemic disease, and to ensure that medical services are available to the sick.

Although the ICESCR does not have a mechanism for individual complaints, the Australian Government is required to provide reports on its implementation every five years. The Committee on Economic, Social and Cultural Rights, under the leadership of a distinguished Australian human rights activist and scholar, Professor Alston, has made it perfectly clear to States that sweeping statements will not be an acceptable form of reporting, and has developed rigorous reporting guidelines. Current standards should be compared with previous indicators, information should be provided on specifics such as infant mortality, access to safe water and life expectancy. And perhaps most importantly from our point of view, States should report "if there are any groups in your country whose health situation is significantly worse than the majority population".³

Although technically it is only governments who are required to report, NGOs can provide information to the Committee on Economic, Social and Cultural Rights concerning alleged violations, and the Committee can then ask suitably probing and embarrassing questions of the government. Professor Alston has been extremely progressive in developing mechanisms and procedures to ensure that the views of NGOs can be given voice during the examination of country reports. I am sure the Committee would not be averse to receiving information from some

2 Article 12.

3 Alston, P, "The International Covenant on Economic, Social and Cultural Rights" in UN Centre for Human Rights and UN Institute for Training and Research, *Manual on Human Rights Reporting under Six Major International Human Rights Instruments United Nations*, New York, 1991, p 43.

of you on matters omitted by the Australian Government in its upcoming official report on the implementation of the ICESCR.

The Convention on the Rights of the Child (CROC), also ratified by Australia, is similarly explicit about health, spelling out children's rights to the highest attainable standards of health and to facilities for the treatment of illness. It specifically mentions infant and child mortality, primary health care, adequate nutrition and clean drinking water, pre- and post-natal health care, health education and preventative health.⁴ Again there is no mechanism for individuals to take specific complaints to the CROC Committee, but as with the ICESCR, they can provide information to the CROC Committee which can be raised in response to the Australian Government's five-yearly obligatory reports. The CROC Committee can recommend to the General Assembly that the Secretary-General be requested to undertake specific studies on issues concerning CROC.⁵ I would suggest that the Australian Government might be less than pleased if the next visit by the Secretary-General was for the purpose of scrutinising the welfare of our communities, rather than to open conferences.

Staying with health, the glaring disparities between Indigenous and non-Indigenous health are obvious grounds for complaint under the Convention on the Elimination of All Forms of Racial Discrimination (CERD), also ratified by Australia. Article 2 lays down the general prohibition on racial discrimination, and Article 5 explicitly requires that States parties guarantee the right to public health and medical care without discrimination.⁶ In late 1992 Australia accepted the competence of the CERD Committee to receive complaints from individuals or groups of individuals claiming violations of CERD.

Another obvious area where the human rights of Indigenous Australians are being abused is in the criminal justice system. And here I include not only deaths in custody, but our appalling over-representation in the prison population, and prison conditions. Again start with the right to life and Article 6 of the ICCPR. Recalling the HRC's comments on the meaning of this article, one would be hard pressed to prove that the conditions in which many of our people are incarcerated meet the criterion of being "consistent with respect for" the right to life. Placing a

4 Article 24.

5 Article 45(c).

6 Article 5(c)(iv).

human being in conditions which are likely to induce suicide, and the flagrant disregard for this eventuation may well breach Article 6.⁷

The obscene number of Indigenous people in prisons are no strangers to solitary confinement, forcible separation from family, community and country, with no opportunity for communication, squalid conditions, refusal of medical care, and humiliating treatment. All may be grounds for complaint to the HRC under Articles 7 and 10 of the ICCPR, which respectively provide that:

No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.

All persons deprived of their liberty shall be treated with dignity and humanity and with respect for the inherent dignity of the human person.

I hardly think that having prison officers dangle pairs of socks in front of you with suggestions that you could become the next death in custody qualifies as treatment with dignity and humanity. And while I'm at it, I do not think that being kept stewing for three days in the back of a paddy wagon doing the tour of remote communities in north Western Australia en route to a trial judge meets the requirements of either Article 10, or Article 9, which requires that persons charged be promptly brought before a qualified judge.

In order to elaborate the precise meaning of these articles, the HRC takes guidance from the "UN Standard Minimum Rules for Prisoners". We could do a quick check on whether those rules are being applied to the hundreds of Indigenous people serving time in lockups in remote communities right now. Is the watch-house in Mornington Island a healthy, well-ventilated and well-lit cell with adequate space as in Rule 10? Is the kid in Murray Bridge who was locked up and refused his asthma medicine receiving adequate medical care as in Rule 24? Is shoving a suicidal prisoner in a cell and poking him every two hours the local version of specialist psychiatric service as in Rule 22?

Perhaps the gravest area of grief for Indigenous people is what is happening to our young people, and their treatment by the juvenile justice system. The gross over-representation of young Aboriginal people in the juvenile corrective institutions is well known to us all. Just to remind you,

7 For an extensive discussion on the application of international law to prison issues and deaths in custody see John Hookey, "Aboriginal Deaths in Custody: International Issues", consultant's report to the Royal Commission into Aboriginal Deaths in Custody, Aboriginal Law Centre, University of NSW, 1990.

across Australia it is by a factor of 22.⁸ Clearly this raises issues under CERD. The discriminatory response that the juvenile justice system has to our young people raises even more questions. Why are our kids in Western Australia 25 percent of those arrested and 67 percent of those in detention centres?⁹ Why are one in three young people referred to children's panels, but only one in eight Aboriginal children? Why are they arrested when their non-Aboriginal counterparts receive summonses? Why are they detained in custody when others are granted bail? Questions you well may wish to put to the CERD Committee when it is considering Article 5, which provides for equality before the law and guarantees equal treatment before courts and tribunals.

If you happen to know one of the 85 percent of young Aboriginal people who report being hit, punched, kicked or hit with a baton, phone book or torch by police, or of the 80 percent of those who reported racist abuse by police,¹⁰ or any of the kids who spend most of their young lives in detention centres away from their family and community with no cultural education, perhaps you had better not tell them that the overarching principle required in the treatment of juveniles is that they must be assured "a meaningful life in the community which will foster a process of personal development and education".¹¹ And will the kids in boot camps thousands of kilometres from their home receive the "care, protection, and all necessary individual assistance – social, educational, vocational, psychological, medical and physical – that they require in view of their age, sex and personality"?¹² Tell them that Australia promised to uphold these principles when it ratified CROC¹³ or that they are the internationally accepted and endorsed standard minimum rules and you're likely to only add to their sense of hopelessness. At least if you tell them that they are also known as "the Beijing Rules" they

8 Cunneen, C, and T Liebesman, *Aboriginal People and the Law in Australia*, Butterworths, Sydney, 1995, p 62.

9 Wilkie, M, *Aboriginal Justice Programs in Western Australia*, Crime Research Centre, Nedlands WA, 1991, p 150.

10 Cunneen, C, *A Study of Aboriginal Juveniles and Police Violence, Report Commissioned by the National Inquiry into Racist Violence*, Human Rights Australia, Sydney, November 1990, p 2.

11 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), 1.2.

12 Ibid, 13.5.

13 See in particular Articles 37 and 40.

may get a good laugh. Because that's about how far away those rules might be from their reality.

However, we would do well to remind the Australian Government that it sponsored those rules, and that they were adopted by the UN General Assembly. Better still, you might also think about providing information to the HRC or to the CROC Committee suggesting that Australia is doing less than well in upholding the most basic principles: diversion from custody, institutionalisation as a sanction of last resort, and separation from adults. For starters they might be interested to know that over two-thirds of young Aboriginal people in Western Australia are received into adult prisons despite explicit requirements that juvenile prisoners be separated from adult prisoners.¹⁴ Or that in 1990, 90 percent of Aboriginal boys and 97 percent of Aboriginal girls in Western Australia served their sentences in police lockups.¹⁵

I doubt that once you have started you'll be scratching around for material, but you might want to include in your communications some information on some less than satisfactory aspects of the law. As you may know, when the Western Australian Parliament introduced the *Crime (Serious and Repeat Offenders) Sentencing Act* in early 1992, the then Human Rights Commissioner demonstrated in graphic terms how the law was in flagrant breach of several articles of the ICCPR and CROC. It was not hard to predict that his words would fall on deaf ears in Western Australia, but they might have been of interest to the HRC. That notorious Act has now lapsed, but it has been replaced by the *Young Offenders Act* 1994. Here again, the Parliament of Western Australia had little problem with pushing through an Act which it had been advised was in breach of Australia's international treaty obligations. Of particular concern are the provisions concerning sentencing of so called serious and repeat offenders. The Act explicitly states that when sentencing these young people, who are overwhelmingly Aboriginal, it should "give primary consideration to the protection of the community ahead of all other principles".¹⁶

Now I don't want to skip over that. The highest principle spelled out again and again in instruments dealing with young people is that the primary consideration must be the "best interests of the child". That

14 Broadhurst, RG, et al, *Crime and Justice Statistics for Western Australia: 1990*, Crime Research Centre, Nedlands WA, 1991, Table 5.3.

15 Ibid, Table 5.7.

16 Section 125.

principle holds in all cases. Always. You could not ask for a more explicit breach of the principle. In addition, in directing courts to diverge from standard principles when sentencing these young people, the Act contravenes both the ICCPR¹⁷ and CROC,¹⁸ which explicitly forbid arbitrary sentencing. Once again, I doubt that this information will be conveyed by the Australian Government in its forthcoming report to the HRC or the CROC Committee.

One very significant area that you might like to look into is the possibility of pressing land rights claims under Article 27 of the ICCPR.

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Although this is a fairly general article, providing that minorities shall enjoy the right to enjoy their own culture, the HRC has indicated that in the case of Indigenous peoples, enjoyment of this right may require positive legal protection of traditional lands.¹⁹ The HRC has made some fairly explicit statements concerning the way in which developments that prevent Indigenous peoples' hunting, fishing or living according to their culture on their traditional lands may be in breach of Article 27.²⁰

I hope that I've given you ample food for thought. And I haven't even started to cover the territory. The 20,000 Aboriginal people without adequate water,²¹ the 5,000 homeless Indigenous families,²² the 14,000 Aboriginal people in Western Australian remote communities who live without proper sewerage systems, power sources, or other essential

17 Article 9.

18 Article 37(b).

19 General Comment No 23 (50), adopted by the Committee at its 1314th meeting, 6 April 1994.

20 In particular, see *Lansmann v Finland*, Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992 (8 November 1994), where the complainant alleged that quarry developments interfered with traditional hunting rights and so breached Article 27.

21 Figures from Federal Race Discrimination Commissioner, *Water: A report on the Provision of Water and Sanitation in Remote Aboriginal and Torres Strait Islander Communities*, AGPS, Canberra, 1994, p 12.

22 Jones, RM, *The Housing Needs of Indigenous Australians*, CAPER Research Monograph No 8, 1991.

services.²³ These people, along with the children who don't get pre-school, let alone secondary or higher education, could all find suitable provisions under the ICESCR and CERD.

When I say they could find them, that is largely a hypothetical statement. There are undeniably huge impediments which the average person faces in using the mechanisms of international instruments. The fact that they are there means absolutely nothing if you have no way of understanding them or using them. It is of little use the Australian Government recognising the competence of committees to hear individual complaints if it is going to do nothing about helping individuals become competent to make those complaints. This was recognised by the Royal Commission into Aboriginal Deaths in Custody and, in its official response, the Commonwealth Government committed itself to provide funds for educational programs, two of which are being developed by my office. And I will endeavour to make them effective. However, by no stretch of the imagination are existing funding levels adequate to do the job comprehensively.

I must also comment on an issue of which everyone in this country should be made aware, namely the fact that the Commonwealth used some of this royal commission money to set up an Optional Protocol Unit, not for people whose rights are being violated, but for the government to defend itself. This is a scandal that must be exposed and corrected. I have no objection to the government's defending itself – it has every right to do so. However, money earmarked to protect the rights of the most abused peoples in this country must not be the funding source.

So I close where I began. It's not perfect. It's far from perfect. But I'd suggest that Indigenous Australians could do a lot worse than have a few billion people of the international community on our side.

23 Report of the Western Australian Government on Western Australia's 151 most remote communities, reported in the *West Australian*, Editorial, 12 June 1994.

Indigenous Peoples,
the United Nations
and Human Rights

editor

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