ABORIGINAL AND TORRES STRAIT ISLANDER ORGANISATIONS PRESENTATION TO U N COMMISSION ON HUMAN RIGHTS

Mr Paul Coe of the Redfern Aboriginal Legal Service, speaking on behalf of the National Aboriginal Conference, the National Aboriginal and Islander Legal Service Secretariat, the National Aboriginal and Islander Health Organisation, the National Aboriginal and Islander Childrens Service, and the Federation of Land Councils has called for an advisory opinion of the International Court on the legal frontiers of indigenous land ownership. He has been speaking before the U.N. Commission on Human Rights on 15 March 1984 (For a report of an earlier presentation to the Commission (August 1983) see [1984] Australian I.L. News 46) He said in part:

> "Efforts are being made by the present Government to return land to Aboriginal people, but just passing back a piece of paper is not likely to change the situation measurably. Under the laws now in force, Aboriginal people will still not be able to stop mining on their land. Furthermore, Aboriginal people can only reacquire land that is unoccupied and, in the opinion of State or local officials, not needed by Europeans for towns, mines, or other purposes...This has been a rather brief summary, but we think it suggests the territorial character of the most serious human rights problems facing indigenous peoples in Australia and elsewhere. Simply establishing the legal frontiers of indigenous land ownership will go a long way towards protecting indigenous peoples' lives, health, and human rights generally. As in the case of other territorial questions among peoples and nations, we feel this is a matter of facts and history peculiar to each situation; and therefore one that should be resolved judicially.
>
> We are suggesting, then, that particular situations threatening the survival of indigenous peoples-situations that are essentially of a territorial nature should be brought to the attention of ECOSOC and the General Assembly with the recommendation that they be resolved on an advisory opinion from the world court".

An accompanying written statement stated:

> "There is a widespread but mistaken belief that the displacement of native Americans and Australians was historical, and therefore no longer a priority for international action. On the contrary, nearly one fifth of Australia and one third of Canada consist of unceded indigenous territories in which organized indigenous communities form a majority. These areas are still being annexed and exploited for mining and hydroelectric power, years after respective the States ratified the Charter of the United nations and the International Covenant on Civil and Political Rights. Areas of particular concern include Ntesinan (Labrador), the western Canadian Arctic, Western Australia, and Australia's Northern Territory, where nearly 100 thousand indigenous people are threatened with or are in the process of being displaced
>
> The most widespread example of legal discrimination against

indigenous populations, however, is in the persistent use of the theory of terra nullius to justify the confiscation of territory The situation in Australia is illustrative Beginning in 1788 and continuing to this day, the Government established on Australian continent by the United Kingdom has been displacing the indigenous population by coercive means. No remedy has been available in Australia's municipal courts on the pretence that the entire continent was legally uninhabited (terra nullius) that is, the indigenous population was culturally and institutionally inferior and therefore incapable of owning land. According to this racist theory, the entire continent became the property of the United Kingdom the movement white Britons set foot on its easternmost shore two centuries ago.

The advisory opinion on Western Sahara has already settled the legal issues relevant to the Australian situation, but indigenous Australians have no direct access to the International Court of Justice to protect their territorial rights. Indigneous peoples should, in appropriate cases, have standing to raise terra nullius issues in the world court Alternatively, the Commission should refer appropriate cases to the Economic and Social Council with the recommendation that they be submitted to the Court for advisory opinions Since the lawless annexation of indigenous territory is where human rights problems for indigenous Australians and North American begin, it is the point at which the more efective action can be taken to protect human rights."

(UN Doc E/CN.4/1984/NGO 53, MARCH 1984, 2-3)

Written statement submitted by the Four Directions Council, a non-governmental organisation in consultative status (category II)

J R C

PROPOSED COMMONWEALTH PARLIAMENT RESOLUTION ON ABORIGINAL AFFAIRS: STATUS OF AUSTRALIA AS 'SETTLED' OR 'CONQUERED' COLONY

Some of the issues referred to in the previous item are also addressed in the Resolution on Aboriginal Affairs moved in the House of Representatives and the Senates and awaiting debates. In moving the resolution the Minister for Aboriginal Affairs the Hon C. Holding MHR, stated that, it was designed:

> "to provide the Parliament and the nation with a set of principles which will guide the attitudes of the majority of Australians to Aboriginal Australians and of them to us. In doing so, it will provide the foundations for policies that governments can apply in the future." (Parl. Debs (HofR) 8 Dec 1983, 3485-6).

The Resolution would state in part:

That this house. .

(1) Acknowledges that

(a) the people whose descendants are now known as the

> Aboriginal and Torres Strait Islander people of Australia were the prior occupiers and original owners of Australia and had occupied the territory of Australia for many thousands of years in accordance with an Aboriginal system of laws which determined the relationship of Aboriginal responsibility for and to the land to which they belonged.
>
> (b) from the time of arrival of representatives of King George III of England,and the subsequent conquest of the land and the subjugation of the Aboriginal people, no settlement was concluded between those representatives and the Aboriginal and Torres Strait Islander people;
>
> (c) as a result of the colonization of the land by Great Britain the rights of the original owners and prior occupiers were totally disregarded;
>
> (d) since the arrival of European settlers in Australia, the original inhabitants have been dispersed and dispossessed with the result that their descendants are, as a group, the most disadvantaged in Australian society;
>
> (e) this disadvantage persists, despite measures taken by State, Territory and Australian governments, and by Aboriginal and Torres Strait Islander people themselves, so that further measures by Australian society as a whole, and by the Parliament of the Commonwealth in particular, will be required to ensure real equality and advancement for the Aboriginal and Torres Strait Islander people.

It went on to spell out a variety of 'special measures' which must be taken, concluding that the Bicentennial year of 1988 provides an immediate focus point towards which all Australians can work together to achieve the objectives set out in this resolution.

The Resolution's implicit reference to the controversy are to whether Australia was a 'conquered' or 'settled' colony was elaborated on by the Minister at a seminar in may 1983. He said then:

> "We must not dwell on the past, but at the same time we have to be prepared to face up to the past and what has happened in order to apply effective solutions to the future. We have to face the fact that Australia as a country was conquered, not settled. If you take the view that Australia was settled then you see it as a colony which was uninhabited and had no system of law. But in the Gove case, although the plaintiffs were unsuccessful, Mr Justice Blackburn did hold that Aboriginal customary law was recognizably a system of law. (ALRC, Report of a Working Seminar on the Aboriginal Customary law Reference (7-8 May 1983),2."

This may be compared with the conclusion of the Senate Standing Committee on Constitutional and Legal Affairs in its report on the feasibility of an'Aboriginal treaty' or Makarrata:

> "It may be that a better and more honest appreciation of the facts relating to Aboriginal occupation at the time of settlement, and of the Eurocentric view taken by the occupying powers, could lead to the conclusion that sovereignty inhered in the Aboriginal peoples at that time, However, the Commitee concludes that, as a legal proposition sovereignty is not now vested in the Aboriginal peoples except insofar as they share in the common sovereignty of all people of the Commonwealth of

Australia. In particular, they are not a sovereign entity under our present law so that they can enter into a treaty with the Commonwealth. Nevertheless, the Committee is of the view that if it is recognized that sovereignty did inhere in the Aboriginal people in a way not comprehended by those who applied the terra nullius doctrine at the time of occupation and settlement, then certain consequences flow which are proper to be dealth with in a compact between the descendants of those Aboriginal peoples and other Australians." (Two Hundred Years Later (1983) para 3.46).

J.R.C.