Pacific Indigenous Peoples Preparatory meeting for the World Conference on Indigenous Peoples 19 - 21 March 2013, Sydney Australia

Agenda Item: Doctrine of Discovery

Paper submitted by the Indigenous Peoples Organisation (IPO) Network of Australia - prepared by the Foundation for Indigenous Recovery and Development Australia (FIRDA).

Introduction

The legal justifications for the colonisation of Australia have a confused history, which in some respects can be traced back to the Papal Bulls from the fifteenth century that gave Spain and Portugal the right to colonise non-Christian peoples. Although this Catholic authority was rejected by Protestant nations long before the rise of the British Empire, by the seventeenth century new theories of international law provided the Doctrine of Discovery with freshly laid foundations. In spite of these developments, the effects of the Doctrine of Discovery, in all its regional variations, have continued to be disastrous for Indigenous peoples in the former British colonies.

When the British explorer Captain James Cook sailed up the east coast of Australia in 1770, he recorded in his diary the annexation of only the eastern parts of the continent on the grounds that Dutch navigators had already "discovered" the western part (*Cook's Journal*, 17 August, 1770). What he did not do is seek the consent of the Aboriginal people, even though he was obligated to do so by the King's instruction at the time.

The colonies of New South Wales and Van Diemen's Land (now called Tasmania) were then established more on the basis of arrogance than legal theory. A clearer understanding of British settlement was demanded in 1835 when John Batman attempted to make a treaty with the Indigenous peoples in the area now known as the city of Melbourne. While he was immediately compared with William Penn, unlike Penn, he had not been authorised by the Crown and his treaty venture was declared void. The issues were similar to those in *Johnson v McIntosh* (1823), since in the American case the leading question was also whether a private company could enter into a treaty with the Indians.

There was a short-lived attempt to establish the colony of South Australia on just terms, however the Australian colonies developed an extreme version of agrarian ideology, since it was often claimed that they were established on "waste and uninhabited" land, a conscious legal fiction. After 1842, the legal expression "waste and uninhabited" was truncated simply to "waste" lands of the Crown, an expression that later became known as the doctrine of *terra nullius*.

This legal fiction remained law in Australia for 150 years, overturned only in 1992, when the High Court of Australia rediscovered a common law concept of 'native title' in the case of *Mabo v State of Queensland*. In abandoning the fiction of *terra nullius*,

the subsequent jurisprudence and native title legislation has reinstated the medieval fiction that the Crown owns all underlying or radical title, and therefore has an exclusive right to alienate land. This, in effect, revives the Doctrine of Discovery from *Johnson v McIntosh*.

Native title in Australia today has effectively removed the concept of possessory title, leaving only a bundle of traditional rights on analogy with the medieval English rights to take game on common lands.

Native title was subsequently discovered to be a "burden on the Crown", which, of necessity, provoked the question of how the Crown should compensate Aboriginal and Torres Strait Islander peoples for the breach of traditional rights. Three of the judges in *Mabo* proposed that since the Federal Constitution envisaged compensation "on just terms" for the compulsory acquisition of land, then compensation for the loss of native title should be made available from that date. However, the prevailing opinion was that the obligation to compensate native title holders arose only after the advent of the *Racial Discrimination Act* in 1975, thereby exposing the opportunities for discrimination against Indigenous people that existed, and still exist, under the Federal Constitution.

While the High Court's decision in relation to compensation has had some influence in negotiated settlements of native title claims, it is still the case that no litigated cases have delivered compensation even for the wrongful extinguishment of native title rights since 1975.

Aboriginal and Torres Strait Islander peoples have suffered immensely through forcible removal from their lands, segregation and assimilation. At the same time, non-Indigenous peoples have been given immense opportunities to lease, purchase, inherit, and exploit these lands and resources to the detriment of their traditional owners.

Recommendations

We recommend that:

1. Indigenous peoples have equal status to States across all UN forums and agencies where their interests and/or lands, seas and territories are concerned. This extends to the full and effective participation of Indigenous peoples in accordance with Articles 18 and 19 of the Declaration on the Rights of Indigenous Peoples.

2. Urge states to enter into effective processes for redress under Article 28 of the Declaration on the Rights of Indigenous Peoples.

3. Recommend to the Human Rights Council that the Universal Period Review process be extended to require all states to report annually on their implementation of the Declaration with particular attention on Articles 28 and 37;
4. Establish a consultation process with the World Council of Churches with a view to developing the implications of their Executive Committee's denunciation of the Doctrine of Discovery on 14-17 February 2012.