THREE COMMENTS ON PEOPLES' RIGHTS

1. **MR PETER BAILEY** OBE, Deputy-Chairman, Human Rights Commission (Commonwealth)

Two strands of thought seem to be emerging from the discussion. The first is between those who favour considering established international law and how it can be developed, and those who are pressing for new rights to be included in the list, such as the right to development. The second relates to the question whether there is in fact a right to development, and whether it in some way subsumes the discussion about the rights of peoples (the subject of this seminar) or how precisely it is related to those rights. In the Human Rights Commission, we are accustomed to operating at the workface where international law and domestic law interact. Complaints based on the ICCPR and certain other instruments come to us and it is our task to try to get them recognised in domestic law and practice. So we have both a stand in the existing law and a role in attempting to bring "non-law" into it to produce improvements in terms of the observance of human rights. We attract a good deal of criticism on the way because it is thought we are playing fast and loose with the existing law and are using vague concepts - even though they are derived from international human rights instruments. The same discussion seems now to be pervading those who look at the rights of peoples and question whether there should be a move beyond the existing rules in international law.

There are already recognised rights which are relevant to peoples - both the great Covenants on human rights include as Article 1 the right to self-determination. The ICCPR has also Article 27 which provides that minorities are not to be denied the right to enjoy their own cultures - and minorities would certainly include peoples. There are a good many more rights which peoples might claim under the ICESCR - Article 6 on the right to work, Article 7 on the right to enjoy just and favourable conditions of work, Article 12 on the right to everyone to enjoy physical and mental health and Article 13 on the right of everyone to education, to name only a few. In my view it would not be enough to collect these Articles together. Something needs to be done to focus them on the rights of peoples and to assist in getting perhaps a new Covenant, or perhaps a Protocol or Protocols to the existing Covenants, ready for ratification.

The second theme, just what are peoples, is also perplexing. At some times we appear to be talking about self-determination as the primary objective. At other times we appear to be thinking more in terms of protecting the rights of members of a people even though statehood or some form or self-government is not really in question. An example of the latter would be the Australian Aboriginal people, who are not seriously seeking self-government as a single political entity. But unquestionably they need better protection of their rights than exists at present. Do we need to distinguish in this context between two separate strands of rights of peoples - those leading towards better enjoyment of a wider range of rights within the framework of a particular state?

2. **Ms Kathleen Taperell**, Assistant Secretary, Department of Foreign Affairs*

There are three issues which need to be considered in the context of the elaboration of the right to development:

1. Who is the subject of the right?

Can human rights, as opposed to obligations, be vested in States? A number of countries maintain that they can be, but as I understand it, there is no precedent in international law for the vesting of human rights in States. Human rights are vested in the individual. Certain collective rights derive from those individual rights, especially from the right of freedom of association. But that does not mean that these rights extend to States or Governments.

2. What is development?

Development can more logically be seen as a process than a right, as a way of achieving those individual rights set out in the International Covenant on Economic, Social and Cultural Rights. Yet we must accept that the concept of a right to development has some status since it is the subject of resolutions of the United Nations General Assembly. It is not yet, however, an internationally recognised legal right.

To the extent that, bearing General Assembly resolutions in mind, we might consider it a right, we should see it as deriving from the ICESCR. One might have expected that it would therefore elaborate the content of the rights set out in the ICESCR, or give guidance to Governments about the ways in which ICESCR objectives could be realised, for example, through distributional justice, or through popular participation. (Popular participation itself is now being described as a right.) Drafts of the declaration do not, however, do that. Instead they are directed at strengthening the call for a new international economic order and at increasing pressure on developed countries to transfer resources including aid to developing countries.

3. How would a right to development be enforced?

There is a tension in international human rights law between the need to protect human rights and fundamental freedoms and the obligation to refrain from intervention in the domestic affairs of sovereign states. The international community has succeeded in raising the consciousness of Governments of their human rights obligations, but we could not say that it guarantees protection for individuals or groups whose rights are violated by Governments. It is even more relevant to ask how the rights some countries wish now to vest in States could be enforced. A right to a New International Economic Order, or a right to increased development assistance, or to equality of opportunity for nations, could not possibly be enforced by the United Nations. International economic arrangements are the business of institutions outside the UN system, and official development assistance less a legal obligation than a political imperative.

(***Note**: These views are personal and do not necessarily reflect the Department's views.)

3. **Dr H. C. Coombs**, Visiting Fellow, Centre for Resource and Environmental Studies, Australian National University

An earlier speaker introduced his remarks by saying that what he had to say should not be interpreted as a plea for Aborigines. Perhaps I should commence by making it clear that what I say certainly should.

As I see it, it is the function of the law and its institutions to provide mechanisms for the settlement of disputes, to provide a framework for peaceful relationships between members of a society and to establish mechanisms whereby those who believe themselves to have been injured or to have suffered injustice may seek redress. There can be no doubt that in these respects the law, international and domestic, has failed the Aboriginal people.

It was interesting to be informed that the claim of the Mik-mak people of eastern Canada that they had been denied the right of self-determination which the Charter of the UN purports to guarantee them had been dismissed on technical grounds without determining whether the Mik-mak and other indigenous peoples possess such a right in international law. This is a question of great moment for Aboriginal Australians as it arises from the wider question of whether the actions of the British Government in:

(a) claiming and asserting by force sovereignty over the Australian continent; and

(b) extinguishing progressively without negotiation or compensation the property rights of the inhabitants of that continent;

were valid in international law.

While the rights of colonised peoples whose territory was external to that of the colonisers have been acknowledged and international legal and political institutions have developed and made effective programs for the decolonisation of these peoples, those whose territories have been wholly incorporated into that of the colonisers remain without redress. Not merely without redress but without standing in the institutions which exist ostensibly for their protection of their rights.

These institutions and the legal system of our own society have functioned to enforce the original destruction of those rights and to prevent the legality of that destruction being subjected to judicial process.

It has been argued that such judicial process is inapplicable to an issue as absolute as where sovereignty lies, in a world where historically this has been determined often by war. Even if this were true it would not necessarily be true of the destruction of previously existing property rights. And of course there is no reason why the validity in international law of action taken to achieve either of these purposes could not be subjected to judicial review. Even if it is politically impracticable to reverse the effects of such action after long periods of time the outcome of such a review may well be relevant to the political resolution of the continuing dispute.

Sovereignty is not indivisible. The Australian federation successfully has divided power between the Commonwealth and the States and from time to time continues to do so by agreements of limited duration. It is not even necessary that the parties to such agreements should hold common views on the precise location of sovereignty in relation to particular matters.

As an Aboriginal leader has wisely remarked, "It is unlikely that the Commonwealth Government and Aborigines would agree about the issue of sovereignty in principle, but that need not prevent them meeting to divide power between them."