

March 5, 2001

Ms. Erica-Irene Daes
Special Rapporteur on Indigenous Peoples and Their Relationship to Land
Sub-Commission on the Promotion and Protection of Human Rights
The Office of the High Commissioner for Human Rights
Geneva, Switzerland
OHCHR-UNOG
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Re: Petition for U.N. Intervention to Protect the Rights of Ngarrindjeri (aboriginal)
People on Hindmarsh Island, Australia

Dear Ms. Daes,

On behalf of the Ngarrindjeri people of South Australia, and at their request, we are addressing this letter to you as a communication concerning human rights abuses by the Australian government. This communication is directed to a Special Rapporteur due to the urgent nature of our request for investigation and intervention.

Upon review of this letter, it will be clear that the Australian government has breached its commitment to protect human rights within its borders under domestic and international law. The Ngarrindjeri people we represent are victims of those violations, and they are prepared to provide reliable information as to how their people have suffered as a result. This group is an indigenous aboriginal group that has been discriminated against with regard to its cultural, spiritual, and environmental practices, and particularly the secret religious practices of women. The issue at hand involves a bridge, constructed by private developers in conjunction with the government that will compromise sacred

aboriginal sites due to over-development and over-use. The bridge will also inhibit this minority group's ability to continue its connection with their traditional lands, as it is against their culture to use such bridge for transportation.

The Ngarrindjeri have litigated in domestic courts and have received no redress. They have exhausted domestic remedies and thus are now requesting immediate attention by the United Nations. The purpose of this communication is to request the United Nations to encourage Australia's compliance with relevant human rights instruments with which Australia, as a party, is bound to comply. Among the documents the Australian government has violated are the following: *Charter of the United Nations, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of all Forms of Racial Discrimination, Draft Declaration on the Rights of Indigenous Peoples, and the Convention on the Elimination of all Forms of Discrimination Against Women.*

After review of this petition, we request immediate intervention on the part of the United Nations, Office of the High Commissioner of Human Rights, or the United Nations Sub-Commission on the Promotion and Protection of Human Rights, or its agents or representatives (e.g. Special Rapporteurs) appointed by either.

1. History

The Ngarrindjeri are an aboriginal group of people who inhabited Australia prior to English colonization in the 1800's. Hindmarsh Island, in South Australia, has been home to the Ngarrindjeri since before British rule. Ngarrindjeri are essentially "of the

land.” Hindmarsh Island and surrounding waters are a source of religion, art and culture. The land is fundamental to aboriginal identity, cultural survival, and economic viability. Taking the land would destroy Ngarrindjeri sacred sites, sites of worship, burial grounds and healing places— places used to educate their people about their culture and laws. Construction of a bridge to facilitate use and development of this island by non-Ngarrindjeri people would essentially constitute a “taking” of their land.

In the late 1980’s the South Australian government backed investors and developers in building a marina on Hindmarsh Island. Developers later received government permission to build a bridge to service the marina. Until then, the only access to the island was a ferry service. The Ngarrindjeri’s and other needs of island travel were sufficiently served by the ferry until then. Under the prospective scenario, the bridge will replace ferry service, and the Ngarrindjeri will have no means of returning to the island; use of the bridge conflicts with their spiritual and cultural beliefs. Thus, the marina and the bridge will greatly inhibit the Ngarrindjeri use of the island. At special risk is the preservation of sacred sites and practices.

The marina and the bridge drew opposition from the start. In 1994 a group of Ngarrindjeri women protested the bridge, asserting it would disturb traditional “secret women’s business.” Because the business was so sacred, the women could not divulge the “secret” details. The dispute temporarily halted bridge construction and the Federal Minister for Aboriginal Affairs issued an emergency declaration stopping bridge construction for a projected twenty-five years. But an Australian Royal Commission investigation dismissed the “secret women’s business,” calling it a fabrication. In February 1995, the Federal Court of South Australia quashed the emergency measure and

construction again resumed. Ngarrindjeri continued to protest the bridge. In 1998 an Ngarrindjeri woman, Doreen Kartinyeri, brought the first suit against the Commonwealth of Australia. Her claim charged the *Hindmarsh Island Bridge Act* (a law enacted in 1997 to allow bridge construction to proceed) violated the Constitution and the *Heritage Protection Act* (enacted in 1984 to preserve and protect areas of significance to Aborigines and their traditions). The Australian High Court ultimately held for the government, and bridge construction proceeded.

The second suit, brought by Ngarrindjeri Darrell Sumner, was heard by the Supreme Court of South Australia. Sumner claimed: (1) the bridge construction contracts violated public policy and were thus void, (2) acts of genocide by defendants since 1800 through theft and wrongful acquisition of Ngarrindjeri land constituted actionable negligence, and (3) breach of fiduciary duty for failure to prevent further acts of genocide. The court labeled “genocide” as the basis of the claims and held Australian domestic law did not protect against genocide, which is protected only by international conventions. The action was “struck out” in April 2000, and bridge construction continued. There have been no further appeals or new actions filed in this case.

Our client seeks a compromise. They are willing to work with the government to reach an agreement where the interests of all parties can be advanced. The Ngarrindjeri want to inhabit the island, but not necessarily to the exclusion of others. They strongly believe in the sharing of, respect for, and protection of the island and its surrounding waters. Thousands of Ngarrindjeri still have cultural and spiritual contact with the land, waters and Ngaitjis (totems which are considered friends or companions carrying messages from Ngarrindjeri elders) of Hindmarsh. Hindmarsh represents all that is left of

the land, water, flora and fauna that are essential to Ngarrindjeri subsistence. The Ngaitjis species are endangered and on the verge of extinction and must be protected to preserve the cultural, spiritual and economic survival of this indigenous group. In short, increased and unrestricted public use of the island, made possible by the bridge and the marina, thus threaten the Ngarrindjeri with cultural genocide (i.e., ethnocide).

Our request is that the United Nations intervene immediately and halt the opening of the bridge and its ongoing use, pending further negotiations. The Ngarrindjeri propose an agreement with the government to preserve their rights, while permitting responsible use and development of the Island by non-Ngarrindjeri people. Access to the island should be limited, with specific safeguards to protect Ngarrindjeri sacred sites. Ferry service should continue to be provided for the Ngarrindjeri people, whose culture prohibits the use of bridge access. When the English colonized Australia in 1836, there was to be no land taken from the indigenous peoples without treaty or purchase. Through later legislation, disregard and disrespect for this minority group and their rights, the government has failed to follow its initial policy. Because Hindmarsh Island Bridge is scheduled to open in early March, we request prompt United Nation intervention.

2. Domestic Law Applicable to This Controversy

The Australian Constitution itself does not provide for equal protection under the law. However, section 51 of the Constitution gives Parliament the “power to make laws for the peace, order and good government of the Commonwealth with respect to... the people of any race, for whom it is deemed necessary to make special laws.” This provision has been interpreted strangely, by the Australian High Court in the Doreen

Kartinyeri case, to *allow* adverse discrimination based on race. Section 51 of the Constitution also establishes that the Commonwealth has the power to make laws with respect to “the acquisition of property *on just terms* from any State or person for any purpose in respect of which the Parliament has power to make laws.” “On just terms” has been interpreted to require compensation for any compulsory acquisition of property.

The *Racial Discrimination Act 1975* (RDA) was Australia’s attempt to incorporate the *International Convention to Eliminate All Forms of Racial Discrimination* (CERD) into domestic law. Section 7 of the RDA provides “approval is given to ratification by Australia of the Convention”, Section 9 provides “it is unlawful for any person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of impairing the recognition, enjoyment or exercise, on any equal footing, of any human right or fundamental freedom in the political, economic, social, cultural, or any other field of public life”, and §10 holds discriminatory any law that prevents persons of any race from enjoying a right to the same extent as persons of another race.

The *Heritage Protection Act* (enacted as the *Aboriginal and Torres Strait Islander Protection Act*) was enacted in 1984 to preserve and protect “from injury the desecration of areas... that are of particular significance to Aboriginals in accordance with Aboriginal tradition.”

The *Native Title Act of 1993* (NTA) was Parliament’s response to the court’s decision in *Mabo v. State of Queensland*, overturning 200 years of Australian property rights to allow indigenous ownership of land. Prior to *Mabo*, the land taken by settlers was deemed “terra nullius” (unoccupied land) and in effect denied indigenous peoples

possession of land in favor of settlers “rights”. Native Title was established to grant title to land over which Aborigines still had some connection and whose “aboriginal title” the government had not extinguished through valid public acts. However, the 1998 amendments to NTA diluted much of the earlier land protection granted indigenous peoples, e.g., by rejecting the concept of communal title.

The *Sexual Discrimination Act 1984* (SDA) was the Australian government’s codification of the Convention for Elimination of All Forms of Discrimination Against Women (CEDAW). Under SDA a woman may present a claim to the Australian Human Rights and Equal Opportunity Commission (HREOC) (the domestic human rights body charged with hearing claims raised under several human rights statutes) claiming she was treated unfairly because of sex... or a legal “requirement (rule, policy, practice or procedure) that is the same for everyone, but which has an unfair effect on particular groups.”

The *Commonwealth Biodiversity Act of 1999* purports to protect the environment by identifying matters of national environmental significance such as world heritage properties, Ramsar wetlands of international importance, nationally threatened species and communities, migratory species protected under international agreements, the Commonwealth marine environment (generally outside 3 nautical miles from the coast), and additional matters specified by regulation. The Act purports to protect those species listed under the Act by preventing development in these species’ habitat. Hindmarsh Island features protected wetlands and related and listed species.

3. Applicable International Law

As a member of the U.N., Australia has failed to meet its obligations under several applicable human rights instruments. The *Charter of the United Nations*, pursuant to *Article 1* requires all members to promote equal rights and self-determination of peoples and respect for human rights and for fundamental freedom for all without distinction as to race, sex, language or religion. *Article 17* of the *Universal Declaration of Human Rights* requires respect for the right to own property and mandates that no one shall be arbitrarily deprived of his property.

The *International Covenant on Civil and Political Rights* (ICCPR), to which Australia is a party, protects the Ngarrindjeri's right to self-determination (*Article 1(2)*), equal protection under the law (*Article 26*), and to practice their own culture, religion and language (*Article 27*).

Further protections against racial discrimination are provided by the *Convention on the Elimination of All Forms of Racial Discrimination*, which Australia has signed and ratified. Under this convention state parties are obligated, inter alia not to engage in an act or practice of racial discrimination against persons or groups of persons.

The *Draft Declaration on the Rights of Indigenous Peoples* has persuasive relevance. Among other provisions, the Declaration provides that "indigenous peoples have the right to engage freely in all their traditional and other economic activities" (*Article 21*) and that indigenous peoples have the right to "maintain and strengthen their distinctive spiritual and material relationship with the lands, territories" (*Article 25*).

The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), to which, again, Australia is a ratified signatory, prohibits "any distinction, exclusion or restriction made on the basis of sex which has the effect or

purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

4. Admissibility and Summary of the Merits

The Ngarrindjeri have exhausted all domestic remedies. The High Court of Australia handed down, in 1998, a final decision in the *Kartinyeri* case. It held the *Hindmarsh Island Bridge Act* was not contrary to the Australian Constitution (Section 51) or to the previously legislated *Heritage Protection Act*. The South Australian Supreme Court, in April 2000, rejected the *Sumner* appeal, which the Court found had been based on non-actionable “genocide” grounds. The Ngarrindjeri have pleaded for intervention to the *Human Rights and Equal Opportunity Commission* (HREOC) of Australia, the domestic human rights body, to no avail. Thus, the Ngarrindjeri have exhausted reasonable and diligent efforts to use remedies available to them under domestic law.

The Australian government’s human rights record on indigenous issues has been dismal. The government has failed to uphold the *1975 Racial Discrimination Act* by interfering with the Ngarrindjeri’s ability to enjoy and use their land. Facilitating the non-indigenous development of Hindmarsh Island inhibits the Ngarrindjeri’s ability to practice and teach their traditions and thus is promoting the demise of their people and their future. This can be statistically shown by the large decline in population, shortened life expectancy and higher rates of incarceration of Ngarrindjeri people resulting from governmental acts, essentially robbing the Ngarrindjeri of that which gives them life.

Where the Ngarrindjeri women have special needs for the preservation of their heritage and future generations, the government has violated the *1984 Sexual Discrimination Act*. The Royal Commission disregarded the “secret women’s business.” Without these practices, intertwined with the lands and waters of Hindmarsh, the women are deprived of an essential key to their procreation.

Finally, the Australian government has infringed on Ngarrindjeri’s land rights, arguably in violation of the *1993 Native Title Act*. Further, although Section 51 of the Constitution gives the Commonwealth the power to make laws with respect to “the acquisition of property *on just terms* from any State or person for any purpose in respect of which the Parliament has power to make laws,” the Ngarrindjeri have not been given an opportunity to negotiate “just terms” for the taking of their property rights.

Similarly, international law protections have been ignored by the Australian government, as noted earlier. *Article 17* of the *Universal Declaration of Human Rights* has been violated because Ngarrindjeri have been arbitrarily deprived by the government of their right to own property, notwithstanding the *Native Title Act*. Ngarrindjeri have been given title to less than 500 acres on the entire island. Additional claims submitted under Native Title have been delayed and ignored, for reasons unknown.

As mentioned earlier, the ICCPR provides three articles of protection for Ngarrindjeri which the Australian government has violated. Most importantly, the Ngarrindjeri are being denied their right to self-determination in violation of *Article 1*. In short, a minority with little power, the Ngarrindjeri are disregarded by a government exploiting an imbalance of power.

Finally, CEDAW affords Ngarrindjeri women protection where the “women’s business” must be kept secret to preserve their future. The “secret women’s business” is essential to procreation. The government’s bridge construction facilitates a “distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women... on a basis of equality of men and women.” If Ngarrindjeri women are deprived of their practice and its secret nature, the effect will be the end of their procreation ritual and potentially their race. Laws enacted – such as the *Hindmarsh Island Bridge Act* -- and the progression of development in the area of Hindmarsh continues to impair practices essential to the existence of these people.

4. Conclusion

The Ngarrindjeri request, the your immediate intervention, of the U.N. Special Rapporteur. The Hindmarsh Island bridge is scheduled to open imminently. Once that occurs, everything that Hindmarsh Island represents to this minority group slips further and further from their reach. These people are entitled to the use and enjoyment of the land they own, and to engage in the cultural and spiritual practices inextricably tied to Hindmarsh that are essential to their existence. On behalf of the Ngarrindjeri, we ask the intervention of the U.N. at the earliest possible time.

Respectfully submitted,

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