

Jabiluka and it's Implications to International Law

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Article: Submitted To ALRC

9th September 1999

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The Australian Government's deft skills when reporting to international treaty bodies are well-renown. Professor Hilary Charlesworth has identified a particularly successful strategy adopted by Australian delegations whenever faced with an examination of Aboriginal issues:

Whereas some countries that are otherwise regarded as good international citizens sometimes take their reporting obligations in a very dilatory way, Australia doesn't. However, even though our reports are of good standard, they tend to provide very positive spins on a particular fact situation. Australia has developed a technique which I call "confess and avoid". For example, the report will admit that a particular Indigenous community has shocking rate of illness, and then detail all the measures that have been put into place to solve the problem.

Generally speaking, the exchanges between the Australians and the committees have been exceptionally polite. The Australian representatives are thanked for being honest, and it becomes a very self-congratulatory exchange.

Meanwhile, back Down Under, its business as usual.

The Mirrar people's ongoing case against the Australian Government and mining giant North/ERA before the UNESCO World Heritage Committee has shown that "confess and avoid" remains the fall-back approach to black issues, even when at complete odds with the Commonwealth's aggressive domestic stance.

During the most recent round of World Heritage Committee deliberations in Paris, the same conservative government officials who are engaged domestically in discrediting the Mirrar people's opposition to the Jabiluka mine became overnight converts to the language of self-determination.

However the transformation from mining advocacy to Aboriginal flattery has not been an easy one for the Australian Government team involved in the Jabiluka issue. The first rounds in the World Heritage Committee process were highly successful for the Mirrar, perhaps because the Australian Government, particularly Environment Minister Robert Hill, initially chose a hardline approach.

The Mirrar argument is relatively straightforward. The Mirrar people's living cultural tradition was a key aspect in Kakadu receiving World Heritage status in 1991 under both cultural and natural criteria of the World Heritage Convention. The Mirrar could demonstrate that their living cultural tradition was directly threatened by the Jabiluka proposal and therefore the cultural values of Kakadu were threatened by the mine.

The fact that the Jabiluka Mineral Lease is administratively excised from the World Heritage Area is of little relevance when applied to World Heritage values. The ancient Mirrar living

cultural tradition is of the same significance within the comparatively recent borders of the Jabiluka Mineral Lease as it is in the World Heritage Area. There are many laws, customs and ceremonies which traverse both areas..

Accordingly, the Mirrar argued that the ascertained and potential threats to their living tradition and culture posed by further mining on their land required that Kakadu be inscribed on the List of World Heritage Danger pursuant to Article 11, Paragraph 4 of the World Heritage Convention and Chapter III of the Operational Guidelines for the Implementation of the World Heritage Convention.

In June 1998, the Mirrar and Australian NGO's presented their arguments to the UNESCO World Heritage Committee's Bureau with a view to having a Special Mission dispatched to investigate Jabiluka's impact. The Australian Government did anything but "confess and avoid" at this stage. It vigorously denied there were significant impacts on living tradition from the mine, despite the fact that members of that living tradition were sitting in the corridor outside, urging Bureau members to visit their country. Australia's belligerence backfired. Not only did the Bureau decide to send a Mission, it was to be led by the Chairman of the Committee and the Head of the World Heritage Centre.

The UNESCO Mission conducted their investigation in Kakadu, Darwin and Canberra in the last week of October, 1998. The Mission met with government, industry, conservation and Aboriginal groups during their visit.

While the Australian Government controlled the Mission's agenda, it significantly underestimated the ability of the Mirrar to present clear-cut arguments about the severe cultural impacts caused by the imposition of the Ranger mine on Mirrar country and the manner in which such impacts would be exacerbated by Jabiluka. The Mirrar were allocated four hours to show the Mission their cultural sites on the Jabiluka Mineral Lease and their living conditions within Kakadu National Park. The Mirrar also presented a comprehensive written submission to the UNESCO Mission team.

While the Australian Government was well prepared for the environmental arguments associated with the impact of Jabiluka on Kakadu's natural values, their inability to address the arguments of Traditional Owners soon became clear. For example, the Government and ERA had no adequate explanation for why construction of Jabiluka had been allowed to proceed without baseline cultural data. Defensive outbursts and personal attacks from Robert Hill, combined with blatant collaboration between the Australian appointees to the Mission and the Minister's office, did nothing to further Australia's argument.

In late November the seven-member UNESCO Kakadu Mission handed down its Report, finding that the threats identified by the Mirrar were apparent and calling for the Jabiluka project to be scrapped amongst a range of corrective measures. The two Australian Government appointees to the Mission predictably dissented from the Report.

The 22nd Session of the World Heritage Committee held in Kyoto in early December 1998 adopted the Mission Report in full. However, due to the extremely short period between the Mission's Report and the Kyoto meeting (caused by the October 3 Federal Election) and the Australian Government's vehement opposition to "In Danger" listing, the Committee delayed making a decision on whether to include Kakadu on the List of World Heritage In Danger until an extraordinary meeting in Paris in July, 1999. At the same time it voted 20-1 for work on

Jabiluka to be immediately halted.

The Australian Government, in particular Minister Hill, claimed unfair treatment. In reality Australia's hardline approach to the Jabiluka issue had nosedived before the international community. Yet having "won" the native title amendment process, "outsmarted" the world on greenhouse emissions and gained re-election with a GST package it was not yet ready to "confess and avoid" on Jabiluka.

ERA were informed that the Australian Government would support the continuance of work at Jabiluka in defiance of UNESCO. A cross-departmental working group representing the Department of Foreign Affairs and Trade; the Department of Science, Industry and Resources; Environment Australia; the Office of the Supervising Scientist; and the Department of Prime Minister & Cabinet was established to co-ordinate an intensive worldwide lobbying effort and information campaign.

Literally thousands of pages of reports were provided to members of the World Heritage Committee. Capitals were targeted in an effort to impose a "whole of government" approach on Committee members. Correspondence was exchanged between Australia and other member states at the very highest level. High level bureaucrats were dispatched to briefings in Africa, the United States, Central America, Asia and a number of European countries. Deals were made on Australian Government support within other international committees.

The Mirrar were variously characterised as "an isolated minority", "confused and manipulated", "incapable of understanding modern economics". They were accused of intimidation and fabrication. Even the Mirrar's legal right to country, established in two land claim processes, was attacked as part of the Australian Government's lobbying effort.

The partisan reporting of the Australian Government was easy to refute and their smear campaign provided a sharp contrast with the quiet dignity of the Mirrar and their leader, Yvonne Margarula. At a time in which the unlimited, worldwide resources of the Government and North/ERA should have been all pervasive, the Mirrar were able to keep in the race with a fax machine, email and strategic grassroots support. Australia failed to deal with the critical cultural issues at the same time as the Mirrar kept them uppermost in the minds of Committee members.

The centrepiece of the Australian Government's information effort was a report entitled "Australia's Kakadu", which resembled a uranium mining public relations document more than a state party report to UNESCO. For example, instead of acknowledging that the Ranger mine had been stridently opposed by the Mirrar in the 1970's, the report attempted to represent that the Mirrar had previously agreed to uranium mining. Such blatant attempts at deception were simply exposed and severely undermined the Government's lobbying effort.

By July 1999 the Australian Government realised that the hardline approach had failed. The Mirrar had countered their information campaign and achieved significant support in key member states. The over-zealous condemnation of the Mirrar did not wash with those who had visited Kakadu or met the Traditional Owners. While pressure from state capitols had locked in a number of Committee members, the numbers were fluid enough to cause Australia substantial anxiety.

In the final days before the World Heritage Committee's extraordinary Kakadu meeting, the

Australian Government swiftly developed a classic “confess and avoid” package. They were forced to admit to UNESCO that there had been a “breakdown of communication” with Traditional Owners and announced a range of “compromises”, including a delay on development of Jabiluka.

The confession was well received. International committees made up of state parties (especially those with indigenous minorities) are extremely reluctant to punish other state parties who display voluntary public contrition. The World Heritage Committee in particular has a culture of consensus or “win-win” compromise.

While some Australian NGO’s favoured an all out attack on the Government, it was clear that the limited compromises were enough to avoid an “In Danger” listing. The World Heritage Committee was simply not going to humiliate one of its longest-serving members by imposing an “In Danger” listing on an apparently contrite Australia.

This was confirmed by a number of state party delegations who advised the Mirrar that they were under instructions to vote against “In Danger” listing in the wake of Australia’s conciliatory approach. As one senior delegate said: “The last thing we want to become is the International Court of Environment and Culture: prosecuting, judging and sentencing other State Parties.”

Various delegates made it very clear that the only way for the Mirrar to improve the Australian Government’s position was to talk. In addition, any refusal by the Mirrar to communicate with the Australian Government would be viewed as obstructionist. It was up to the Mirrar to gain a tangible result which ensured that the World Heritage Committee remained the international Jabiluka watchdog.

The media coverage of the UNESCO decision focused on the Australian Government’s successful avoidance of an “In Danger” listing. Yet despite the success of Australia’s “confess and avoid” strategy in preventing official sanction, the Mirrar left Paris satisfied with the strongly worded resolution and public commitments made by Australia.

On their departure from Kakadu for the UNESCO meeting the Mirrar were facing unlimited blasting, drilling and construction in an area of extreme significance leading to full operation at Jabiluka, simultaneous with Ranger, in 2001. The Australian Government had repeatedly stated that Jabiluka would proceed “full steam ahead” regardless of an In Danger listing.

The Mirrar left the World Heritage Committee with at least an 18 month delay on the development of Jabiluka while the mine’s cultural viability is assessed. They left with Government funding for the new Aboriginal Education Unit - rather than funding being tied to production at Jabiluka. They left with a commitment from the Minister to improve his understanding of Jabiluka’s serious cultural impacts; to closely monitor the divisive actions of the company; and to prioritise the development of vital infrastructure and service delivery projects.

The Mirrar left Paris with a Committee representing nearly every nation in the world affirming the unique and essential importance of Mirrar culture and the grave consequences for Mirrar society if Jabiluka proceeds. They left with the knowledge that their leader, Yvonne Margarula, had been the first indigenous Australian to address the World Heritage Committee; that she had done so in the Mirrar language and had spoken with a profound dignity recognised by all present.

Most importantly, they left Paris with a firm assurance that the World Heritage Committee would closely examine the manner in which Australia addresses its "confessions", including the provision of a complete report by April, 2000.

The Mirrar battle against the Jabiluka uranium mine is in many ways a microcosm for the wider Aboriginal struggle. Just like native title and the stolen generations, Jabiluka is a symptom of fundamental flaws in the way Australian society relates to Aboriginal values. It is not an issue which will be quickly or simply resolved by a particular decision.. International law is only ever one forum of many.

Mick Dodson provided a recent assessment of the usefulness of international law for indigenous people:

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...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 link them to what is most close at home...

I'd suggest that Indigenous Australians could do a lot worse than have a few billion people of the international community on our side.

The Mirrar have achieved the kind of results expressed by Dodson within the limited scope of the World Heritage Convention. The Mirrar's UNESCO fight is shifting the domestic and international debate on Jabiluka further towards the Mirrar position at every stage.

The Mirrar are now working with the entire North Kakadu community to develop plans for an economic and social future independent of imposed mining development. The support the Mirrar now enjoy from decision-makers in all corners of the globe will serve to help underpin the success of this community-based process.

