

THE DISPUTE BETWEEN NAURU AND AUSTRALIA OVER REHABILITATION: A TEST CASE FOR ECONOMIC SELF-DETERMINATION

by

M Rafiqul Islam*

Introduction

The longstanding dispute between the Republic of Nauru and the Commonwealth of Australia, over the rehabilitation of phosphate lands mined out prior to Nauruan independence, has been under adjudication by the International Court of Justice (ICJ) since November 1991.¹ In this case concerning *Certain Phosphate Lands in Nauru*, the ICJ is required to adjudge, *inter alia*, whether Australia, being the principal administering authority of the Trust Territory of Nauru, incurs any international legal obligation to rehabilitate phosphate lands worked out under Australian administration.² Both parties have accepted the compulsory jurisdiction of the Court under Article 36(2) of its Statute without any reservation. A number of subtle and emerging international legal principles are likely to encounter judicial scrutiny in this case. The right of the Nauruans to economic self-determination appears to be the dominant one in view of the application of Nauru.

Self-determination has two interrelated, indeed inseparable, components: "political", referring to free determination by the "self" concerned of their political destiny; and "economic", entitling them to freely pursue their economic objectives by gaining control over their natural wealth and resources. The Nauruans achieved their independence on 31 January 1968, a fact that seemingly testifies to their realisation of "political" self-determination. It is the extent to which the Nauruans exercised their right to "economic" self-determination under Australian rule that may well engender a case for Australia to answer.

This paper outlines the "economic" aspect of self-determination in the UN Charter regime and Australia's obligations arising therefrom. It examines the magnitude of denial, if any, of "economic" self-determination in Nauru's pre-independence era and possible consequences for Australia. Finally, it briefly highlights and comments upon any probable influence that emerging international environmental law may exert on the outcome of the case.

Economic Self-Determination in the Charter Regime and Australia's Obligations

(a) The UN Purposes

Self-determination has been regarded as an inherent right of all, particularly dependent peoples' right to freely determine their political status and to pursue their economic, social and

* School of Law, Macquarie University, Sydney, Australia.

1 On 19 May 1989 Nauru instituted proceedings against Australia in the ICJ. Australia lodged its counter memorial in January 1991. The final time limits for the case were set in a procedural hearing on 2 May 1991 and came before the Court in November 1991.

2 Nauru claims that Australia has violated its obligations towards Nauru under the UN trusteeship system and trusteeship agreement for Nauru. It requests the ICJ to adjudge and declare that Australia "... is bound to make restitution or other appropriate reparation to Nauru for the damage and prejudice suffered". See the text of communiqué no.89/7 of 22 May 1989 by the Registry of the ICJ, The Hague; also the Order of the Court on the case issued on 18 July 1989.

cultural developments.³ This connotation of self-determination owes its origin to the purposes of the UN. The establishment of the UN was contemplated to serve four major purposes. The development of “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” is one of them.⁴ Similarly, the achievement of international economic aims and social co-operation has been made contingent upon “respect for the principle of equal rights and self-determination of peoples”.⁵ The UN undertakes to promote its economic objectives under Article 55 in compliance with this principle. These objectives cover virtually every aspect of human life and all matters to which the internal order of member States relate. Hence the principle of equal rights and self-determination of peoples, in other words, facilitates human rights and dignity providing political, economic and social justice to the peoples. Its denial may therefore be viewed as stultifying international economic co-operation and incongruous with the purposes and principles of the UN.

The UN purposes, especially the economic ones, are not sheer statements of distant goals but involve definite legal obligations. The basic duty by which the UN justifies its existence is the fulfilment of its purposes. It is a common practice that member states assume responsibility to materialise UN objectives. Merely by being a member of the UN, a state wilfully undertakes certain obligations flowing, overtly and covertly, from the Charter. It places individual member states under a specific obligation to take joint and separate action for the achievement of economic aims set out in Article 55 of the Charter. The use of the word “pledge” in Article 56 creates a legally binding obligation.⁶ When member states pledge themselves to promote the economic purposes of Article 55, they assume an obligation to foster respect for their peoples’ right to self-determination - a precondition of stability and well-being. The unconditional imposition of this obligation on “all members” of the UN tends to indicate that members have assumed this obligation towards “all peoples”, irrespective of whether they are within colonial, non self-governing, trust, or metropolitan territories.

(b) Subsequent UN Resolutions

That the denial of dependent peoples’ right to, and control over, their economic resources militates against the realisation of their self-determination is reiterated and reaffirmed in a number of UN resolutions. The General Assembly Resolution 1314 (XIII) characterises the status of permanent sovereignty of peoples and nations over their natural wealth and resources as a basic constituent of the right of self-determination.⁷ Gaining the greatest momentum from the 1960 Decolonisation Declaration,⁸ the right of peoples to economic self-determination derives its ultimate boost and sustenance from the UN Resolution 1803 (XVII) on Permanent Sovereignty Over Natural Resources.⁹ Free pursuance of economic developments by the peoples as an indispensable requirement for the realisation of self-determination, is endorsed in the 1966 International Covenants on Human Rights and re-endorsed in the 1970 UN Declaration on Friendly Relations.¹⁰

3 Art 1 of the International Covenants on Human Rights, GA Res.2200 (XVI) of 16 December 1966 (1967) 6 *Int'l Leg Mat* 360 and 368; Principle V of “Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the UN”, GA Res 2625 (XXV) of 24 October 1970, (1970) 9 *Int'l Leg Mat* 1295.

4 Art.1(2) of the UN Charter.

5 Art.55 of the UN Charter.

6 The report of the San Francisco Committee 11/3 maintains that the word “pledge” is in no way without legal force. See MS Rajan, *UN and Domestic Jurisdiction*, Asia Pub House, London (1961) at 277; Q Wright, “Recognition and Self-Determination” (1954) 48 *Am Soc IL Procd* 30; MGK Nayer, “Self-Determination Beyond the Colonial Context: Biafra in Retrospect” (1975) 10 *Tex ILJ* 334.

7 GA Res of 12 December 1958 establishing the Commission on Permanent Sovereignty Over Natural Resources.
8 “Declaration on the Granting of Independence to Colonial Countries and Peoples” GA Res 1514 (XV) of December 1960.

9 GA Res of 14 December 1962, for the text, see (1963) 57 *Am JIL* 710.

10 *Supra* n.3.

A close examination of various UN prescriptions on self-determination referred to, reveals that its exercise does not merely mean political freedom in the technical sense, but also seeks to afford opportunity for the unimpeded enjoyment of economic rights by its beneficiary. The UN instruments have blended effectively the political and economic aspects of self-determination simply because they are indivisible and interdependent. These instruments establish an indissoluble link between them, as political freedom, standing alone without economic freedom, is hollow, self-defeating and as such, unsustainable. It would be erroneous to accord any priority to one aspect over the other. Their unqualified endorsement as integral components of self-determination in the same paragraph is intended to stress that they deserve equal attention and emphasis.

(c) International Trusteeship System

Of the three separate Chapters on colonial affairs in the UN Charter, Chapters XII and XIII, dealing with the Trusteeship System, embody extensive provisions for the eventual independence of trust territories. Under this system, administering authorities committed themselves to work in collaboration with the Trusteeship Council to prepare less developed regions for self-rule. The worldwide concern for, and interest in, the future of trust territories, following the Second World War, necessitated the creation of the Trusteeship System and the Trusteeship Council as one of the principal organs of the UN. The fundamental objectives of this System, among others, are: "to promote the political, economic, social and educational advancement of the inhabitants of the Trust Territories and their progressive development towards self-government or independence ...".¹¹

Indeed, the system was praised as a "civilised mission" designed to remove the political, economic and social primitiveness of the dependent peoples and to progress them towards independence.¹² The administering authority undertook obligations to develop political and economic institutions and to promote the socio-economic well-being of the dependent peoples. Implicit in this sacred trust was the condition that the dependent peoples and their territories should be utilised exclusively for their welfare, not for the benefit of the administering territory and peoples. Thus the assigned task and assumed obligations of the administering authorities towards their respective trust territories were explicit and far reaching. However, these objectives of the system were frustrated in an overwhelming majority of cases. The international community witnessed flagrant exploitation of trust territories for the benefit of administering authorities. These authorities negligently failed to prepare dependent peoples politically and make them economically viable for independence. This lack of preparedness was used as a basis for their continuing rule. This situation prompted the UN to endorse an unfettered right of the dependent people to self-determination in the 1960 Decolonisation Declaration: "inadequacy of political, economic or educational preparedness should never serve as a pretext for delaying independence".¹³

(d) Australia's Obligations Towards the Trust Territory of Nauru

- (i) From the Charter Regime: Australia undertook certain obligations with respect to the trust territory of Nauru. It accepted and was bound by the obligations under Chapters XII and XIII of the UN Charter. It was, in the main, obliged: (1) to ensure the political advancement of Nauru towards self-government; (2) to promote economic welfare of the Nauruans and constructive development in the territory; and (3) to report periodically to the UN on the political, economic, social and educational conditions in Nauru. These responsibilities have been internationalised in the Charter regime by a constant flow of authoritative UN prescriptions. Consequently, these obligations of Australia were not matters essentially

¹¹ Art 76 of the UN Charter.

¹² JF Engers', "From Sacred Trust to Self-Determination" (1977) 24 *Neth IL Rev* 85.

¹³ *Supra* n.8, para.3.

within its domestic jurisdiction.¹⁴ Moreover, Australia has expressly adopted the principle of self-determination as the central pillar of its administration of human rights.¹⁵ It was Australia which had the prime responsibility for Nauru's pre-independence administration which was to be carried out in compliance with the UN Charter and obligations arising therefrom.

- (ii) From the Nauru Trusteeship Agreement: The placement of trust territories under alien administrative authorities was not arbitrary, but followed by terms and conditions of administration. Since each trust territory was unique and posed its own special problems, a separate and independent trusteeship agreement, setting out terms and conditions of trust, was devised for each territory pursuant to Article 81 of the UN Charter.

The territory of Nauru became a trust territory under Article 77(1a) of the UN Charter. The Trusteeship Agreement for the Territory of Nauru, concluded on 1 November 1947,¹⁶ designated Australia, the UK and New Zealand "as the Joint Authority which will exercise the administration of the Territory" to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory" (Art.2). The actual administration was vested in Australia under Article 4. Article 3 required Australia "to administer the Territory in accordance with the provisions of the Charter and in such a manner as to achieve in the Territory the basic objectives of the International Trusteeship System which are set forth in Article 76 of the Charter". Hence the Charter objectives of the Trusteeship System were made an integral part of the Trusteeship Agreement for the Territory of Nauru, dispelling doubts, if any, as to the binding nature of those obligations involved in the administration of Nauru. Australia was further duty-bound by Article 5(2a-b) of the Trusteeship Agreement to:

Take into consideration the customs and usages of the inhabitants of Nauru and respect the rights and safeguard the interests, both **present and future**, of the indigenous inhabitants of the Territory ... Promote ... the economic, social, educational and cultural advancement of the inhabitants ... (emphasis added).

Hence the present and future prosperity of the trust territory of Nauru and its dependent peoples was the paramount consideration and binding obligation of Australia under the UN Charter and the Trusteeship Agreement for Nauru.

The Bone of Contention: Rehabilitation

(a) Rehabilitation Issue in Historical Context

The territory of Nauru, a Central Pacific island, had a distinct historical identity. The Nauruans are the indigenous people, continuously inhabiting the territory since time immemorial.¹⁷ Extensive phosphate deposits were discovered on the island in 1900 when it was under the German influence. Australia's direct involvement in the administration of Nauru dates back to November 1914 when Australian troops captured the island after the outbreak of the First World War. Australia retained this control until 1920 when a League of Nations mandate for Nauru was

14 The UN practice shows that the use of Art.2(7) of the Charter as a bar against international intrusion into any dispute over the implementation of self-determination of people has always been a losing battle. See MK Nawaz, "Colonies, Self Determination and the UN" (1962) 11 *Indian YI Aff* 33; RE Gorehck, "Wars of National Liberation: Jus ad Bellum" (1979) 11 *Case WRJIL* 71.

15 See the views expressed by Senator Gareth Evans, the Minister for Foreign Affairs and Trade, in relation to Australia's role in the development of the principle of self-determination in "International Law and Australia's Interests" (March 1989) 60 *Aust For Aff Trade* 93.

16 For the text, s.10 *UN Treaty Series*, 3; also N Harper and D Sissons, *Australia and the UN*, Manhattan Pub Co, New York (1959) at 379.

17 For a discussion on the history of the Nauruans, see S Petit-Skinner, *The Nauruans*, MacDuff Press, San Francisco (1981) at 20-38; N Viviani, *Nauru: Phosphate and Political Progress* ANU Press, Canberra (1970) Ch.1; G Pitman, *Nauru: The Phosphate Island*, London (1959); (Feb 1968) 39(2) "Current Notes on I Aff (549)".

created and conferred on the British Crown.¹⁸ Knowing informally this decision, Australia reached an agreement with the UK and New Zealand on 2 July 1919 in which the former undertook to exercise the mandate in compliance with conditions set by the League Council. This agreement in fact placed the administration of Nauru under Australian control and made provisions for the mining of its lucrative phosphate deposits through the British Phosphate Commissioners (BPC).

The salient features of this agreement were: (1) that the administrative expenses of the island were to be paid out of the proceeds from phosphate sale, if necessary (Art.2); (2) that the title to the phosphate deposits would be vested in the BPC (Art.6); (3) that the phosphate deposits to be mined under the direction, management and control of the three Commissioners, one appointed by each Government (Art.9); (4) that the Partner Governments would get priority of access to Nauruan phosphate at cost of production price (Art. 14); and (5) that phosphate not needed by the Partner Governments would be sold at market price and profit deriving therefrom would be credited to the three Governments.¹⁹

The Australian Parliament ratified this agreement through the *Nauru Island Agreement Act* 1919 (Cth). A subsequent agreement between the Partner Governments in 1923 reconfirmed the actual governing power of Australia over Nauru giving absolute legislative and disallowance powers and powers to appoint administrators for Nauru. The 1947 Trusteeship Agreement for Nauru, though designating the Partner Governments as the Joint Administering Authority, vested the actual administration of Nauru in Australia.²⁰ This position of Australia as the actual Administrative Authority of Nauru was once again incorporated in the Nauru Agreement of 26 November 1965, between the Partner Governments, that established a Legislative Council for Nauru.²¹

Pursuant to the UN Resolution 2347 (XXII) of 19 December 1967 and the *Nauru Independence Act* 1967 (Cth), Nauru became an independent Republic on 31 January 1968. By then one-third of the Nauruan phosphate lands had been explored by the BPC under Australian administration, creating a forest of coral limestone pinnacles of up to 15 metres high.²² These worked-out phosphate lands are totally useless for habitation, vegetation, agriculture or any other economic utilisation. A rehabilitation scheme is to be launched in order to render these lands reusable for any purpose. Since all agreements were concluded, all legislation enacted and all administrators appointed exclusively by Australia uninterruptedly from 1919 to 1968, Nauru now holds Australia responsible for rehabilitation.

(b) Rehabilitation Issue at the UN

The BPC carried out mining operations in Nauru under Australian administration in the absence of any legislative or contractual obligation for the rehabilitation of mined out lands. The long-term impacts of such an omission on the future of the Nauruans and the possibilities of rehabilitation or resettlement have been repeatedly pointed out to Australia by the Trusteeship Council and its Visiting Missions since 1949. Australia itself was well aware of the gravity of the situation. It informed the Trusteeship Council that:

The phosphate deposits will be exhausted in an estimated period of seventy years at the

18 Done pursuant to Art.119 of the Versailles Treaty of 28 June 1919 and Art.22 of the League of Nations Covenant.

19 The agreement is annexed to the Schedule of the *Nauru Island Agreement Act* 1919 (Cth); for the text, history and interpretation of this agreement, see M Williams and B Macdonald, *The Phosphateers*, Melbourne U Press (1985) at 135-68.

20 Art.4, *supra* n.16.

21 For the text, see the Schedule of the *Nauru Act* 1965 (Cth); "Report of Trusteeship Council" 25 July 1966 – 30 June 1967 GAOR 22nd sess suppl 4 (A/6704), at 45.

22 Nauru's application to the ICJ and accompanied map of phosphate land mined before January 1968, reproduced in [1990] *Aust IL News* 157, 162; C Forbes, "Poor Little Rich Island", *The Sydney Morning Herald, Good Weekend*, 9 June 1990 at 45.

end of which time all but the coastal strip of Nauru will be worthless. The Australian Government is live to the possibility that the island might not then provide a satisfactory home for the indigenous population and that it might be necessary to give the natives an opportunity to transfer to some other island.²³

In response, the Trusteeship Council called upon Australia “to ensure that ... the needs of the inhabitants must have precedence” over “the expansion requirements of the phosphate industry”.²⁴ The General Assembly to this end reaffirmed “the principle that the interests of the indigenous inhabitants must be paramount in all economic plans or policies in trust territories”.²⁵ In 1962, both the Trusteeship Council and its Visiting Mission unequivocally recommended that the drawing up of a detailed plan for resettlement was unavoidable; and

that the strongest obligation (for such a plan) rests with the governments of the countries which have benefited from low price, high quality phosphate over the many years of the operation of the Commissioners to provide the most generous assistance towards the cost of whatever settlement scheme is approved for the future home of the people of Nauru.²⁶

The Administering Authority reacted favourably declaring that “ample provision of means for developing a future home is not and will not be a stumbling block towards a solution and that the Administering Authority will be mindful of its obligation to provide such assistance”.²⁷ This proclaimed commitment was reiterated in 1963.²⁸

In fact, at a Canberra Conference in October 1960, Australia told Nauru that the Administering Authority offered to resettle the Nauruans in any of the three metropolitan countries over a period of thirty years. Australia also made an abortive attempt to rehabilitate the Nauruans on Curtis Island in Queensland. The proposal was unacceptable to the Nauruans as it sounded a total assimilation of the Nauruans into the Australian community at the expense of Nauruan separate identity.²⁹ Nauru reinforced its claim, at the June 1965 Canberra Conference, that it was Australia’s positive duty to restore the island. The Trusteeship Council also asked Australia to pursue the question of a future home for the Nauruans which would preserve their national identity.³⁰ In response, Australia on 24 January 1966 appointed the Nauru Lands Rehabilitation Committee “to examine the practicability, costs and usefulness of rehabilitating the mined out areas of the phosphate island of Nauru”. The lone feasibility study on rehabilitation, concluded in June 1966, was never made public and its recommendation for partial rehabilitation and revegetation, with provision of adequate water catchment, went unheeded.³¹ No further arrangement for rehabilitation was proposed or undertaken by Australia prior to the independence of Nauru.

The UN however continued to call upon the Administering Authority to “take immediate steps, irrespective of the cost involved, towards restoring the Island of Nauru for habitation by the Nauruan people as a sovereign nation”.³² The Special Committee of twenty-four also urged the Administering Authority “to rehabilitate Nauru according to the express wish of the people so that they could continue to live there”.³³ The General Assembly, in noting that Nauru would be independent on 31 January 1968, unanimously resolved and reiterated its previous posture with respect to rehabilitation.³⁴

23 “Report of the Trusteeship Council 6 August 1946 – 22 July 1947” GAOR 4th sess Supl No.4 (A/933) at 74.

24 *Ibid* 76.

25 GA Res 322 (IV) of 15 November 1949, on Economic Advancement in Trust Territories.

26 Report of the Visiting Mission to Nauru, p.5; “Report of the Trusteeship Council, 20 July 1961 – 20 July 1962” GAOR 17th Sess Supl No.4 (A/5204) at 41.

27 *Ibid*.

28 “Report of the Trusteeship Council, 20 July 1962 – 26 June 1963” GAOR 18th Sess Supl No.4 (A/5504) at 28.

29 For a discussion on these proposals, see Viviani, *op cit*, 141-147.

30 GA Res 2111 (XX) on Question of the Trust Territory of Nauru.

31 See Viviani, *op cit*, 149.

32 GA Res 2221 (XXI) of 20 December 1966.

33 Res of 27 September 1967; Trusteeship Council, 13th Special Sess 22-23 November 1967, T/SR 1323-4, p.4.

34 GA Res 2347 (XXII) of 19 December 1967.

(c) Claims and Counter-Claims

The distinct national identity of the Nauruans, a product of prolonged geographical and social isolation before European contact in 1907, fuels their concern for rehabilitation. During Canberra conferences since 1959, the Nauruans asserted and reasserted their demand for rehabilitation.³⁵ The Nauruan Government set up an independent Commission of Inquiry into the Rehabilitation of the Worked Out Phosphate Lands. The Commission in its report, in the main, concluded:³⁶

- (i) that the failure to restore the worked out land to useable condition, or to compensate the Nauruans for the loss of use of their lands, was a violation of international law and the relevant trusteeship agreement;
- (ii) that there was no agreed upon or just settlement which exonerated the Partner Governments from the responsibility to rehabilitate the lands; and
- (iii) that a cost-feasible plan of rehabilitation of all the worked out lands on Nauru can be developed.

In a number of diplomatic notes during 1987-89, Nauru asked Australia to recognise and accept responsibility to rehabilitate the pre-1968 mined-out lands. The findings of the Commission were also communicated to Australia.³⁷ The Nauruan claims submitted to the ICJ are greatly influenced by the Commission's findings. These claims include:³⁸

- (i) that Australia has breached its obligations accepted by it under Article 76 of the UN Charter and under Articles 3 and 5 of the Trusteeship Agreement for Nauru;
- (ii) that Australia has failed to comply with international standards for the implementation of self-determination; and
- (iii) Australia has engaged in a denial of justice with respect to the Nauru people through its exploitation of the land and failure to provide adequately for rehabilitation of the land.

Australia, though, "reserved" its formal reply to Nauru's claims, denying flatly any responsibility for rehabilitation. In a note to Nauru on 27 July 1987, Australia expressed its official position, in that it "regards the comprehensive Phosphate Agreement, concluded prior to Independence, as a just settlement that cleared the Partner Governments ... of any responsibility for the rehabilitation of Nauru".³⁹ Australia reasons that it was exonerated by the independence arrangement whereby rehabilitation has been the responsibility of Nauru.⁴⁰

Right to, and Control Over, the Phosphate Industry

(a) The Ownership of Phosphate and Royalties

Prior to 15 June 1967, there was no recognition that the phosphate deposits legitimately belonged to the Nauruans. The BPC obtained the ownership of phosphate deposits under the 1919 agreement with the Partner Governments.⁴¹ The Nauruans asked Australia to take steps to transfer the legal ownership of the phosphate deposits to the natives. Australia rejected this claim outright, arguing that the BPC acquired sound legal right to phosphate deposits under the 1919 agreement.⁴² It is difficult to appreciate how this agreement could transfer the ownership of phosphate

35 Being aware of the growing frustration of the Nauruans over their phosphate industry, the Trusteeship Council asked Australia to hold regular conferences between the Nauruans, the BPC and Department of Territories to clarify the affairs. Such conferences were held annually between 1959 and 1967. For a discussion on these conferences, see Viviani, *op cit*, Ch.8.

36 The Report of the Commission was delivered to the President of Nauru on 29 November 1988, "The Report" Melbourne 1988, Ch.35; also mentioned in *supra* n.22, *Aust IL News* 168.

37 Copies of these notes are annexed to the Nauruan application, *ibid* at 171-74.

38 *Ibid* at 168-169.

39 *Ibid* at 171.

40 An argument to this effect has been developed in a brief article published in the "Department of Foreign Affairs' Newsletter" of 13 July 1990.

41 *Supra* n.19.

42 See Viviani, *op cit*, 138.

deposits from the Nauruans to the BPC – a right which was inherently inalienable.

Neither the Partner Governments nor the BPC ever sought permission from, and/or consulted with, the Nauruans to mine. On the contrary, the transfer occurred against the expressed wishes of the indigenous peoples. The Administering Authority did not possess any competence whatsoever to dispose of the phosphate title that did not belong to them. Of course, the Administering Authority was obliged to explore the natural wealth and economic resources of Nauru to the extent that was strictly required and justified under their trusteeship obligation. And this obligation must be performed for the sole beneficial interest of the Nauruans. By transferring the natural resources of the Nauruans against their interests and will, the Administering Authority surpassed its permissible limit of authority under the Trusteeship system and the relevant trusteeship agreement. As to the legal status of the 1919 agreement, one could argue with some degree of strength that it was ordained and sanctioned by incompetent parties. In consequence, it lacked an important, if not the decisive, attribute of legitimacy which in effect made it invalid insofar as it dealt with the rights and interests of the Nauruans.

Australia also insisted that the BPC had no obligation under the 1919 agreement to pay any royalties at all.⁴³ The BPC consistently took the view that royalties were gratuitous payments within its exclusive jurisdiction and that there existed no definite duty to pay phosphate royalties to the Nauruans. Nonetheless, the BPC maintained that it would pay royalties for the needs of the Nauruans. Hence phosphate royalties were paid to the Nauruan not on the “right” basis but on the “need” basis, solely determined by the BPC and the first royalty paid was a half penny per ton of phosphate sold.⁴⁴ The royalty rate was extremely low because: (1) the royalty rate itself was lower than what should have been the case in an “at arms length” deal; and (2) royalty was calculated on the phosphate price which was arbitrarily set by the BPC far below world price.

The net gain for the Nauruans from phosphate royalties was quite insignificant. The Trusteeship Council frequently raised the question of royalties with recommendations for their further increase. Its Visiting Mission found that the demand for increase in royalty rate in proportion to the cost of living was basically legitimate.⁴⁵ The Trusteeship Council was also convinced that “the royalty payment for the benefit of the Nauruans was low, at least in terms of their future needs”.⁴⁶ In response to a Trusteeship Council recommendation, Australia arranged conferences between the Nauruans and the BPC to review the royalty rate. These conferences, though conceding some enhancement to the royalty rate, were far from satisfactory in redressing the injustice perpetrated over a protracted period of 49 years.⁴⁷

(b) Economic Benefits from the Phosphate Industry

It is evident that real benefit from the Nauru phosphate industry went to the Partner Governments who imported the Nauruan phosphate at cost price and utilised in producing cheap fertiliser for their agriculture sector. The immediate beneficiaries were Australian farmers who soon realised that a great deal of future prosperity of their wheat industry would depend on Nauruan phosphate and they were assured of lower priced supplies for many years to come. This purpose took priority over all other purposes. It has been observed that:

Nauruan phosphate helped Australian cattle grow fat, wool grow thick and wheat grow tall. But all that grew on Nauru was a forest of coral pinnacles.⁴⁸

As noted earlier, both royalty rate and price of phosphate were artificially kept far below world market price. Australia ran the administration of Nauru as a profit earning concern, supported

⁴³ See Viviani, *op cit*, 140.

⁴⁴ *Supra* n.22, *Sydney Morning Herald* at 47.

⁴⁵ “Report of the Trusteeship Council, 4 December 1952 – 21 July 1953” GAOR 8th Sess Supl No 4 (A/2427) at 119.

⁴⁶ “Report of the Trusteeship Council, 17 July 1954 – 22 July 1955” GAOR 19th Sess Supl No.4 (A/2933) at 333.

⁴⁷ For an analysis of the outcome of these conferences, see Viviani, *op cit*, Ch.8 and a table at 189 showing royalty rates since 1920.

⁴⁸ *Supra* n.22, *Sydney Morning Herald* at 47.

entirely by the BPC from the proceeds of phosphate sale. The public funds, generated from the profits of phosphate sale in world market, spent for the benefit of Nauru never exceeded 40 percent and in most years was less than 20 percent.⁴⁹

The Nauruans were increasingly alienated in their physical and physiological relations to their land as the phosphate was removed and more land was taken over for buildings and plant. Although Nauruans showed a strong preference for administrative works, the BPC employed them only as skilled and semi-skilled labour and all administrative positions were held by Europeans.⁵⁰ Independent legal, technical or economic advice, with respect to phosphate operations, was systematically refused to Nauruans. This denial caused considerable displeasure in the 1963 Trusteeship Council session.⁵¹ In the absence of any precise information and advice on the phosphate industry, the Nauruans were unable to make a strong case in support of their demand for more benefits. The Australian Administration in Nauru ratified many BPC decisions on mining which directly and adversely affected the Nauruans who were never consulted. Successive legislation regulating phosphate mining operations in Nauru deprived the indigenous people of their right to, and control over, natural resources. Nauruan economic resources were thus exploited for the benefit of the Administering Authority – sacrificing Nauru's vital interest.

(c) Transmission of Information About Phosphate Industry

Australia was specifically obliged to transmit at regular intervals, usually annually, to the UN, information about all spheres of administration of Nauru and to co-operate with the Visiting Mission from the Trusteeship Council.⁵² But the BPC, like monopolists, maintained a complacent taciturnity under the paternalistic administration of Australia which, not only the Nauruans, but also the Trusteeship Council failed to penetrate. Since 1950, Australia has failed to provide detailed financial figures on BPC's operation in Nauru even on request by the Trusteeship Council. It withheld those figures on the pretext that there was no separate financial account for Nauru. But such accounts were kept and available.⁵³ The 1962 Visiting Mission asked for the operational figures of phosphate industry from the BPC. Instead, the Department of Territories supplied those figures in such a manner that disguised the real facts sought by the Visiting Mission.⁵⁴ The UN Decolonisation Committee of Twenty-Four in the 1960s made a series of demands for information concerning Australia's dependent territories. Australia retaliated by withdrawing its membership from the Committee.⁵⁵

All these instances cast considerable doubt about Australia's *bona fides* as to its loyalty towards the duty to transmit information to the UN. Its consistent stand against the disclosure of the BPC's accounts leads one to believe that Australia was well aware of what it was doing in Nauru, but wanted to keep that confidential.

(d) The Nauru Island Phosphate Agreement 1967

Demands for greater control by the Nauruans over the phosphate industry grew in stages into a formidable force in Nauru as well as in the UN. The Nauruans' urge to freely follow their

49 See the Public Finance Table, 1921-66 in Viviani, *op cit*, 180.

50 See Viviani, *op cit*, 90.

51 The Nauruan's request for such advice was vetoed either by the BPC, which said that royalties had nothing to do with the economics of the phosphate industry, or by the Australian Administration which always offered Department of Territories' assistance. Although Australia allowed Nauruans to seek expert advice in 1964, it blocked Nauru's preferred adviser. See "Report of the Trusteeship Council, 1963-64" A/5804 at 31; also Viviani, *op cit*, 135-36.

52 Quite apart from its obligation under arts.86 and 88 of the UN Charter, Australia assumed such a duty under art.5(1) of the 1947 Trusteeship Agreement for Nauru.

53 For a discussion on Australia's stand against the disclosure of the BPC's accounts, see Viviani, *op cit*, 126-27 and 186-87 (for tables on available accounts); also Williams and Macdonald, *op cit*, 402 and 564-65 (for tables on available accounts).

54 For a discussion on how it was done, see Viviani, *op cit*, 134.

55 Report from the Senate Standing Committee on Foreign Affairs and Defence, the Parliament of the Commonwealth of Australia, "UN Involvement with Australia's Territories", Australian Government Publishing Service, Canberra.

economic goals consolidated further following the conclusion of the Nauru Agreement of 26 November 1965 among the Partner Governments.⁵⁶ It established a Legislative Council for Nauru, devoid of any jurisdiction over the phosphate industry, its operation, ownership and control, phosphate royalties, and the ownership and control of phosphate bearing lands (Art. 1.2a). In response, the Nauru Local Government Council⁵⁷ hardened its stand on phosphate matters and submitted precise proposals to obtain control over the industry.

At the same time in 1966, both the Trusteeship Council and the General Assembly stepped up their campaign in support of Nauru. The Trusteeship Council in its resolution drew the attention of the Administering Authority to the UN Resolution 1803 (XVII) on Permanent Sovereignty Over Natural Resources. It re-emphasised that the inalienable sovereign control of the Nauruans over their natural resources was a precondition of the exercise of their right to self-determination and that the denial of this right was contrary to the spirit and principles of the UN Charter.⁵⁸ The General Assembly recognised “that the phosphate deposits on the Island of Nauru belong to the Nauruan people” and recommended “that the Administering Authority should transfer control over the operation of the phosphate industry to the Nauruan people”.⁵⁹

Confronted with this mounting Nauruan and international concern for the present and future economic plight of the indigenous peoples, the Administering Authority concluded the Nauru Island Phosphate Industry Agreement on 15 June 1967 with the representatives of the Nauruan peoples. Under this agreement, the Nauru Local Government Council became the owner of the phosphate enterprise at Nauru and took over its full control and management for the first time.⁶⁰ This agreement was rather a belated recognition by the Administering Authority of the Nauruans’ inalienable right to ownership of phosphate deposits on their island. The underlying force that made the agreement possible was the principle of permanent sovereignty over natural resources which is widely recognised by the international community and its forum, the UN, as binding (even without any conventional obligation).⁶¹ This agreement sought to restore this right of the Nauruans by re-establishing their sovereignty over the phosphate industry. It was not meant to confer reciprocal rights, privileges or exemptions on the Administering Authority which were incompatible with the very object of the agreement.

The agreement revived the Nauruans’ right only to the remaining phosphate deposits, not to those already explored under Australian administration. Nauru could not possibly be held responsible for any act or omission in relation to the pre-independence mining for the obvious reason that it did not have any hand in, and control over, those operations. The rationale is plain: the lack of right precluded associated obligation. In other words, where there was no right, there was no obligation. The most logical corollary is that the Administering Authority, for whom the Nauruan phosphate deposits were a cheap source of enrichment for many years, should perform the obligation of rehabilitation of mined out land under their administration. This obligation existed quite independently of the agreement.

Given the contents of the agreement, it would be an arduous task to assert that special financial arrangements for rehabilitation have been made in the agreement which exculpated the Admin-

56 This agreement superseded the earlier agreements of 1919 and 1923 (art.7) and was implemented by the *Nauru Act* 1965 (Cth).

57 Set up in 1951 with limited power to replace the old Council of Chiefs. C Skinner, *Nauru: The Remarkable Community*, Centre for South Pacific Studies, U of California Santa Cruz December 1977 at 107.

58 “Report of Trusteeship Council, 1 July 1965 – 26 July 1966” GAOR 21st Sess Supl No.4 (A/6304), at 43.

59 GA Res 2221 (XXI) of 20 December 1966.

60 For the text, see Schedule of the Nauru Phosphate Agreement Ordinance of 19 January 1968 (Cth). A synthesis of the agreement may be found in “Report of Trusteeship Council, 27 July 1966 – 30 June 1967” GAOR 22nd Sess Supl No.4 (A/6704) at 48-49; (June 1967) 38 (6) *Current Notes on I Aff* 261-62.

61 For the text of the UN Res 1803 (XVII) of 14 December 1962 on Permanent Sovereignty Over Natural Resources, see (1963) 57 *Am JIL* 710; for an analysis on the principle, see PJIM de Waart “Permanent Sovereignty – Over Natural Resources as a Cornerstone for International Economic Rights and Duties” (1977) 24 *Neth IL Rev* 304-22.

istering Authority from their responsibility. The agreement handed over to the Nauru Local Government Council the "capital assets of the phosphate industry" at a valuation based on "original cost less depreciation at a rate consistent with the economic life of the asset" (clauses 7 and 8.1). Nauru had to buy from the BPC the phosphate plant and equipment to continue mining at an agreed upon price of 21 million dollars to be paid over a period of three years ending on 30 June 1970. During this transitional period, the management and supervision of the phosphate industry was vested in the BPC, not in the Nauru Local Government Council. The complete control and management of the phosphate industry by the Nauruans were subject to the full payment for the assets on or before the stipulated time. Moreover, Clause 5(1) required the Nauru Local Government Council to supply its phosphates "exclusively to the Partner Governments" at the amount of two million tons annually at a price (fixed at A\$11 per ton under clause 6) lower than its fair value in an open market negotiation.

The 1967 agreement contained no provision on rehabilitation. Nor did it make a special concession for the purpose. The issue of rehabilitation of the worked out phosphate lands remained unresolved in, and persisted after, the agreement. The fact that the parties drifted apart on rehabilitation was surfaced and recorded at the Trusteeship Council's thirty-fourth session which noted the conclusion of this agreement. The Trusteeship Council noted that the financial arrangements under the agreement, according to the Administering Authority, "took into consideration all future needs of the Nauruan people, including possible rehabilitation of land already worked". It further noted the strong objection to this statement by the Nauruans who stated "that the land already worked out should be restored by the Administering Authority to its original condition". In the end, the Trusteeship Council, "regretting that differences continue to exist on the question of rehabilitation", expressed "earnest hope that it will be possible to find a solution to the satisfaction of both parties"⁶² - a hope that is yet to be realised. Hence any assertion that the 1967 settlement was "extremely generous" and "extinguished" the Administering Authority's responsibility for rehabilitation⁶³ is as unilateral and irreconcilable as it was before, for neither the Nauruans nor the Nauru Island Phosphate Industry Agreement of 1967 embrace such an assertion.

Environmental Problems in Nauru

Human awareness of surrounding environment is as old as human civilisation and the law has been used for centuries to protect the environment and conserve resources. This awareness has now turned into a grave concern as environmental crises are growing alarmingly both in quantity and intensity. The situation has not only compelled the members of the world community to act collectively to address environmental challenges but also brought the environmental problems to the forefront on the global agenda in the 1990s. It is in this era of importance of the environmental issues that the ICJ is hearing the case which involves serious environmental disorders inflicted on Nauru as a result of the BPC's mining activities. Viewed from these perspectives, one may be inclined to believe that the emerging international law of environment⁶⁴ may exert an impact, however insignificantly, on the outcome of the case. Though not categorically mentioned in the application of Nauru to the ICJ, these issues could conveniently be brought before the court within the purview of the claim that Australia has disregarded its obligations under general international law.

It would be easier to affirm, rather than to deny, that the operation of the phosphate mining in Nauru under Australian administration caused "desertification"; a man-made desert leading to

⁶² "Report of Trusteeship Council, 27 July 1966 - 30 June 1967" GAOR 22nd Sess Supl No.4 (A/6704), at 49.

⁶³ *Supra* n.40.

⁶⁴ For an insight into this emerging international law regime, see, N Singh, "Right to Environmental and Sustainable Development as a Principle of International Law" (1987) 29 J Indian L Institute 289-320; VP Nanda, "Trends in International Environmental Law" (1990) 20 Cal West ILJ 187-205.

deterioration in the productivity of land.⁶⁵ The operation also caused deforestation, loss of vegetative cover and the extinction of native species. The pinnacles have now spread over 80 percent of the arable land rendering the island almost uninhabitable. The environmental dysfunctions have occurred due to the BPC's pursuit of unsustainable economic development without any scheme of rehabilitation, replantation and revegetation. The BPC even failed to replant trees and resoil cultivable land, a judicially recognised duty of the mining authority in Ocean Island (a British colony).⁶⁶ The combined and cumulative effect of all these failures has contributed to the substantial degradation of the terrestrial ecosystem of Nauru and the region in general.

The worldwide recognition of environmental issues has created a favourable climate for the expeditious development of international environmental law. The ICJ may be persuaded to take heed and to be responsive to the right of the Nauruans, especially the future generation, to environment, at least insofar as it relates directly to their very existence and survival, for it seems to be in the same category and potency as the right to life. Moreover, precedents exist whereby the ICJ expressly recognised the continuous evolution of international law and the relevance of that factor in the determination of the law applicable in a case under consideration. For example, in the *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, the ICJ observed that: "In seeking to determine the law applicable to this case, the Court has to bear in mind the continuous evolution of international law".⁶⁷ This possibility is reiterated in the *Fisheries Jurisdiction* case.⁶⁸ This conviction of the ICJ is compelling and such emerging trends in international environmental law may be a factor in the decision of this case.

Conclusion

It is difficult to predict exactly what would be the forthcoming verdict of the ICJ in this case. Nonetheless, the foregoing examination of pertinent factors involved in the case tends to impart that Nauru has a fairly strong case in terms of its claims. It may not be too perplexing to convince the Court that Nauruan phosphates were used for the maximum benefit of the Administering authority at the cost of the vital interest of the indigenous people, should the Court accept statistics as admissible evidence. The economic interest of Australia in the phosphates of Nauru inaptly came into conflict with the former's integrity as the Administering Authority of the latter. The prolonged utilisation of Nauruan phosphates at cost price for the prosperity of Australian farmers, a need which took priority over all needs of the Nauruans, manifestly compromised Australia's trustworthiness in discharging its obligations, towards Nauru, assumed under the UN Trusteeship System and the Trusteeship Agreement for Nauru of 1947.

The Nauruans were despotically deprived of their inalienable sovereign right to natural resources found on their island until 1967 (practically 1970), a fact that itself constitutes an infringement of international law. Under Australian administration, the BPC explored Nauruan phosphate deposits in a way detrimental to the rights and interests of the Nauruans, converting the island into a place almost impossible to live in. These circumstances if viewed in the light of the UN Charter provisions on international trusteeship system, the trusteeship agreement for Nauru of 1947, the principle of permanent sovereignty over natural resources, the right of the Nauruans to economic self-determination and emerging international environmental law, suggest that a strong case may be made out for arguing that Australia, being the administrator of Nauru, failed to ensure adequate and reasonable arrangement for the present and future needs of the Nauruans who inherited from Australia an unrehabilitated and nearly uninhabitable island

65 For a discussion on environmental problems in the Asia-Pacific Region, see R Mushkat "International Environmental Law in the Asia-Pacific Region: Recent Developments" (1989) 20 Cal West ILJ 21-38.

66 See the British High Court decision in *Tito v. Waddell* (No.2) [1977] 3 All ER 129.

67 [1970] ICJ Rep 33.

68 [1974] ICJ Rep 19.

with no real economic prospect or viability as a sovereign nation.

The economic exploitation of Nauru is not a novelty but a typical syndrome of trusteeship system or colonialism. The world community might have a perception of the evils inherent in this system whereby a group of people is placed in a subservient status to be administered by an alien group who was trusted to accomplish "a civilising mission". The sacred trust was baffled by the trustees who often accorded priority to their own needs and greeds. It is possible to prepare an endless list of economic deprivation perpetrated by the administering authority or power on dependent peoples in the Pacific, Africa and Asia. The Nauruan claim of economic exploitation by its trustees is therefore fraught with a wider implication on those potential claimants, which the ICJ may find inimical to the present order. Should Nauru succeed in its quest for economic independence, it would be hailed as a triumph for the right of dependent peoples to economic self-determination which may stimulate others to follow. Whether the ICJ is willing to open this flood gate remains to be seen.

