LAW & PEACE

Lessons from Nurrungar

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Should social activists engage the legal system?

This article sets out to describe the outcomes of court cases arising from the national peace protest outside the so called 'joint' US/Australian missile tracking station Nurrungar during Easter of 1993.

In preparing for Nurrungar and in working with other activists pursuing their cases through the courts and afterwards through fines, community service or prison we have been struck by the absence and inaccessibility of written material about the history of social change activists' dealings with the legal system. Many non-violent direct actions result in minor criminal charges, which means that many of them never go beyond the Magistrates Court level and, therefore, never find their way into law reports or other published legal materials. This is a great barrier to tracking the legal strategies and political outcomes of people arrested for civil disobedience in the past and building on their experiences and analyses. This article is one small contribution to changing this state of affairs and arises from our commitment to recording the history (including the legal history!) of the peace movement.[1]

The Nurrungar protest involved at least 700 people from all over Australia. Inevitably, such a large gathering was made up of people who had a variety of reasons for being there with varying ideas about what constitutes effective political action. This flowed through to produce differing ideas about whether to undertake arrestable actions, and why and how to approach the legal system.

Most activists were arrested for entering the Nurrungar Prohibited Area as part of two mass entries onto the land, one as part of a symbolic auction and dismantling of the Base to allow it to be used for socially worthwhile purposes, the other after a march to the fence culminated in speeches including an invitation to enter from an elder of the Kokatha people, the traditional custodians of the land. Some activists entered at night and let off flares inside the Prohibited Area, while others were arrested for trespass on defence property at the adjacent Woomera rocket range during a tour of various defence sites around the Woomera and Nurrungar Prohibited Areas. Virtually all of the activists arrested at the protest were charged with trespass under s.89(1) of the Commonwealth *Crimes Act* (since the defence facilities concerned are all situated on Commonwealth land).

Court as an unfortunate consequence of the protest

Many protesters saw arrest as an unfortunate consequence of their involvement in the protest. Hundreds of people chose to enter the Prohibited Area during the protest as a way of expressing their opposition to the presence of the Base and related issues (US imperialism, denial of land rights to indigenous people, or Australian militarism). Most were arrested. Many saw no point in engaging the legal system any further than necessary.

Many of these people made simple guilty pleas at the first available opportunity, some making a statement about why they had chosen to break the law. A few pleaded not guilty and tried to obtain an acquittal on technical grounds or to have no conviction recorded under s.19B of the

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Commonwealth *Crimes Act*. Most of the people making s.19B applications engaged lawyers. The remainder represented themselves, some having been given basic information about how to do so at arrestees' meetings. None of these applications succeeded, although one was granted at the Magistrates Court and overturned on appeal to the Supreme Court.

Some of these arrestees saw pleading not guilty as a sure way to get a higher fine when there was no chance of escaping conviction. They were not interested in investing time or money in pursuing their cases in the courts either because it would exceed their resources or because they saw the legal system as unjust, or both. Some thought that their available time and money could be better spent on continuing the campaign in other ways than by appearing in court, preparing defences etc.

Court as a place to make a statement

For many of the arrestees the appearance in court was a further chance to make a public statement about the issues surrounding the Nurrungar Base and the reasons they had taken action opposing it. The arrestees made a collective statement by issuing media releases and staging a rally with street theatre outside the Adelaide Magistrates Court on their first major appearance date. The speeches and the symbolic cutting of a mock lease on the Base and the arrestees filing into court through the now broken 'Lease' received wide media coverage in Adelaide including all major local television stations. The mass court appearance provided an opportunity to further publicise the anti-Base agenda and to build on the momentum of the original protest.

Inside the court itself there was an opportunity for individuals to make their own statements about the Bases and related issues. Although most did this by pleading guilty and making a speech when asked for comments before sentence was passed, the choice to plead guilty was tactical rather than philosophical. Some arrestees took the same approach but pleaded not guilty and made their statement from the witness stand. While those pleading guilty explicitly recognised that according to the law they had committed a crime, those who pleaded not guilty argued that they had committed no moral wrong and therefore refused to accept their 'guilt'. In both cases it was a matter of saying 'we do not accept that the law is just, and we have a higher duty to disobey unjust laws'.

The effect of these statements, usually made before near empty courtrooms, was difficult to judge and the attitudes of the magistrates and court staff varied from interest and sympathy to boredom and frustration. Although some arrestees appeared to believe it was possible to affect the political consciousness of the magistracy in this way, it is hard to know to what extent they achieved their aim.

Many activists found that representing themselves, standing before the court and making a statement was personally empowering. At least one activist was disappointed that he had allowed a solicitor to argue for him, partly because the lawyer saw it as his duty to minimise the activist's intent to commit 'the crime' and partly because the activist felt he was virtually a bystander at his own trial.

Legal argument as a strategy to further political goals

A further step in using the court to make a political statement was to make a formal legal defence addressing some of the political issues underlying the 'trespass'. The most prominent example of this was a group of about 30 Melbourne-based arrestees who banded together to run a joint case and travelled to Adelaide in order to appear at their trial. Originally represented by a barrister, they argued under *Proudman v Dayman* (1941) 67 *CLR* 536 that they had held an honest and reasonable belief that they had a right to be on the land because they had been invited there by an elder of the Kokatha people and that therefore they did not possess the necessary mens rea for the offence of trespass.

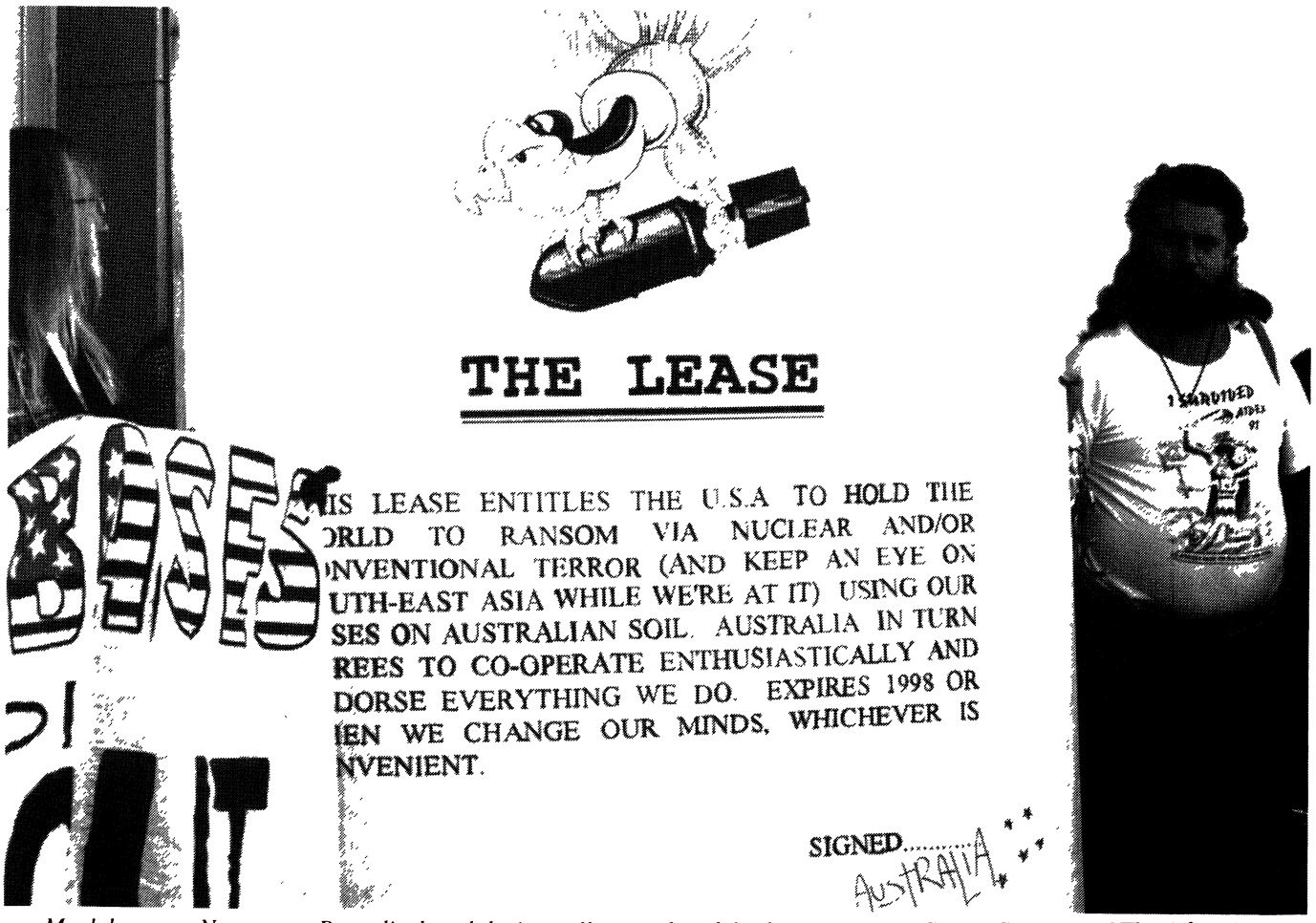
The magistrate refused to hear these cases jointly, so one Melbourne protester's trial went forward as a test case. The prosecution argued that given the massive presence of the police and the numerous signs prohibiting trespass, the protesters must have known that they were trespassing. The defence called Joan Wingfield (a Kokatha elder), who spoke of her people's ties to the land, their dispossession, their current situation and their ongoing objections to the presence of the Base on their land. The testimony was powerful politically, but it was ultimately deemed immaterial by the magistrate and Alice Ryan was found guilty. Her conviction was confirmed on appeal (*Ryan v Commonwealth DPP*, unreported, Supreme Court of SA, Judgement No. S4506, File No. SCRG-93-1845). Despite the guilty verdict and costs of $1100, most of the other arrestees pursued their own cases separately. Some did so because they perceived the magistrate 's refusal to hear their cases jointly as an attempt to force them to plead guilty in order to avoid further expense and effort.

A group of trade unionists from the Construction Forestry Mining and Energy Union (SA) also ran a test case arguing that they had been denied access to potential members of their union working on building sites in the Nurrungar Prohibited Area. After the test case was lost and plans to appeal were dropped, the remainder pleaded guilty.

Similarly, a group of Sydney-based protesters ran a test case. Their case had professional legal support but the activist involved represented himself. He challenged the validity of the Commonwealth's title to Nurrungar and whether the signs around the area had been erected pursuant to proper authority. After two days of argument, the magistrate decided that he had had enough. He took the Commonwealth title as given and stated that the defendant's legal argument had weakened his moral case. He was found guilty with $1100 costs.

Apart from these group attempts, many individual arrestees tried to argue legal defences. These ranged from moral cases strengthened by a few key phrases relating to a particular defence, to much more thoroughly researched arguments. Particularly notable here were the attempts at the defence of necessity, detailing the role of the Nurrungar Base in war in the Middle East (US war planes had been in action over Iraq during the protest). Again the point was to raise the issues about the role of the Base in war fighting, but these cases involved a tacit acceptance of the validity of the law and then argued that in this particular case the circumstances made an otherwise illegal action necessary. At least one case tried to go beyond this by highlighting not only the necessity of the trespass, but the shortcomings of the defence of necessity (and therefore of the law itself); the main political point being about the links between the law, the state and militarism.

Ultimately though, such attempts at 'bush lawyering' appeared to consume time and other resources out of all proportion to the reception they were granted by the magistrates. One striking feature of the court's response to some of the better prepared self representations that relied on domestic law rather than international law (which the magistrates refused to consider) was the preparedness of magistrates to reject legal argument wholesale. In several cases it seemed that the stronger the legal argument put forward by a lay person was, the more



Mock lease on Nurrungar Base displayed during rally outside Adelaide Magistrates Court. Courtesy of The Advertiser.

likely the magistrates were to reject it without any real explanation of their reasons for doing so.

Many of the arrestees felt that the goalposts kept changing. A magistrate told one arrestee that his moral argument was highly convincing, but *legal* argument was required if he was to be found not guilty. The arrestee presented none and was convicted. The same magistrate later refused to listen to legal argument put by a non-lawyer. Some activists who prepared explicitly legal defences were told that their legal argument would not be listened to. A number of magistrates made remarks to the effect that civil disobedients really ought to plead guilty and accept their penalties (as they apparently did in the 'good old days').

Conclusions from court

Our overwhelming conclusion seemed to be that legal arguments (particularly those presented by non-lawyers) were largely a waste of time, unless the group had the resources to take the case to a higher court. If activists seriously want to engage with the legal system, to win cases and set precedents, then we need to work collectively as we do in organising other political activities. It was quite noticeable, particularly among Adelaide residents who could easily turn up to court, that while the Nurrungar protest was organised as a mass action, many activists accepted the court's definition of 'individuals before the law' and so did not approach their cases as a unified group. This limited the options which could be pursued through the legal system.

There were problems involved in dealing with the courts at any level of engagement. Some activists who represented themselves were overwhelmed by the formality of the court, the attitudes of court officials and the complexity of the law. Some found the court system overtly sexist and many found that their ability to present their cases was seriously disrupted by interjections from the magistrates.[2] Attempts were made to address these problems. Workshops on representing oneself were held in Melbourne and Newcastle, and in Newcastle mock trials were run to give activists some practice. Arrestees in other cities organised a variety of things including legal information sessions, fundraising events and a newsletter in Melbourne. Thus while some found the court experience alienating, other activists found self-representation an empowering process which formed the focus for learning about court machinery, world events, past protests and legal principles.

In our opinion, the key factors for arrestees who found the process empowering were organisational and personal support, and social background. Those activists not from middle class, Anglo-Saxon backgrounds sometimes did not have the information necessary to follow court procedure and some had previous experience of the police and the legal system that led them to treat it with justified cynicism. Middle class people (for example, those with tertiary education) seemed more likely to accept the legitimacy of the legal system or to consider it a useful place to expend effort. Certainly middle class arrestees were more likely to have the kinds of skills and/or the confidence to run defences based in legal argument and were therefore more likely to be accorded some hearing. Those who had a strong political analysis or experience and some organisational support were more likely to feel they could take on the court no matter what their class background. In the absence of such analysis and support, arrestees were more likely to find the experience humiliating and to see that as reflecting on them personally rather than illustrating on the injustices of the system.

At another level there were the greater practical and philosophical problems of engaging with the court system. Almost all of the approaches above accept the ability and legitimacy of the legal system in stating and enforcing the law. Having accepted this, and particularly when presenting legal arguments or being represented, there was the constant danger of getting caught up in the legalities of the case and losing sight of the political goal or sacrificing it for a better chance of winning the case. With this in mind, a very different approach which is part of a long tradition of non-violent non-co-operation was taken by some arrestees – refusal to engage the system.

Refusal

This tradition challenges the power of institutions and laws by refusing to grant them the legitimacy usually assumed to be inherent in them by not co-operating in their activities or recognising their existence. All of the arrestees did this in the sense that rather than applying for permission to enter the Base, protesters simply acted on the change they wanted to bring about by entering the Base. They challenged the claim that it belonged to the Commonwealth rather than the Kokatha people by acting on the invitation of a Kokatha elder to enter her lands rather than acting on the warning signs posted around the prohibited area. After the protest, some activists extended this line of action by refusing to define their action as illegal or themselves as criminals[3] and by refusing to co-operate with the expected process of trial with its appearance of fairness and justice.

The best planned use of this type of strategy came from the Spanner Action Group, a group of non-violent activists who went to Nurrungar with a preplanned action aimed at focusing attention on the fact that money currently spent on Nurrungar and for other military purposes is money that could be better spent on medicines, food, housing and education. They organised a mock auction of the Base, taking bids for socially useful purposes to which it could be put instead, and at its completion distributed large cardboard spanners, inviting people to climb over the fence into the prohibited area with them in order to begin 'dismantling' the Base. The group's strategy was to view planning for the protest, participating in it and dealing with subsequent legal issues as parts of one action. Therefore they planned their post-Nurrungar activities to continue to carry through the goals they had in mind at Nurrungar.

They decided to refuse to accept the court's jurisdiction over their actions and consistent with their approach, refused to undertake community service or to pay a fine because to do so would support the violence of the state's involvement in militarism by providing it with money or labour. As a matter of strategy, they also wanted to take control over their cases so far as possible. Rather than accepting the times, dates and processes dictated by the court, they refused to attend trial in Adelaide. They were convicted in their absence and warrants were issued. They then informed the police in Adelaide of the date on which they would travel to Adelaide in order to present themselves to go to prison.

When they arrived in Adelaide they issued media releases announcing their intentions and performed street theatre to illustrate the positive things that could be done with the money spent on Nurrungar. Then they walked together into the central Adelaide police station ready to go to prison.

In adopting this approach, the Spanner Action Group maintained a measure of initiative. They undermined the legitimacy of the courts by simply ignoring them, and although the state eventually exercised its power through the prison system, the Spanner Action Group ensured that this imprisonment was at their own convenience – the state could not exercise its coercion at will. This was not the only form of refusal used by Nurrungar arrestees, though it may have been one of the most conscious and creative.

A number of activists chose to give a name other than their customary one to the police, and some also chose to give an address other than the one they usually live at. Some did so because they wished to avoid all further contact with the legal system, others because they could not afford the expense involved in travelling to Adelaide for later trial. Since these activists could not be traced by the police or the DPP, their involvement with the legal system over charges relating to Nurrungar came to an end before they left the protest.

Others chose to refuse to accept the bail condition that they not re-enter the Nurrungar Prohibited Area and spent the remainder of the protest in police custody. Some took this action because they felt they could not in honesty undertake the bail condition and wished to indicate their continuing objection to the existence of the defence installation at Nurrungar. Others appeared to believe that if enough people refused the bail conditions the sheer pressure of numbers on the facilities at Woomera would mean that no bail conditions would be imposed by the police. This possibility did not eventuate. However, some of those who engaged in this form of non-co-operation did so with the intention of raising the cost of Nurrungar to the state and undoubtedly they were effective in achieving that aim. Those who continued to refuse bail were taken to Port Augusta gaol and spent Easter there.

Bail refusal did, however, prove an effective tactic during processing when some activists (apparently considered to be 'troublemakers' by the police) were placed in solitary confinement at Woomera. Others being held in custody and waiting to be bailed at the same time objected and collectively refused to accept bail until those in solitary had been bailed and released. In the case of one protester who had been bashed during arrest this tactic resulted in medical care being made available much sooner than would otherwise have been the case. Bail refusal was effective in this situation because of the sheer number of people the police were attempting to deal with at once in the small space of the Woomera police station.

Conclusion

If there was one overall lesson to be learned from the Nurrungar cases it is that activists need to give more thought to the court and legal system as an integral part of the protest action. In planning a legal approach, activists need to work as groups, because to face the law as unsupported individuals is to disempower ourselves.

There is no one correct strategy. The choice of strategy will depend on the aims of the campaign/action and whether these can be furthered by being arrested and going through the courts. It will depend on what political and financial resources are available and the level of skill, experience and confidence of the activists involved. It will also depend on the underlying theory of state of those involved; on whether they see the state as simply an instrument of oppression or as site of struggle.

References

1. For information about legal preparations for the protest and more information about Nurrungar, see Heath, Mary, 'Arrest Watch' (1993) 18(4) *Alternative Law Journal* 176.
2. Victorian Anti-Bases Campaign Coalition, 'Nurrungar . . . Will It Ever End?' (1994) 3(2) *Coalition Bulletin* 16, 16.
3. Kahn, Karen ,'Challenging Authority: Civil Disobedience in the Feminist Anti-Militarist Movement', (1989) 12(1) *Women's Studies International Forum* 75, 77.