“Strengthening Partnership between States and indigenous peoples: treaties, agreements and other constructive arrangements”

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Submission prepared and representative of the Tanganekald and Meintangk Peoples

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The views expressed in this paper do not necessarily reflect those of the OHCHR.
Introduction

This paper addresses the ongoing colonial project within Australia with a focus on the exposure of the Tanganekald and Meintangk Peoples of the Coorong and south-eastern region of the state of South Australia to the impact of the laws of Australia. This paper will provide an independent critique on the current position of Indigenous Peoples in relationship to the Australian state and recommend future possibilities.

Tanganekald and Meintangk Peoples connections to ruwi the land are from the beginning or time immemorial and those connections have been recorded in the following song:

Guru’nulun ‘and ‘wardand ‘wanunj ganji
‘goronjkanjal ‘lei a’ meinj ‘nainj’gara’nal
‘guru’nulun ‘and ‘wardand ‘terto:’lin
(h’)end ‘barum ai! ‘walanjala talanja’leir
r’einamb ‘maranj’gara’nal.

Since the 1836 arrival of the agents of the British Empire and the South Australia Company Indigenous Peoples of the coastal regions of South Australia have asked the question: “by what lawful authority do you come to our lands?” What authorises your efforts to dispossess us from our ancient connections to ruwi-lands?” These questions remain unanswered; we are hopeful that this forum will consider the ongoing sovereign position of Indigenous Peoples whose lands have been unlawfully entered, stolen and governed without our consent.

No Treaties between First Nations Peoples of Australia and the state.
There have been no treaty agreements entered into with any First Nations Peoples -including the Tanganekald and Meintangk Peoples - of the territories now called Australia.

The lands of the Tanganekald and Meintangk Peoples, without our knowledge and consent, were included by the British Empire’s and the South Australia Company’s land grab which began in 1836. Permanent, garrisoned colonial settlements were imposed and established from that time on.

Status and Participation of Peoples
There is a long and conflicting Eurocentric history attached to the status of Indigenous Peoples. Prior to the colonial invasion of our ruwi-lands, our old people called our peoples Tanganekald and Meintangk, and (under duress) many of us remain connected to our ancient names and history. The Australian colonial project named us by many other identities including: barbarians, heathens, Aborigines, British subjects, Australians, and Indigenous People. The truth of our connection to land is our ancient and original language names.
From the earliest beginning of the Australian colonial project First Nations Peoples have been excluded from holding effective ownership and governance of our lands. Colonial processes controlled and constructed the identity of Indigenous Peoples of “Australia”. Representations by Indigenous Peoples in international fora are still largely mandated by the state, few representations are independent of state power. Such is the under-resourced position of Indigenous Peoples.

The access Indigenous Peoples have to processes which have power to determine our identities was raised in the 1999 Treaty Study Report, regarding the limitations of the 1989 ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in independent countries. Similarly Indigenous Peoples had limited access to the final UNDRIP process and final draft.1 So while support for the ILO Convention and also the UNDRIP has been expressed by a number of indigenous organisations that support is far from being unanimous.2 It is, in fact not possible to declare wide sweeping support and as Martinez recommended in his Report it is preferable that a case-by-case approach is called for, recommending that opportunities be made available for Indigenous Peoples to speak as true subjects of International law in the voice of their own peoples rather than having that voice taken up and spoken for by larger representative bodies.

I further submit in support of the Martinez 1999 Report that Indigenous Peoples be not excluded from recognition as sovereign subjects of International law. This is the current position: nation states have determined that which are to be ‘proper’ sovereign subjects of international law3, and will not admit us.

First Nations Peoples of “Australia” have a complex legal system which has evolved over thousands of years, only interrupted at 1788 (it began in “New South Wales”) by the forceful intrusion of the British Empire. Prior to that we shared amongst all the Peoples a history of peaceful co-existence evidenced by the 500 and more Aboriginal languages which then existed. The agreements negotiated between the Indigenous Peoples of this continent are evidenced by the songlines and the mutual respect shared amongst them for the meeting of songlines; shared spaces; exclusive spaces; private spaces; public spaces and gendered spaces. While we did not have any written-word documents those pre-existing and ongoing treaty agreements amongst Peoples are nevertheless recorded in the songlines. These records are held by song-holders across the country. Unfortunately the 1999 Martinez Treaty Report did not include this body of knowledge; the resources made available to the study were too meagre to take on the inclusion of this additional body of knowledge.4

Aboriginal Law is complex in its expression of land ownership, and manifests in the form of song-law and stories which are connected to country. This method of being in relationship to land is almost in opposition to colonial understandings of land ownership. The absence of a crown-title deed of ownership should not mean that the ancient ownership of lands held by...

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3 Ibid para 50, 55.
4 Ibid para 56, we negotiated treaty agreements using our own cultural ways of doing this kind of business, and to correct Martinez at para 57, 98; international agreements also existed in Aboriginal Australia.
Indigenous Peoples is displaced. The song and story still lies in the land, and with it remains the ownership of country held by sovereign Indigenous People. This is a form of ownership which cannot be extinguished by the laying over of a colonial paper title, nor by the latterly-constructed “Native Title” process (which still remains inferior to the colonial “freehold”). These processes, carried on without any prior treating, are ongoing breaches of Indigenous Peoples’ rights. We are excluded from the rights to hold and own land unless we buy it back from the colonists, but we are also denied more broadly the rights to have an Indigenous World view held in a distinct body of Indigenous Knowledges.\(^5\)

An important aspect of the work still needing to be done was recommended by Martinez: the inclusion of Indigenous Knowledge in any future work within this area. It is submitted that this work is critical but it is work that requires proper indigenous protocols and approaches.\(^6\)

### Domestic – International: Human Rights – Rights of Peoples

Further unanswered questions remain in relation to the general matter of “the human rights of indigenous individuals”. Obviously, this is a different notion from that of “the rights of indigenous peoples”, which is broader in scope and, in fact, includes those individual “human rights”.\(^7\) Unfortunately the UNDRIP does not resolve this question, but rather compounds the problem. It is clear that the Declaration is not able to provide a clear resolution to these questions. It should be apparent then that there is a critical need for an independent international mechanism which is free of any conflict of interest between colonial states and Indigenous Peoples.

### Law as an instrument of Colonialism

While there is a history of international treaty agreements amongst and between the First Nations Peoples of Australia there are no existing treaties between the First Peoples and the coloniser. The doctrine of *terra nullius* was used to annihilate Indigenous Peoples, and this position has not been altered post-*Mabo* and the *Native Title* legislation. If anything, these latter-day laws have instead entrenched the colonisers’ position and quest for legitimacy.\(^8\) From a sovereign position we confront a *process of retrogression*; we are being deprived of essential attributes of our identity as sovereign subjects in international law piece by piece, and where our original status as sovereign nations was grounded in our territory, our capacity to enter into international agreements and govern ourselves suffers with continuing population reduction and the ongoing erosion of our cultures due to relentless assimilationist policies.\(^9\)

### Status-British subject Australian citizen – no agreement or consent obtained.

The colonist invaders intent was always to remove our sovereignty, but it is interesting to consider early colonial frontier jurisprudence as it was applied to the

\(^{12}\)Ibid para 223.
\(^{6}\)Ibid para 62.
\(^{7}\)Ibid para 65, 66 see also; Schulte-Tenckoff and Kahn 2011. 20 (3) *Griffith Law Review*, pp673-701, for a critique on the UN Permanent Forum as a final body of review.
\(^{8}\)Ibid para 100
\(^{9}\)Ibid para 105
Tanganekald resistance, which took place along the Coorong in South-East South Australia in 1840. As the matter for an opinion on the legitimacy of the hanging of Aboriginal People without a trial came before Justice Cooper of the South Australian Supreme Court he determined that in bringing the [Tanganekald] ‘murderers’ to justice British law could not take effect:

*I feel it impossible to try according to the forms of English Law people of a wild and savage tribe whose country, although within the limits of the Province of South Australia, has never been occupied by Settlers, who have never submitted themselves to our dominion, and between whom and the Colonists, there has been no social intercourse.*

The Supreme Court judge considered the Tanganekald to be outside British law. The law was applied in a differential manner and this was hotly debated by the colonists. The issues which were raised considered: the application of English law to ‘British subjects’ who were not actually ‘British’, but sovereign Peoples; and to the justifications for a military expedition. In retribution and without trial there were hangings of Aboriginal men on the Coorong beach, and the fate of many others remains unknown. What we do know is that within a few years the population of our people was drastically reduced and that from 1840 onward Tangalun became a ‘secure’ colonial territory.

At the time Advocate General Smillie justified the event as follows:

*Necessity warranted the Executive Government, in abandoning ordinary forms, which were inadequate to the emergency, to take upon itself the responsibility of putting forth those more ample powers and prerogatives, with which, for the welfare of the state and the peace of society, it is constitutionally vested.*

Across this colonial history the Tanganekald and Meintangk peoples have continued to have been governed as the included-excluded, as British subjects, yet illegally executed under a declared ‘state of emergency.’ Justice Cooper of the South Australian Supreme Court held the view in 1840 that his court had no jurisdiction over ‘frontier’ Aborigines:

*My objection to try the natives of the Big Murray tribe is founded, not on any supposed defect of right on their part, but on my want of jurisdiction. It is founded on the opinion that such only of the native population as have of some degree acquiesced in our dominion can be considered subject of our laws, and that with regard to all others, we must be considered as much strangers as Governor Hindmarsh and the first settlers were to the whole native population when they raised the British standard, on their landing at Glenelg.*

In frontier times the judiciary of South Australia viewed our peoples as sovereign tribes existing outside British Law. This position was however later amended by Crown law officers in the UK, living at a distance from the frontier violence and resistance. But in determining the status of sovereign peoples as British subjects or otherwise, the British left unfinished business, that is the remaining implications of state murder of its own ‘British’ subjects. Australian colonial legal history is littered with early frontier encounters in the result of which the judiciary treated us as sovereign peoples but then later over-ruled that position to call us British subjects.

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10 Watson (2011) 20 (3) *Griffith Law Review,* pp 619-640, citing from Lendrum this quote is taken from the Colonial Secretary’s Office records.
11 Ibid.
12 Ibid, citing works of Lendrum reference to the Grand Jury of the Supreme Court 3 November 1840.
This has left a schizophrenic result, that is in law sovereign peoples were deemed British subjects but were left without the protection of British law from crimes such as murder by the agents of the British Crown and the theft of our land by those same agents.

The British Empire worked to divest Indigenous Peoples of sovereign privileges, especially jurisdiction over our lands, recognition of Indigenous forms of societal organization, and our status as subjects of international law. In our status on the colonial frontier at first contact we were deemed sovereign peoples living outside British law, but soon we were spoken of as British subjects and now we are deemed citizens of the Australian state.

However the point at which we were deemed British subjects is loaded with conflict. A ruling by a Supreme Court Judge in South Australia clearly determined our status as sovereign peoples but those at home in the UK declared we were British subjects. A relationship of conflict and war which began as between international subjects ended in our domestication as British subjects, but at no point was the consent of Indigenous Peoples to becoming British subjects or Australian citizens ever obtained. And this occurred in a setting of a declared ‘peacefully settled state’.

**Current discourse sovereignty, treaty, land rights, extinguishment and constitutional recognition**

We continue to affirm that our original sovereignty remains intact, and we remain sovereign peoples who have never entered into consensual relations with any state or British Crown to surrender our international status.\(^\text{13}\) Attempts to correct that position have been unsuccessful, and within Australia treaty debates are non-existent. Public perception is largely based on the mis-conception that the *Mabo* decision and *Native Title* legislation provide land rights, that reconciliation provides social justice, and the Rudd government apology: ‘sorry’ has ended and healed a long history of assimilation and the attempted genocide of Indigenous Peoples. It is a misconception because native title is not land rights, reconciliation provides for no concrete shift in embedded colonial power relationships, and ‘sorry’ has not ended state interventionist policies which are assimilationist in their effect.

Australian law does not provide for any Indigenous Rights protection or even human rights protection; the Australian Constitution instead embeds the principles which still support a largely racist White Australia foundation; a foundation based upon the genocide of Indigenous Peoples and the exclusion of non-white peoples.

**Not without the consent of the natives**

Scattered across early colonial jurisprudence there are clauses indicating: ‘with the consent of the native’. I don’t have time here to elaborate on how this requirement in law has been played out within the colonial history of Australia. However there are concerns regarding the construction of contemporary agreements and how the consent of the native is obtained. For example there is currently controversy over the capacity for *Native Title* Indigenous Land

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\(^{13}\) Treaty Report 1999, para 149 and para 160 The Makarrata concluded as a non-event and further treaty debate has not occurred.
Usage Agreements to provide for the consent of the natives. This is largely due to conflict in many of these land settlement arrangements.

Native Title Indigenous Land Usage Agreements are problematic for many reasons and should not be considered an appropriate framework for the obtaining of consent, particularly in the Australian context and in the absence of any Treaty negotiations. The ILUA agreements should not be considered a constructive agreement. These agreements do not provide for an equitable foundation for future constructive arrangements between the state and Indigenous Peoples: they do not have the capacity to address the serious power imbalances and vulnerability of Indigenous Peoples in negotiations with the state and corporate power brokers. In any negotiation there should be “non-negotiables”, for example the principle of the extinguishment of so-called native title as a condition for the settlement of indigenous claims. It remains to be seen to what extent the existence of such “non-negotiables” - if imposed by State negotiators - compromises the validity not only of the agreements already reached but also of those to come. The free consent of indigenous peoples, essential to make these compacts legally sound, may be seriously jeopardized by this particularly effective form of duress.”  

Finally they are simply domestic arrangements which have no status as international agreements and should not be read as having that status. In the Treaty Report of 1999 it was recommended that the “process of negotiation and seeking consent inherent in treaty-making (in the broadest sense) is the most suitable way not only of securing an effective indigenous contribution to any effort towards the eventual recognition or restitution of their rights and freedoms, but also of establishing much needed practical mechanisms to facilitate the realization and implementation of their ancestral rights and those enshrined in national and international texts. It is thus the most appropriate way to approach conflict resolution of indigenous issues at all levels with indigenous free and educated consent.”

It is clear that the Australian state is unable to produce any evidence which would prove that Indigenous Peoples of Australia have expressly and of our own free will renounced our sovereignty. The principle that no one can go against his own acts goes back to ancient Rome and was valid as a general principle of law at the time of the dispossession. So while Australia has benefitted from gaining jurisdiction over Indigenous lands through domestic laws, the question remains to be answered: by what lawful authority has it done so? “By what means could they possibly have been legally deprived of such status, provided their condition as nations was originally unequivocal and has not been voluntarily relinquished?”

**Future possibilities**

While the *UN Declaration on the Rights of Indigenous Peoples* provides for minimum universally relevant standards, the reality is that it will not be effective in protecting and affirming the sovereignty of Indigenous Peoples. This is because the Declaration is limited in

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14 Ibid para 302.
15 Ibid para: 187 and para 192 domestic processes should not assume the place of international processes and mechanisms.
16 Ibid para 263
18 Ibid para 284.
what it can achieve. What is achievable currently is limited to the scope and direction of the state in which Indigenous Peoples continue to live and remain captive of. In Australia we largely struggle with the state’s ongoing assimilationist agenda, and are without political, legal and economic power to resist in a significant way or to create an effective Indigenous alternative.

Unless a space is created whereby Indigenous Peoples have the capacity to own and control our lands and resources, and to continue engaging, unmolested, in economic activities on those lands. Unless as a minimum we are able to achieve such a space then “very little or no progress can be made in this regard without tackling, solving and redressing - in a way acceptable to the indigenous peoples concerned - the question of their uninterrupted dispossession of this unique resource, vital to their lives and survival.”

In his Treaty Report of 1999 Martinez stated the “indigenous problematic today is also ethical in nature. In doing the right thing the world needs to comprehend that humanity has contracted a debt with indigenous peoples because of the historical misdeeds against them. And that while it may not be possible to undo all crimes against Indigenous Peoples, there remains an ethical imperative to undo the wrongs done, both spiritually and materially, to the indigenous peoples.”

We continue to challenge the idea that somewhere we have ‘lost’ our international juridical status as nations/peoples”. Indigenous Peoples’ status as sovereign peoples is not a claim to be given but one that seeks a re-affirmation of who we have always been. Indigenous Peoples are not created out of international law; we have come to international law as pre-existing, already formed and arrived entities to the position of being subjects in our own right in international law. We continue to provide the opportunity for the United Nations to correct the injustice and the exclusion of Indigenous Peoples. It is an exclusion that is based upon racism and imperialism and calls for as a minimum to be corrected. We therefore speak to the United Nations in a language constructed by international law and politics and affirm our right “…like all peoples on Earth, are entitled to that inalienable right. Article 1 of the Charter of the United Nations gives blanket recognition of this right to all peoples (enshrining it as a principle of contemporary international law, as does article 1 common to both International Covenants on Human Rights.”

**Independent International Mechanism**

There remain many unanswered questions, questions that cannot be answered by the original colonizing States; there is an urgent need for an independent mechanism enabled and resourced to act and report independently so as to be able to best address the ongoing and critical position of many Indigenous Peoples of Australia.

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19 Ibid para 252.
20 Ibid para 255.
21 Ibid para 256 and 265 additional to this argument Martinez Treaty Report at 269. Referred to “article 27 of the Vienna Convention ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty …") was already a rule of international law at the time when the process leading to the disenfranchisement and dispossession of indigenous peoples’ sovereign attributes was under way, despite treaties to the contrary concluded with them in their capacity as recognized subjects of international law.”
Indigenous Peoples of Australia are sovereign international entities, even though we are largely unrecognized by some members of the international community. We affirm our claims and ownership of our original territories, ongoing survival against the state’s assimilationist policies, and ongoing laws of the land embedded in songs and stories which continue to govern our relationships to country and to each other. It is upon that basis that we are positioned internationally and to hold the capacity to engage in dialogue with other international sovereign entities. This is a position that is not recognized by the Australian state, but it is core to our argument as to why domestic mechanisms will continue to fail.

Recent examples of the conflict between domestic law and international interventions can be seen in the applications made by Indigenous Peoples whose lives are affected by the Northern Territory Intervention and also the planned development of a nuclear waste dump at the site near Tennant Creek in the NT known as Muckarty. The UN recommendations in respect of the racially discriminatory character of the NT Intervention laws was ignored by the Australian government and to date there have been no sanctions against the ongoing discriminatory acts of the Australian government. It is clear that an international mechanism is needed to monitor ongoing developments within Australia.

The Treaty Report of 1999 recommended the establishment of an international body and by way of example referred to the proposed Permanent Forum on Indigenous Peoples being under certain circumstances empowered to act as an international body of review of disputes between indigenous and non-indigenous peoples. However at the time of the writing the the 1999 Report the Permanent Forum had not come into existence and recent critiques of this body suggest that it would not be well placed to offer effective resolution of disputes. And another international mechanism with the capacity to effectively manage disputes is recommended.

In relation to the situation in Australia the following question remains unresolved, as does the unfinished business of International law between the Australian state and Indigenous Peoples:

- **By what lawful authority has the State of Australia come into existence?**

This question remains and still arises even though there have been no formalized relations between Indigenous Peoples with the non-indigenous colonizing power. It is illogical to assume that because there were no juridical relations with the colonial powers that the situation should result in a differentiation between their rights and the rights of those who did. This question remains relevant in the period since the International Court of Justice advisory opinion in the *Western Sahara Case* and *Mabo No 2*, and their rejection of *terra nullius* as a basis for lawful foundation. While the theory of *terra nullius* has been rejected the ongoing effect of its application to Australia remains embedded in Australian law. While repudiated in name the effect of *terra nullius* continues as a foundational principle upholding the ‘act of state’ doctrine being a legitimating principle for the foundation of the state. The Australian High Court faced the dilemma of ridding its legal system of all traces of its racist foundational history by rejecting *terra nullius* while at the same time holding that foundation intact:

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23 Ibid para 285.
In *Mabo No 2* Justice Brennan J was careful to ensure that while rejecting *terra nullius* there would be no possibility of leaving the foundation of the Australian state unraveled of its colonial foundation:

...*this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency...*Although this Court is free to depart from English precedent which was earlier followed as stating the common law of this country, it cannot do so where the departure would fracture what I have called the *skeleton of principle*. The Court is even more reluctant to depart from earlier decisions of its own. *The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed.*

So while *terra nullius* in name has been rejected the underlying principle of foundation remains unchallenged in Australian law, even though the Charter of the Organization of American States and Article 2.4 of the Charter of the United Nations provides that contemporary international law rejects the notion that rights are secured via unethical means.

The burden of proving status is currently shouldered by Indigenous Peoples. We must prove our continuing sovereignty and our ownership of land (domestic law deems as Aboriginal title). However I argue that the state should carry the burden of proof and be called upon to prove *by what lawful authority [it has] come into existence.* Martinez held the view that “…it must be presumed until proven otherwise that Indigenous Peoples continue to enjoy such status. Consequently, the burden to prove otherwise falls on the party challenging their status as nations. In any possible adjudication of such an important issue, due attention should be given to an evaluation of the merits of the juridical rationale advanced to support the argument that the Indigenous People in question have somehow lost their original status.*

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25 1999 Treaty Report para 287
26 Ibid: para 288