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## THE FUTURE IS OUR PAST:

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### WE ONCE WERE SOVEREIGN AND WE STILL ARE

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by Irene Watson

#### INTRODUCTION

In this short space I will address the ongoing sovereignty of Aboriginal peoples, in particular drawing from my Tanganekald and Meintangk Peoples' perspective and their struggles to co-exist within the ongoing Australian colonial project.

Since the 1836 arrival of the agents of the British Empire and the South Australia Company my old people and now myself and others have been asking the question: 'by what lawful authority do you come to our lands? What authorises your efforts to dispossess us?'<sup>1</sup>

#### TREATIES, FIRST NATIONS PEOPLES, INTERNATIONAL LAW AND THE STATE

The British have never attempted to enter into any treaty agreements with any First Nations Peoples—including the Tanganekald and Meintangk Peoples—while we have become displaced, and our lands occupied and developed without our consent. Our status as Peoples has endured a long and conflicting Eurocentric history. The Australian colonial project named us with many identities: 'barbarians', 'heathens', and 'Aborigines', as well as 'British subjects', and 'Australians'. The Aboriginal truth of our connection to land is ancient, while the state truth is different but dominant. The state deems Aboriginal peoples as domestic subjects, while the truth of our international subjectivity concerns a long and famous struggle to be heard. The limited access Aboriginal peoples have had to international processes was raised by Miguel Martinez, the author of the 1999 UN *Study on Treaties ('Treaty Study')*.<sup>2</sup> Martinez recommended a case-by-case approach when considering the opportunities available for Aboriginal peoples to speak as subjects of international law.<sup>3</sup>

First Nations Peoples of 'Australia' have complex legal systems, which have evolved over thousands of years. We share a history of peaceful co-existence, evidenced by the 200 and more Aboriginal languages in existence at the time of the 1788 invasion. The agreements negotiated between the Aboriginal peoples of Australia are evidenced by the

song lines and the mutual respect shared between them for the meeting of song lines; shared spaces; exclusive spaces; private spaces; public spaces; trading spaces; and gendered spaces. While we have no written evidence of those pre-existing and ongoing treaty agreements amongst peoples, they are nevertheless recorded in the song lines and other arrangements we made with each other regarding boundaries and law and culture. These records are held by song-holders across the country. Unfortunately, the UN *Treaty Study* did not have the resources to research and include this body of knowledge at the time the report was being developed.<sup>4</sup> It was particularly unfortunate because different ways of being lawful go unrecognised by those who now control Aboriginal territories.<sup>5</sup> Martinez recommended that the inclusion of Indigenous Knowledge was critical to the work required in developing Indigenous protocols and approaches.<sup>6</sup>

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 colonisers. The doctrine of *terra nullius* was used to legally annihilate Aboriginal peoples, and this position has not been altered post-*Mabo (No. 2)*<sup>7</sup> and the introduction of *Native Title* legislation<sup>8</sup>. If anything, these laws have entrenched the colonisers' quest for legitimacy.<sup>9</sup> From an Aboriginal sovereign position we confront a process of retrogression; we are being deprived of the essential attributes of our identity as sovereign subjects in international law piece by piece, and whereas our original status as sovereign nations was grounded in our territory, our capacity to enter into international agreements and govern ourselves suffers with the continuing population reduction and the ongoing erosion of our cultures by the relentless assimilationist policies.<sup>10</sup>

#### BRITISH SUBJECT AUSTRALIAN CITIZEN – NO AGREEMENT OR CONSENT OBTAINED

The colonial intent was always to remove our sovereignty. The Tanganekald resisted incursions onto our lands along the Coorong in south-east South Australia and in 1840 a massacre occurred on both sides of the frontier. The

Tanganekald resisters were largely rounded up and the accounts of what then happened go largely unreported, except that two Tanganekald men were hung without trial. But when the matter came before Justice Cooper of the South Australian Supreme Court in 1840 he decided 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.<sup>11</sup>

Justice Cooper decided that the Tanganekald were considered to be living outside British law. The law was applied in a differential manner and this matter 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 shortly after 1840 Tangalun<sup>12</sup> became a 'secure' colonial territory.

Across this colonial history the Tanganekald and Meintangk peoples have continued to be governed as the included-excluded, as British subjects, yet illegally executed under a declared 'state of emergency'. In Adelaide in 1840 Justice Cooper held the view 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.<sup>13</sup>

In determining the status of sovereign peoples as British subjects the British left unfinished business, that is the remaining implications of the state murder of 'British' subjects. Sovereign peoples were deemed British subjects, but subjects without the protection of law from crimes of murder and theft of land. The point at which we were deemed British subjects is loaded with conflict. It begins in conflict and war between competing international peoples and ends in our domestication as British subjects. There

is no point in the story where the consent of Aboriginal peoples to become British subjects (or subsequently Australian citizens) was obtained.

While we have been stamped 'British subjects' and 'Australian citizens', many of us affirm our sovereignty as people who have never entered into consensual relations with any state or British Crown to surrender our international status.<sup>14</sup> Attempts to correct that position have been unsuccessful, and within Australia treaty debates are almost non-existent. Public perception is largely based on the misconception that *Mabo (No. 2)* and *Native Title* legislation provided land rights, that reconciliation provides social justice, and the Rudd Government's utterance of 'sorry' healed a long history of assimilation and our attempted genocide. But 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 Aboriginal rights recognition or even human rights protection; while the *Australian Constitution* embeds principles which still support a largely racist White Australia foundation; based upon the genocide of Aboriginal peoples and the exclusion of non-white peoples.

Scattered across early colonial jurisprudence there is an aspirational clause repeated: 'with the consent of the native'. I don't have time here to elaborate on how this requirement was played out across Australian legal history, however concerns arise in respect of how the consent of the native might be obtained and constructed. Currently there are negotiations occurring under native title law in the form of Indigenous Land Usage Agreements ('ILUAs'). It is a concern that ILUAs could be used as a framework for obtaining the 'consent of the native'. It is a particular concern because they do not provide an equitable foundation for future constructive arrangements between the state and Aboriginal peoples. This is because they don't address power imbalances and the vulnerability of Aboriginal peoples when they are negotiating with state and corporate power brokers. In any negotiation there should be 'non-negotiables', for example the principle of extinguishment of native title as a condition for the settlement of Aboriginal 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 Aboriginal peoples, essential to make these compacts legally sound, will be jeopardised until power imbalances that give rise to duress are addressed.<sup>15</sup> The ILUA example is a domestic

arrangement and has no status as an international agreement and should not be read as having that status.<sup>16</sup> It is clear that the Australian state is unable to produce any evidence which would prove that Aboriginal peoples of Australia have expressly and of our own freewill 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 first contact and dispossession.<sup>17</sup> So while Australia has benefitted from gaining jurisdiction over Aboriginal 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 had not been voluntarily relinquished?'<sup>18</sup>

### FUTURE POSSIBILITIES

While the UN Declaration on the Rights of Indigenous Peoples ('UNDRIP')<sup>19</sup> provides for minimum universally relevant standards, the reality is that it will not be effective in protecting and affirming the sovereignty of Aboriginal peoples. The Declaration is limited in what it can achieve. What is achievable currently is limited by the scope and directions of the state in which Aboriginal peoples continue to live and remain captive of. In his *Treaty Study* Martinez stated that 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.<sup>20</sup>

We continue to challenge the idea that somewhere we have 'lost' our international juridical status as nations and peoples. Aboriginal peoples' status as sovereign and independent is not a claim to be given but one that seeks a re-affirmation of who we have always been. Aboriginal 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 international law in our own right. We continue to provide the opportunity for the United Nations to correct the injustice and the exclusion of Aboriginal 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 to all peoples blanket recognition of this right (enshrining it as a principle of

contemporary international law, Article 1 is common to both International Covenants on Human Rights.<sup>21</sup>

### INDEPENDENT INTERNATIONAL MECHANISM

There remain many unanswered questions, questions which cannot be answered by the original colonising states. There is an urgent need for an international independent mechanism, enabled and resourced, to act and report independently so as to be able to best address the ongoing and critical position of Aboriginal peoples of Australia. Conflict between domestic Australian law and international law last erupted with the Northern Territory Intervention; UN recommendations in respect of the racially discriminatory character of the Intervention laws were ignored by the Australian Government. It is clear that an international mechanism is needed to monitor the ongoing developments within Australia.

Indeed, the *Treaty Study* recommended the establishment of an international body and at the time recommended that the proposed UN Permanent Forum on Indigenous Peoples be empowered to act as an international body of review in disputes between Indigenous and non-Indigenous peoples. However, at the time of Martinez writing the *Treaty Study* the Permanent Forum had not come into existence and recent critiques of this proposed body suggest that it would not be well placed to offer effective resolution of disputes.<sup>22</sup> An international mechanism with the power and capacity to effectively manage disputes is still needed.

### BY WHAT LAWFUL AUTHORITY HAS THE STATE OF AUSTRALIA COME INTO EXISTENCE?

The question still requires an answer. It's illogical to assume that because there were no juridical relations between Indigenous and colonial powers that the situation should result in a differentiation between their respective rights.<sup>23</sup> The question remains relevant because while the theory of *terra nullius* has been rejected in *Mabo (No. 2)* it remains embedded as a legitimating principle for the foundation of the state.<sup>24</sup> The underlying principle of foundation of Australian law remains unchallenged, even though Article 2.4 of the Charter of the United Nations provides that contemporary international law must reject rights which are secured via unethical means.<sup>25</sup>

The burden of proving status is currently shouldered by Aboriginal peoples. We must prove our continuing sovereignty. Rightfully, however, 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.<sup>26</sup>

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- 19 UN General Assembly Resolution 61/295, 13 September 2007.
- 20 Ibid [255].
- 21 Ibid [256], [265].
- 22 Ibid [315]; Isabelle Schulte-Tenckhoff and Adil Hasan Khan, (2011) 20(3) *Griffith Law Review* 673-701.
- 23 Ibid [285].
- 24 *Mabo No 2*, (1992) 175 CLR 1, 30.
- 25 Miguel Alfonso Martínez, above n 2, [287].
- 26 Ibid [288].

- 1 For a more detailed discussion of these issues see, Irene Watson, Submission prepared for the United Nations Seminar on "Strengthening partnership between Indigenous Peoples and States: Treaties, Agreements and Constructive Arrangements", Geneva, 16-17th July 2012 <<http://www.ohchr.org/EN/Issues/IPeoples/Pages/SeminarTreatiesAgreements.aspx>>.
- 2 *Study on treaties, agreements and other constructive arrangements between states and indigenous populations*, Final report by Miguel Alfonso Martínez, Special Rapporteur: para 47, E/CN.4/Sub.2/1999/; see also a discussion on UNDRIP and its limitations, in Irene Watson and Sharon Venne, "Talking up indigenous peoples' original intent in a space dominated by state intervention", *Indigenous Rights In The Age Of The UN Declaration*, (Cambridge University Press, 2012) 87-109.
- 3 Miguel Alfonso Martínez, above n 2, [50], [55].
- 4 Ibid [56]. We negotiated treaty agreements using our own cultural ways of doing this kind of business, and to correct Martinez at [57], [98]. International agreements also existed amongst Aboriginal peoples.
- 5 Ibid [223].
- 6 Ibid [62].
- 7 *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.
- 8 *Native Title Act 1993* (Cth); *Native Title Amendment Act 1998* (Cth).
- 9 Ibid [100].
- 10 Ibid [105].
- 11 S D Lendrum, 'The Coorong Massacre: Martial Law and the Aborigines at First Settlement' (1977) 6 *Adelaide Law Review* 26. This quote was taken from the Colonial Secretary's Office records of GRG 511/1840, I discuss the event in Irene Watson, 'Aboriginal(ising) International Law and Other Centres of Power' (2011) 20(3) *Griffith Law Review* 619-640.
- 12 A place forever known to the Tangane kald peoples as the end of the Tangane language, and renamed Kingston SE in 1851.
- 13 S D Lendrum, above n 11. Source is the Grand Jury of the Supreme Court, 3 November 1840.
- 14 Miguel Alfonso Martínez, above n 2, [149], [160]. The Makarrata concluded as a non-event and further treaty debate has not occurred.
- 15 Ibid [302].
- 16 Ibid [187], [192]. Domestic processes should not assume the place of international processes and mechanisms.
- 17 Ibid [194]-[195], [267].
- 18 Ibid [284].

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