TRICK OR TREATY?

YORTA YORTA or VICTORIANS?

EXECUTIVE SUMMARY

The Yorta Yorta people have some fundamental questions that must be addressed from the outset, before you consider what course of action you take, as Peoples and as a Nation.

I expressly state that the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* is an exercise of racial supremacy by the Victorian Parliament. I make this assertion on the basis that under international law one of the fundamental principles of Human Rights is a right to your own identity. From the outset and without any discussion and/or consent, the Victorian Government has denied the Yorta Yorta Nation and its Peoples this fundamental right.

I have highlighted a number of options for your consideration. I have set a number of these factors out for your consideration before engaging with the occupying colonial State.

Three significant questions that must be addressed by the Yorta Yorta are:

To Treaty with an occupying power through a so-called Treaty?
Or do you assert your ancient continuing Sovereignty, as a Sovereign Independent Nation, as you were prior to the British invasion and occupation?
If you cannot make these choices then the only alternative you have available to you is to maintain the *status quo.* If Yorta Yorta choose to maintain the *status quo* then your society and people will be beleaguered by poverty and dependence, with a complete sense of hopelessness and despair.

I strongly urge that the Yorta Yorta Nation puts the Victorian Government 'On Notice' that the Yorta Yorta Nation will NOT be rushed into any decision on agreement-making, under the current so-called Treaty proposals. Yorta Yorta must impress upon the Victorian Government that what is being proposed will have significant and irreversible consequences for future generations.

One option that should be considered is for the Yorta Yorta to decide by referendum amongst themselves either to assert their independent Sovereign Nationhood, or become a domestic entity by agreement through a so-called treaty process. If this path is pursued, then you must understand that Yorta Yorta will be consenting, by agreement, to be ruled by the British occupying colonial state of Victoria, as per the terms of your negotiated so-called Treaty. The question will be: What do you give up in order to achieve an agreement on unequal terms.

Another option is for the Yorta Yorta to assert sovereignty within your defined territorial borders by way of a Unilateral Declaration of Independence (UDI) and your right to exist as a Sovereign State. This UDI will create the emergence of the Yorta Yorta Nation State with the right to exercise its own sovereign independence as a self-determining Nation under international law, with the capacity to negotiate a sovereign treaty under *Vienna Convention of the Law of Treaties* with Britain, the foreign power which is exercising its sovereignty over your lands as an occupying power. Colonialism is now declared under international law to be illegal, e.g. the International Court of Justice (ICJ) decision in 2004 regarding Israel's illegal occupation of Palestinians lands.

Once you have made your decision, you will then have two courses of action:

1. You must establish your self-governing structures as a matter of priority. This will need to be done no matter which choice of political and legal pathway you choose to take. It must be understood that neither the international community, nor the British/Australian/Victorian State, will be prepared to enter into negotiations, if they consider that the Yorta Yorta Nation has little to no capacity to be self-governing. This will be influenced by whether, or not, the Yorta Yorta Nation has an established governance structure and a decision-making process set in place.

2. It will be absolutely essential to put together a very strong negotiating team. I recommend that you ensure this team consists of Law and Culture knowledge holders, Western legal minds, political strategists, social designers and economists.

Unceded Sovereignty means that the limits of your power are boundless and prescribed only by Yorta Yorta Nation Law, culture and customs as the governing Nation. This is Yorta Yorta's authority and your head of power to be self-governing and independent.

INTRODUCTION

This is a brief suggesting ways forward to possibly reaching agreement for so-called Treaty under the current Victorian Government model, and the possible alternatives.

What I have set out in this advice are examples of work that has already been done on Identity, Treaties and Agreements in Australia and overseas. These experiences come from the National Aboriginal Conference (NAC) that was engaged in formal negotiations with the Commonwealth Government, led by the late Prime Minister Malcolm Fraser's administration from 1979 to the mid-1980s. During this period, there were many lessons learnt and I strongly urge you to be cognisant of these experiences, some of which I have set out for your consideration and knowledge.

It is imperative that you make yourself familiar with these experiences and I have no doubt they will assist you to make the appropriate decisions, which I anticipate should have meaningful and beneficial outcomes for your Peoples and Nation.

Two major questions that must be in the forefront of the Yorta Yorta peoples' minds are: Where do we go from here? AND What do we need to do to get there? At the same time, there is a need to focus attention on long-term and sustainable outcomes, which will be beneficial to the Yorta Yorta Peoples and your Nation in future years.

You should NEVER consider any short-term quick fix proposals. We all understand that our Old People may want to get some of their just desserts now, but what is painfully clear in these desires could result in the absolute loss that potentially could come your way. Britain

and its colonial states in Australia have a perfect game plan of divide and conquer entrenched within their templates. Their key is how to manipulate the minds of impoverished people. This is one of the pitfalls that is so wide that you may not even see it coming.

QUESTION OF CITIZENSHIP

There is a significant question about whether, or not, members of the Yorta Yorta Nation have ever been subjects of the Crown of Britain/England and whether Aboriginal people became citizens of Australia after the 1948 *Citizenship Act.* There is a need for this question to be addressed before proceeding with any negotiations at all. There are fundamental repercussions, which may, and could, possibly strike out the Victorian Treaty's validity, because it makes false assumptions in respect of the citizenship status of First Nations Peoples in the State of Victoria.

I emphasise this point to ensure that the Yorta Yorta understand that nowhere in the Australian Constitution, or the Victorian State Constitution, is there anything that makes the people of the Yorta Yorta citizens of the State of Victoria or of the Commonwealth of Australia. In view of this, it is essential that the Yorta Yorta assert and impress upon the Victorian colonial state that the members of the Yorta Yorta Nation have never been made citizens, nor subjects of the Crown by way of being made denizens of the British monarch, at any material time.

If you fail to argue this point you will not be in a position to assert and demand the sovereign rights to which you are entitled. This is an urgent matter for attention.

It is now a legal fact that Victoria's Treaty Advancement Commission, as legislated for, is to put all First Nations Peoples of Victoria in the 'assimilated' basket, and your ability to negotiate possible outcomes goes back to what the Victorian Government can do under their own constitution and nothing beyond that. In this case, if your people do not object to being classified as 'Aboriginal Victorians', this will mean that you have accepted that your Nations' Law and customs are relegated to the distant past. I reiterate the point - they do not see you as anything else other than Victorians, which will prevent any talk of true self-determination under your own Law and culture.

Without First Nations Peoples realising it, the Victorian Treaty legislation has totally assimilated all Victorian First Nations Peoples and Clans into Victorian society.
As I have pointed out above, First Nations Peoples in Victoria are defined as 'Victorians'. Consequently, your right to negotiate has been truncated to the point where you have very limited abilities to negotiate any major outcomes and you will be no better off than you already are, other than to say, you may be able to gain some benefits without State government interference in the future administration of Yorta Yorta affairs on Country.

This so-called Treaty process is one way of avoiding the necessity for proper reparations and restitution programs for the internationally recognised colonial wrongdoings perpetrated against the Yorta Yorta. This must be investigated and thoroughly fleshed out.

The colonial State of Victoria's objective with the so-called Treaty process is achievable. The danger, however, is that not many First Nations Peoples truly understand their legal and Human Rights under international law. These rights are applicable to every First Nation person and every citizen in every Nation State throughout the world. People too often lose rights, because they just simply don't know what those rights are. Consequently, they lose the ability to argue and assert these rights.

These inherent rights can easily be lost or be simply overlooked when people are too easily persuaded to take what is on offer NOW, because everything else that comes before those rights are harder to achieve, such as dealing with your sovereignty, reparation for lands lost and desecrated, the destruction of cultural practices and your ability to observe your customs.

When dealing with impoverished, displaced and dispossessed Peoples, who are suffering from intergenerational trauma, grief, hopelessness, anomie and solastalgia, there are people who do not have the discipline to stand their ground and, instead are willing to just settle for whatever is being offered, even if it's the crumbs of 'recognition', as opposed to holding out for just and sustainable long-term beneficial outcomes, which again are your fundamental Human Rights. Too often, this is the case of people, who seek to address their own personal issues now, as opposed to the long-term sustainable rights and future for their children and their children's children. Currently, too many of our people want their share *now* and leave

no sustainable legacy for future generations. The negative ramification that flows from this is that nothing meaningful is left for future generations.
One significant outcome from a quick fix solution will be the complete erosion of your descendants' inherent rights, that is, they will lose their spiritual connections to Country and will view the Country in the same light as non-Yorta Yorta people, that is, something that can be exploited for cash and personal profit. If the Yorta Yorta are not careful, then the only legacy the people will leave is an absolutely assimilated future and your independent national identity will be lost forever.

You must make decisions that will stick and be long-lasting. There can be no ambiguity about the Yorta Yorta's intentions. The ability to do this will only be achievable if you go forward as one Nation with one mindset. Division and uncertainty will be the chink in the armour that can, and will be, exploited by the colonial powers.

I therefore recommend that whatever decision you reach, your language in your proposal must be without ambiguity and your intentions must be made very clear. Uncertainty and disunity could be your downfall. Nobody can go forward in any form of negotiations without this package being tied up and everybody being on the same page.

The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* includes a clause that speaks of enhancing all Victorian State laws. In this Act, the Victorian State has made its intentions very clear. It seeks your authority, through these negotiations, to be the only head of power to have legitimate powers to govern over the State of Victoria and the people within it. You must understand that this strategic intent to have the Sovereign natural Laws of the First Nations Peoples made subordinate to the Victorian State's laws and is designed to ensure that there is only one law-making body and by this, if you agree, you will validate British colonial rule in Victoria. This means the Victorian State will have total jurisdiction over all First Nations and Peoples in Victoria.

I implore you to become fully aware of this very cleverly designed colonial deed. If you are not up to understanding the complexity of meanings in the English language and what has been decided in this Act, then you have already lost your argument and standing as sovereign Peoples, because the Parliament of Victoria has determined your status without your free,

prior and informed consent. This must be addressed through loud protest before you get to the starting blocks of negotiation.

With this being the case, the key option that you must address at the outset is to claw back your rights to exist as a Sovereign Independent Nation. The crucial statement is revealed in the *Victorian Treaty Advancement Commission Bill*, which reads:

> A future treaty or treaties should enhance the existing laws of this State, acknowledge the importance of culture to Aboriginal identity, bring pride to all Victorians and have positive impacts for all of Victorian society.

This Bill stated 'the laws of this State' in plural, that is, applying to *all* the laws of the State. This is very concerning, because it means that First Nations, Peoples and Clans of Victoria are NOT equal in these proposed so-called Treaty negotiations. This is being achieved without any free, prior and informed consent. This is a decision that was made by the parliamentarians only, and not with the consent of your Elders' Law Council, or equivalent.

In light of this, I strongly recommend that you call for an immediate moratorium on the application and effects of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* until you have had sufficient time to consider all your options. This is a must, considering the gravity of what has been done to usurp your sovereignty, before any formal negotiations have commenced.

CITIZENSHIP

In the Commonwealth parliament, on 1 April 1965 Kim Beazley Snr, MP [Freemantle] affirmed and lamented the material legal fact regarding the lack of citizenship status of Aboriginal people, which continues to this day:

> For heaven's sake, if we in this Australian Parliament cannot guarantee citizenship, let us accept the fact that our Constitution acknowledges only the status of subjects of the Queen and that, no matter how many acts of Parliament we pass, we cannot reach into the States and create any form of meaningful citizenship. Until placitum (xxvi) of section 51 of the Constitution is amended, Aborigines can have no effective Australian citizenship.
>
> http://nationalunitygovernment.org/content/time-first-nations-and-peoples-pick-pace-decolonisation

The success of the 1967 Referendum did not include, as part of the question, anything about the citizenship status of Aboriginal and Torres Strait Islander people. Furthermore, if Aboriginal and Torres Strait Islander people were not already citizens under State law, when did the Commonwealth grant citizenship certificates to Aboriginal and Torres Strait Islander individuals and their families, which included their heirs and successors?

At this point the Yorta Yorta, and everyone else for that matter, must truly ask:

> What are the hidden factors and agendas that are underpinning the push for constitutional recognition and State-based so-called 'Treaties'?

All the facts have never been exposed and are NOT on the table for consideration, especially the statement that informs the people that constitutional recognition will in no way provide them with any real and lasting beneficial outcomes.

Total assimilation and complete acquiescence of First Nations Peoples' sovereignty and individual identities, Nation by Nation, will disappear into the ether, unless otherwise specifically stated in the preamble and the intentions must also be included in the actual body of law.

First Nations must without hesitation demand that their sovereignty remains in force and intact and that their continuing proprietary interest in land always was and always will be, including ownership of all natural resources.

Many people today call for the abolition and complete repeal of section 51 (xxvi) but the Commonwealth is not telling the public that the Commonwealth cannot take away this section from the Constitution, because then they will no longer have any powers to make laws for the Aboriginal and Torres Strait Islander Peoples. Section 51(xxvi) is the *only* part of the Australian Constitution that permits the Commonwealth Government to pass laws for Aboriginal and Torres Strait Islander Peoples, as a distinct race, who are excluded from the Australian Constitution. This is a special note for all First Nations Peoples in Australia to truly understand.

Why is this the case, one may ask? Aboriginal and Torres Strait Islander Peoples are NOT British subjects, nor Australian citizens, under any law of the Commonwealth or the State. The only State law that could be affected is the Franchise Act, where the state can grant the right to vote as enfranchised citizens of that particular State. This grants them the right to vote. In fact, to this day constitutional law requires that, if you were not enfranchised in 1901, then you do not have the right to vote now. As Barbara Kerr points out in *The State*

Franchise in Victoria, 1842-2005 in relation to the *Commonwealth Franchise* Act, 1902:

> In 1901, Victoria became part of the Commonwealth of Australia, and in 1902, the *Commonwealth Franchise Act* was passed, which specified that all born or naturalized subjects of the Crown "not under twenty-one years of age whether male or female married or unmarried" who had lived in Australia for 6 months could vote at the Federal level. It explicitly excluded any "aboriginal native of Australia Asia Africa or the Islands of the Pacific except New Zealand" and persons "of unsound mind" or who had been convicted of an offence that would attract a sentence of one year or more. Note that at this stage, women were explicitly excluded from voting in Victoria, but "aboriginal natives" were never explicitly referred to in Victorian legislation (possibly because requirements of literacy and not receiving charity would have excluded them without naming them).

Make no mistake, the current civil rights of Aboriginal people are restricted rights and all that is done for Aboriginal people under State and Commonwealth laws are 'special measures' for that 'race' only.

In the old days, and even now, any colonial State, with the exception of the Territories, could grant an Aboriginal and Torres Strait Islander person a franchise status. Such status grants to such a person all free rights as a citizen to benefit and suffer the burdens of all other natural or naturalised persons subjected to the societal legal norms as free citizens, known at grassroots as the 'Dog Tag'. Today they turn a blind eye, arguing that we are free citizens, which is not true. There is a reason for the Commonwealth Government, supported by mining companies and private prisons, to spend hundreds of millions of dollars on getting us included in the Constitution as their citizens.

If a constitutional referendum is supported, then we as First Nations people have no right of veto over the end result, which means that we all become Australian and our 'native' status and rights as the Sovereign First Peoples and inhabitants will be eroded to the extent that all that we are and what we have been will become museum pieces and song and dance routines. Make no mistake, there is must at stake.

There are no plans to give us any rights that may result from a successful alteration of the Australian Constitution. No matter how hard they try, we are *not* citizens. This is why they are offering so-called 'treaties' or 'settlement agreements', in order to address the wrongdoings and to bring a concluding end to a continuing attrition, genocide and conflict.

UNDERSTANDING TREATY

Sovereignty is '*The supreme, absolute, and uncontrollable power by which an independent state is governed and from which all specific political powers are derived; the intentional independence of a state, combined with the right and power of regulating its internal affairs without foreign interference.'* [legal-dictionary.thefreedictionary.com/sovereignty]

Treaty is an 'international agreement concluded between two states' *Vienna Convention on the Law of Treaties*, 1969.

Human Rights are collated in *Human Rights at Your Fingertips:* https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-your-fingertips

Occupying power

The Commonwealth Senate Standing Committee on Constitutional and Legal Affairs concluded in its 1983 Report *Two Hundred Years Later* at page 50:

> It may be a better and more honest appreciation of the facts relating to Aboriginal occupation at the time of settlement, and of the Eurocentric views taken by the occupying power, could lead to the conclusion that **sovereignty inhered in the Aboriginals** at that time.... [emphasis added]

Here the Commonwealth and its federated colonies admitted that they are *occupying powers,* which do not have a legal right, nor legal head of power, to rule over First Nations. More importantly, they admit and accept that First Nations' sovereignty did in fact pre-exist.

It is a matter of priority for the Yorta Yorta Peoples and your Nation to decide whether to seek a Treaty in the true sense of the word as it exists in the modern era, or a so-called Treaty under the current Victorian model, which is really only a contract.

In short, an international Treaty means that the Yorta Yorta Nation must demand recognition of its sovereign status under Yorta Yorta Law, customs, culture and spirituality, which come from the Creation. Yorta Yorta must also assert that this Law is the Law of the Land, which

has never been acquiesced, nor has it been ceded at any time, and continues to this day. This is the spine of your argument.

The second option is to succumb to the proposed so-called Treaty process and thereby permit yourself to be governed by the Victorian domestic laws, as discussed in detail later.

It is important for your Elders and leaders to clearly understand that the Victorian colonial State governs in right of the Crown of Great Britain, and operates under British sovereignty. By true material and legal definition and fact, the Victorian colonial State is nothing but an occupying power on the Yorta Yorta Nation's Country. When we speak of power-sharing and being equal in any negotiations, now or in the future, you must forge a clear understanding that Yorta Yorta and the Victorian Government are equal in status in any and all future negotiations.

I recommend that, *if* you choose to negotiate with the Victorian State Government, the Yorta Yorta does NOT agree to use the term 'Treaty'. In fact, I go so far as to recommend that you agree only, (if this is your chosen path) for the Victorian colonial State Parliament to legislate for a *Yorta Yorta Settlement Act*. In saying this, I strongly urge you to agree only to this process, subject to the government agreeing that *no legal conveyancing of lands from your people to the Crown has occurred within the defined territories of the Yorta Yorta Nation* and that nothing is to be viewed, nor construed, as the Yorta Yorta ceding their sovereignty, or acquiescing their sovereignty to British law, in any way, shape, or form.

The Yorta Yorta Native Title case concluded that time and the tide of history has washed away Yorta Yorta title to land. This cannot be accepted, when you consider the High Court of Australia in Mabo held that what had occurred in Australia was acquisition of a radical title by the coloniser, **not a beneficial radical title.** (This is examined in greater detail below)

I urge that, whatever Agreement is reached between both parties, that it is clearly stated that Yorta Yorta sovereignty has never been ceded to the British colonial authorities at any material time, nor to any of their colonial agencies. Yorta Yorta Law, culture and customs remain the Law of the Land. This statement creates a favourable negotiating platform for the Yorta Yorta as it makes you equal.

CONFIRMATION of BRITISH COLONIAL AUTHORITY?

The Yorta Yorta must understand that NO law made in the Victorian Parliament is legal until the Governor of the State countersigns the legislation, so as to give it legal effect. The Parliament of Victoria itself only has authority to create policy and legislation for, and on behalf of, the citizens of Victoria, in accordance with the terms of its constitution. The passing of an Act in the parliament does not in itself become law automatically.

Everything in Australia is done under the sovereign authority of the Crown of England for peace and good government for those who live in Australia. The icing on the cake in this regard is the fact that the laws made by the Victorian Parliament are not legal without the consent of the Governor, HRH Queen Elizabeth II's representative in Victoria.

I therefore put it to the Yorta Yorta that the Victorian Government has NO authority whatsoever to determine the terms and conditions of negotiating a Treaty with First Nations without formal free, prior and informed consent.

The Victorian Government represents the Crown of England with an obligation to govern responsibly for the citizens of Victoria, not for the Yorta Yorta.

ESTABLISHING THE PARAMETERS FOR FUTURE NEGOTIATIONS

By its own admission in its 'Treaty Fact Sheet', the Victorian Government has already pointed out its weaknesses and shortcomings, if it is to negotiate an agreement, or so-called 'Treaty', or other like arrangements. To quote:

> There are three main limitations on treaties in Victoria:
>
> 1. The parties must agree on what is necessary and just.
>
> 2. As a state within the Commonwealth, the Victorian Government can only agree to what is within its own constitutional powers.

> 3. As one state within the Federation, Victoria can only advocate for what is included in a national treaty.
>
> [Victorian Government *Treaty Fact Sheet*]

By virtue of this admission we now need to take it one step further and remind the Victorian Government that it is, and continues to be, a colonial State belonging to a federation of colonies, established by a British Act of Parliament called the *Australian Constitution Act 1901*. Victoria's State legislature was established by way of Letters Patent from the Crown of Britain.

WARNING: The governments in Australia are cleverly jostling themselves into a position to legitimise their colonial authority over Blackfellas and this proposed so-called Treaty will do just that, if agreed to by First Nations.

The initial Victorian Treaty Bill, at page 3 described First Nations Peoples in Victoria as 'Aboriginal Victorians'. Clearly, the current intent of the Victorian 'Treaty' framework Act is to assimilate First Nations into mainstream society. The wording of this Bill confirmed that, without negotiations and/or agreements, the First Nations Peoples in Victoria are being classified as citizens of the occupying colonial State of Victoria.

The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* establishes the Aboriginal representative body, that is designed to create the mechanism for negotiating a so-called treaty or treaties. There was opposition to this by the only Aboriginal person in the Victorian Government, Lidia Thorpe, of the Australian Greens, Member for Northcote in the Legislative Assembly. She opposed the wording of the *Advancing the Treaty Process with Aboriginal Victorians Bill* and put up amendments that were voted down. On 7 June 2018, when the Bill was passed by the lower house, Lidia Thorpe said that she was 'disappointed the government had decided against including a firm acknowledgement in the legislation that traditional owners in Victoria retained sovereignty over their lands.'

She was also concerned 'about a lack of engagement with elders; a potential sidelining of Victorian traditional owners in favour of government-appointed people on the representative body; …' Lidia Thorpe stated to *The Guardian* newspaper: 'Treaties are between two

sovereigns, and to talk about treaty or to go ahead with treaty negotiations and not actually recognise that Aboriginal people are the sovereign people of this land, then I think that's one of the major failures of this legislation. If we can't start by addressing sovereignty, then that's a joke.'

['Victorian lower house passes treaty legislation after Greens accept Labor deal', *The Guardian* 7 June 2018] https://www.aljazeera.com/indepth/features/australia-recognise-sovereigns-queen-180711052948923.html

The ramifications of this situation are stark. Before any formal negotiations have even begun, First Nations Peoples have been made subordinate to the Victorian colonial power, the illegal occupier of First Nations' lands. The position adopted by the Victorian Parliament now places the Yorta Yorta in a very weak position in respect of any future negotiations. This bears witness to John Howard's and Tony Abbott's statements that Australia cannot negotiate a Treaty with its own citizens. These former Prime Ministers understood that Treaties, in the international sense, rather than agreements, can only be made between sovereign powers.

The Yorta Yorta need to fully examine this fact, in order to understand the legal ramifications and restrictions now placed upon you. By being made subordinate, the Yorta Yorta's lack of power from sovereign title lessens your ability to negotiate from a position of strength as an equal party. In reality, your position has been compromised from the outset. The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* has made you domestic citizens of Victoria, suppressing any standing you may have had as an equal party to any and all future negotiations. Your rights to assert your status have been usurped by this occupying foreign power.

Subject to your decisions there is a way through this. Your chosen pathway will require you to investigate a number of legal and political options that are available to you.

DECIDING BETWEEN DOMESTIC TREATY or an INTERNATIONAL SOVEREIGN TREATY

The Yorta Yorta Nation needs to determine whether you are negotiating a so-called domestic Treaty, under the occupying State's authority and jurisdiction. You must understand of course that should this be agreed to, then you will have to consider yourselves to be subject to all the jurisdictional powers of the occupying colonial State of Victoria. This essentially means that the Yorta Yorta will have acquiesced and ceded to the British/Australian colonial powers and their jurisdictions. Should this be the case, the sovereign and territorial jurisdiction of the Yorta Yorta Nation and Peoples, will belong to the colonial State of Victoria. If Yorta Yorta choses to negotiate a so-called Treaty or Agreement of some kind such acquiescence or cession will be achieved and become final.

Yorta Yorta acquiescence through cession is irreversible and will be silently achieved on the basis of the agreed negotiated terms set out in the agreement or so-called Treaty, *if* Yorta Yorta places no specific reservations around cession and acquiescence. In this regard, Yorta Yorta must be very clear about every aspect of any agreement or so-called 'Treaty', which will have everlasting impacts on your lives, Country, culture, economics and future development of the Yorta Yorta Nation, Peoples and your identity.

It is absolutely essential that you conduct as many workshops as you can on what you see as the absolute future for the Yorta Yorta Nation and its Peoples. In order to achieve short, medium and long-term objectives, such a shopping list must be very clearly defined prior to entering into so-called Treaty or Agreement-making negotiations.

Prior to any discussions the Yorta Yorta must first understand the differences between a domestic 'Treaty', compact, agreement, contract or Makaratta and an international Treaty. Without knowing this, the you will only be surmising, without any true understanding of what your full rights are.

NATIONAL ABORIGINAL CONFERENCE (NAC) EXPERIENCE FROM TREATY RESEARCH

From 1981 to 1985 I was the Director of Research for the National Aboriginal Conference (NAC) on the development of a framework for Treaty negotiations between the Commonwealth of Australia and the NAC, representing Aboriginal and Torres Strait Islanders. The National Executive of the NAC asserted that any agreement that would facilitate Treaty negotiations had to be underpinned by two material legal facts:

A. Aboriginal Land Rights was a continuing material legal fact that land had never been conveyed at any time to the colonies during the colonisation of Australia, and that Aboriginal rights to land were continuing, according to their Law and culture.

B. The second demand, which was accepted by the Commonwealth, was that sovereignty had never been ceded at any material time by any Aboriginal or Torres Strait Islander Nation.

Having reached agreement on these two concessional demands, the NAC began a national consultation process from 1979. These consultations were not restricted to regional and/or State consultation forums. Instead, the NAC concluded that the Treaty process was about everybody and that everybody had a right to be heard. Thus, began the four-year community-based consultation process, led by the elected NAC representatives, with support staff to record the conversations. All this work was later undermined by the Hawke Labor Government, which withdrew the NAC funding at budget time in mid-1985, thus shutting down the whole Treaty process.

What is important for First Nations Peoples to understand are the lessons learned during this five-year NAC Treaty research development, and to learn from the NAC's experience. I will set out briefly some key factors, which should be considered by First Nations Peoples, who are thinking of entering Treaty/Agreement negotiations or other.

If the Victorian Government is not prepared to concede that the Yorta Yorta have at no time ceded their sovereignty, or acquiesced in exchange for remedies to address historical wrongs; or if the Victorian Government is unable to provide you with a declaration of war against the Yorta Yorta and a subsequent surrender and Peace Pact in which the Yorta Yorta accepted

the terms of the victors, then there is no possible way in which the British colonialists and their successors could argue that they justly acquired territorial proprietary interest in land and sovereign jurisdiction over the Yorta Yorta, whose Law is the Law of the land.

COMMONWEALTH of AUSTRALIA RULES in RIGHT of the ENGLISH CROWN

After the Commonwealth Government of Australia reached an agreement with the NAC on First Nations Peoples' continuing proprietary interests (ownership) in land and the continuing existence of First Nations' sovereignty, the NAC then set about investigating Australia's sovereign jurisdiction and the Commonwealth's power and right, as the foreigner, to negotiate with sovereign First Nations.

First Nations need to understand that the NAC had concluded that Australia did not have its own sovereignty, quite the contrary. The Australian Government is, by legal definition, a federation of colonial States, all of which govern in right of the Crown of Britain, without which they would not have any legal jurisdiction to form government, because as the Mabo decision held, to quote:

> 33. International law recognized conquest, cession, and occupation of territory that was terra nullius as three of the effective ways of acquiring sovereignty. No other way is presently relevant…

This High Court ruling clearly confirms the sovereign rights of First Nations Peoples within this country to stand their ground and assert their inherent sovereign rights to be independent Nations and Peoples. My assertion in this regard is supported by international legal norms.

I will address this in greater detail below.

RECOGNITION of FIRST NATIONS' SOVEREIGN RIGHTS IN the1830s and 1840s

After more than a year of hearings, the 1836-37 British House of Commons Select Committee on Aborigines stated in regard to the Australian colonies that:

> … it may be presumed that the Native inhabitants of any land have an

> incontrovertible right to their own soil, a plain and sacred right, however, which had not been understood. Europeans entered their borders uninvited, and when there, have not only acted as if they were undoubted lords of the soil, but punished the natives as aggressors if they have evinced a disposition to live in their own country. If they have been found upon their own country, they have been treated as thieves and robbers; they were driven back into the interior as if they were dogs or kangaroos.

In the 1841 NSW Supreme Court case, *R v Bonjon*, Justice Willis overturned the 1836-37 NSW Supreme Court decision in *R v Murrell* and set a new precedent in law. Justice Willis held that 'the Supreme Court of New South Wales had no jurisdiction to proceed with the trial of Bonjon. Bonjon was discharged and released from jail.

Justice Willis stated in his judgment that:

> …if this colony were acquired by occupying such lands as were uncultivated and unoccupied by the natives, and within the limits of the sovereignty asserted under the commission, the aborigines would have remained unconquered and free, but dependent tribes, dependent on the colonists as their superiors for protection; their rights as a distinct people cannot, from their peculiar situation, be considered to have been tacitly surrendered. But the frequent conflicts that have occurred between the colonists and the Aborigines within the limits of the colony of New South Wales make it, I think, sufficiently manifest that the Aboriginal tribes are neither a conquered people, nor have tacitly acquiesced in the supremacy of the settlers.

He also stated:

> I repeat that I am not aware of any express enactment or treaty subjecting the Aborigines of this colony to the English colonial law, and I have shown that the Aborigines cannot be considered as Foreigners in a Kingdom which is their own.

Justice Willis also reasoned that:

> Aboriginal people remained 'unconquered and free, entitled to be regarded as 'self-governing communities'. Their rights 'as distinct people' could not be considered to have been 'tacitly surrendered'. As they were 'by no means devoid of legal capacity' and had 'laws and usages of their own', 'treaties should be made with them'. The

colonists were ‘uninvited intruders’, the Aborigines ‘the native sovereigns of the soil’.

[*R. v. Bonjon* 1841, Supreme Court of New South Wales, Port Phillip District, April 1841 in Macquarie University Decisions of the Superior Courts of New South Wales 1788-1899]

ADMISSIONS AGAINST INTEREST in MABO

R v Bonjon 1841 was not cited in the Mabo High Court decision, but the High Court did in fact uphold this decision when they ruled that ‘native’ rights exists to all in this Country, which comes from their Law, culture and customs. In fact this ruling now affirms that First Nations Peoples’ Law, culture and customs are now part of the British common law of Australia and recognised in the Australian legal system.

One of the key High Court rulings in Mabo is at paragraph 43:

> 43. However, recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if the recognition were to fracture a skeletal principle of our legal system. The proposition that the Crown became the beneficial owner of all colonial land on first settlement has been supported by more than a disregard of indigenous rights and interests. It is necessary to consider these other reasons for past disregard of indigenous rights and interests and then to return to a consideration of the question whether and in what way our contemporary common law recognizes such rights and interests in land.

First Nations’ Law and custom is therefore recognised as having significance and, I say, a higher position than that of the colonial powers. The High Court judges reasoned at para 49:

> 49. … It is not surprising that the **fiction** that land granted by the Crown had been *beneficially* owned by the Crown was translated to the colonies and that Crown grants should be seen as the foundation of the doctrine of tenure which is an essential principle of our land law. It is far too late in the day to contemplate an allodial or other system of land ownership. Land in Australia which has been granted by the Crown is held on a tenure of some kind and the titles acquired under the accepted land law cannot be disturbed. [emphasis added]

This ruling is designed as an attempt to shore up existing land tenures, but if the Yorta Yorta now argue for compensation at today's prices, then an argument will be: How was the land acquired from the Yorta Yorta in the first instance. The reality is the land was 'acquired' as a result of colonists *benefitting* from the proceeds of the crime of murder.

First Nation Peoples in Victoria have ruled and continue to rule their ancient societies under their spiritual Law/Laws as given to them by the Creators. This is the continental common law that the High Court in *Mabo* recognised when it stated that Aboriginal Law and customs are *sui generis,* that is 'unique'. At paragraph 65 the High Court stated it in this way:

> 65. … Native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law. [at para 65]

Significantly, the High Court failed miserably in its duty to uphold its foundation document, the *Magna Carta,* which states at Article 39:

> (39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

Article 40 states:

> '… to no-one shall we deny or delay right or justice'.

Instead, the full bench of the High Court in Mabo admitted that it would uphold the occupying power's colonial skeletal framework and that it did not have the courage to set a just course for future generations, when they reasoned at paragraph 29:

> 29. … In discharging its duty to declare the common law of Australia, 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.

One does not have to be a trained lawyer to understand what the High Court did in Mabo when it made this statement. But for those who may miss the point, the High Court chose to discriminate against the absolute sovereign rights of First Nations in Australia, thus making a mockery of the so-called judicial system, which is tasked with the duty to resolve matters that are unjust and to right wrongs. In this case, the High Court discriminated against First Nations in Australia, in order to uphold and maintain the powers of the occupying State, thereby denying any just outcome for First Nations Peoples.

In *The Australian 'Songlines': Some glosses for recognition*, Professor Gary Lilienthal and Nehaluddin Ahmad have published a legal perspective on continental common law, which affirms what the Sovereignty Movement has been articulating for years:

> Australian indigenous land title is communal allodial title, as a bundle of subsisting rights by operation of Australian Continental Common Law, which therefore cannot be extinguished by the fraud inherent in frame transformation. Indigenous land title is true communal allodial title, beset by a fraudulent colonial occupation, suggesting a lack of internal reason in colonial policy and administration. Successive governments have tried to frame transform the highly sophisticated and ancient indigenous legal and social system, including sophisticated celestial mapping and navigation systems, into mere religious art. [(2017) 23 JCULR]

We can understand why the Victorian Parliament is reluctant to acknowledge and Respect First Nations' sovereignty in Victoria. To recognise First Nations sovereignty will negate the powers of the colonial State. Clearly, by taking this into account we have a legal stalemate from the outset.

To treaty on these terms will legitimise the occupation of the foreign power. Your people must demand equality in the proposed negotiations. We know the concerns, because to see the Yorta Yorta as equals will lessen the State of Victoria's powers, as **there would have to be a power-sharing agreement before any negotiations.** This is now the challenge.

It is from this position that the Yorta Yorta Nation's delegates need to argue that the High Court in Mabo, despite being discriminatory and biased in their decision-making, did, however, hold at paragraph 49 as quoted above, and at paragraph 51:

> 51. …But if the land were occupied by the indigenous inhabitants and their rights and interests in the land are recognized by the common law, the radical title which is acquired with the acquisition of sovereignty cannot be taken to confer an *absolute beneficial title* to the occupied land. [emphasis added]

When you look at the legal definition of **beneficial rights,** the Victorian Government has been breaking ALL laws since the parliament first created the legislature in Victoria. This is because it has been making laws in the parliament on the premise that it had *beneficial* rights to do so in respect of land. This has NEVER been the case. Victoria has never had the power to determine a system of land tenure that takes away the absolute proprietary rights of First Nations Peoples without just terms compensation. I argue that the Yorta Yorta decision by Justice Olney in the Federal Court and the appeal that upheld Olney's decision in the High Court have no legal foundation to this day and are a major fraud against the people, because the decision does not comply with the Mabo rulings. I reiterate paragraph 65 in the Mabo judgment said:

> 65. … Native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law. [at para 65]

Yet here in the Yorta Yorta case, we have a High Court making a decision that is contrary.

The 'tide of history' cannot 'wash away' the Law of the Land.

On this point, I digress in order to say that the High Court's decision to uphold Justice Olney's reasoning and denial of Native Title rights in favour of the Yorta Yorta represents yet again the maintenance of the skeletal framework of *status quo.* It is somewhat disturbing to realise that the High Court's decision is suspect.

The High court, on the one hand in Mabo in 1992, held that the Crown did not get a *beneficial* radical title, yet upheld a decision that suggests the Victorian State Government's land tenure system was valid. With this being the case, the High Court contradicted the earlier decision in Mabo, where it held that the Crown could not assume a *beneficial* radical title, if the land were occupied by native inhabitants at the time of occupation of that particular area of land. What this means for the Yorta Yorta is that the court held that the

traditions of the Yorta Yorta, based on Edward Curr's *Recollections,* did not exist at the time of their Native Title claim in 1994.

In concluding this consideration, the obvious question is: Why then are the Victorian Government officials negotiating with the Yorta Yorta when entering into various proactive programs for the Yorta Yorta on Country which the Victorian Government recognises as Yorta Yorta, even to the extent that they are, or have, negotiated some form of land settlement deal plus additionally they are entering into joint management of the Barmah Forest. I leave this thought with you for you to consider.

SIGNIFICANCE of PACIFIC ISLANDERS PROTECTION ACTS 1872 and 1875

Although the High Court in Mabo referred at paragraph 5 to the *Pacific Islanders Protection Acts 1872 and 1875,* it failed to analyse them and rule on their fundamental importance. The judges stated that the Acts 'were enacted to stamp out blackbirding' and added that:

> 'However, the 1875 Act expressly disavowed "any claim or title whatsoever to dominion or sovereignty over any such islands or places" and any intention "to derogate from the rights of the tribes or people inhabiting such islands or places, or of chiefs or rulers thereof, to such sovereignty or dominion".

The fact is that the 1872 Act defines its reach to include all the colonies of Australia, while the 1875 Act affirms that Britain was not claiming sovereignty over Australia and respected the rights of the 'tribes or people' to 'such sovereignty or dominion'. The 1875 Act is unquestionably part of Australian domestic law as it was gazetted in New South Wales on 24 November 1875 and in Victoria on 26 November 1875 by the respective State Governors.

POWER SHARING

From the knowledge and experience gained from the NAC's endeavours, a sovereign Treaty between Nation States can create a sharing of power. In this regard cognisance must be paid to the formal relationships between State parties, who engage in the process of treaty-making.

I have spoken in this paper about choices between a domestic approach and the international pathway. At this point I direct your attention to what the Victorian Government has already stated in the 'Treaty Fact sheet', where it alludes to being able to negotiate a treaty *only* in terms of a national/Commonwealth treaty. This statement comes from left field, because one needs to ask: If the Victorian Government is seeking to negotiate a Treaty with First Nations based on the State of of Victoria's constitutional rights, then a query is raised as to why this reference is made. It begs the question: Does the Victorian Government have within its own powers, constitution or otherwise, the right to negotiate any form of treaty? It must be remembered that, if we are talking about a sovereign treaty then, of course, the Government of the Commonwealth must be included, because it is only the Commonwealth Government which has the constitutional and legal right to negotiate such treaties under Section 51 (29). the External Affairs power of the Australian Constitution.

From personal experience and discussions at the highest level of the Commonwealth Government, together with numerous briefings with various members of different law faculties both within Australia and overseas, I learnt of the subtleties, overt and covert, of various legal methods by which a Treaty can be negotiated in an open and transparent manner, or how agreements can be dressed up to look like treaties, but in essence they are merely contracts, which set out arrangements and/or understandings.

It is telling that the Victorian Treaty Fact Sheet describes its limitations under its own constitution. An agreement with the Victorian Government can *only* be classified as a domestic so-called Treaty, a contract, compact, arrangement or whatever name the parties choose, e.g. 'Makaratta'. This now makes it very easy to understand why the Victorian Government rejected Lidia Thorpe's proposal that the First Nations Peoples of Victoria remain sovereign entities under their own Law and culture. The reference to a national treaty establishes the key punchline in the Fact Sheet, to quote:

Victoria can only *advocate* for what is included in a national treaty. [emphasis added]

Recognition of any kind in respect of the continuing sovereignty of First Nations in Victoria strikes out Victoria's ability to be a legitimate State and thereby affirms the First Nations Law of the land in Victoria,

Victoria has very limited powers. One power that it does not have is the power to recognise and negotiate a Sovereign Treaty with any First Nation within the state of Victoria. It can only do this, if the Commonwealth Government were to enter into a new understanding with all First Nations Peoples in Australia that they were indeed individual sovereign entities, whose sovereignty continues to this day. The NAC was very astute in its demand for prerequisites and understandings prior to the commencement of the negotiation of a Treaty. To have gained an agreement that First Nations' sovereignty did exist at the time of first contact and that First Nation's proprietary interest in land was always a material legal fact, is now vindicated by the Mabo judgement.

Academic research carried out from 1981 to 1984, reveals conclusions that set new strategic directions. The emphasis by certain members of the Commonwealth Government was that Australia's view on treaties was that they were only negotiated between sovereign states in respect of such things as trade, borders, defence and other legal arrangements. This is because one Nation State cannot encroach upon the jurisdictional power to make decisions of another. So, power-sharing or integrated approaches to world affairs could only be done by way of Treaties between those sovereign states. Many in Australia now seek to dismiss any talk of the continuing sovereign authority of the 'native' inhabitants, the First Nations, of an occupied country.

During my experience in working towards a framework for a national treaty, I learnt that sovereignty is a central issue for First Nations Peoples going forward. There is too little discussion among First Nations. This is because our situation, as it stands, sees complete fragmentation in some respects dysfunction, disunity, and lack of education to understand the rights that have now been created through the United Nations and other international bodies. There are now processes to free people from subjugation and tyranny. There are also international efforts to create a balance so that otherness and unpreparedness are not an

instrument that can be used against Peoples desiring to be free, as spelt out in the United Nations Charter.

These treaty talks and talks of constitutional inclusion by way of referendum are but instruments of diversion. Diversion from the real issues that I know First Nations Peoples want addressed, but we have one weakness amongst First Nations throughout Australia. It's called poverty and dependency. Our peoples' ability to speak freely and openly about their true ambitions is indeed thwarted by seeking to survive and maintaining family unity. Anything and everything that may have a long-term solution to our current problems are too far into the distance. Unfortunately, this does create a barrier and prevents our people from being able to talk freely and set the correct medium and long-term goals.

BETWEEN A ROCK and a HARD PLACE

When I speak of power-sharing, I can reach back through my treasure-chest of experiences. I do recall two very important conversations about the NAC's proposed Treaty framework. Firstly, an informal discussion with Emeritus Professor Colin Tatz, who at the time was a professor at Macquarie University; Peter Bain, Senior lecturer at the Australian Nation University, along with a number of other law lecturers, helped me to form a conclusion that establishing a national treaty framework was going to be an enormous challenge. The following points created that concern.

The first issue was: Do we assert our independence under international law, having maintained our sovereignty at all material time, as I have been discussing in this paper, or do we accept the occupying powers' right to rule and thus cede our sovereignty and rights to the colonial powers and ultimately the Crown.

I learnt that a key issue at stake is: Are we to become subordinate to an occupying power? If we engage with the State then we validate their right to rule over us, *if* there are no preconditions set. In other words, we would be legitimising an illegal foreign occupation by cession or acquiescence in favour our chosen issues and subjects being addressed, such as controlling our own affairs at the local level; social development programmes; development of the Nations' economics; the co-existence of our Law and culture alongside the occupiers' British common law; the right to benefit from natural resources; the right to influence laws on

how our Country is managed and cared for; the question of citizenship and identity; the right to bi-cultural education; and the right to speak our own languages as a first language. Finally, the right to observe and practice our spirituality; right to protect our sacred and spiritual places and spaces, in order to maintain our ceremonial obligations to our Creators . There are of course many other issues. Peaceful co-existence, Respect and social integration are just a few topics that must also be addressed and settled in order to regain the tranquillity that is at the heart of our culture and responsibility to Country.

The legal minds all concluded that the question of sovereignty is central to all. Everything pivots around this issue.

The challenge for First Nations and Peoples and the occupying powers is: What do we gain from future negotiations and what do we agree to give up? In every treaty negotiation there is give and take. So, it must be understood that certain aspects of each other's sovereign powers must be given up in exchange for a peaceful settlement. There is never a treaty negotiated in any part of the world that does not require a trade-off of some kind or other.

A second point that I recall was a decision by the NAC to engage an economist to work with the Treaty Sub-committee to show how the NAC's endeavours to procure First Nations economic growth would impact on the economy of Australia, especially the fact that the NAC was seeking restitution, reparations and compensation for the colonial wrongdoings. Such claims required a complete assessment of the impacts that reparations, restitution and compensation would have on the economy of the country.

I recall having a meeting in Professor Garth Nettheim's office at the University of New South Wales, where Dr HC 'Nugget' Coombs, former Governor of the Reserve Bank of Australia, was present. During my talks with Professor Garth Nettheim. I enquired of Nugget Coombs' availability to work with the NAC on providing such advice and direction on these important economic matters. These discussions certainly highlighted an expressed concern as Dr Coombs understood the gravity of the impacts that such a strategy would have upon the wider economy. I was alarmed that Dr Coombs had so quickly realised how the NAC was planning to develop the national framework for a sustainable economic program . He was not aware of the NAC's astuteness and understanding of the true nature of treaty-making. In fact, he said with words to the effect of:

These are extremely serious matters and the NAC will find themselves treading on very thin glass.

The conversation ended with Nugget Coombs declining to be involved as an advisor on the economics of the Treaty. This came as a very big surprise, because after all, he was the chair of the non-Aboriginal Treaty Support Committee, which he himself founded.

MAJOR EDUCATION PROGRAM REQUIRED

There needs to be a major educational program prior to formal negotiations commencing, so that our Nations can be fully informed of all their rights. There is so much to learn. If these issues are not addressed up front, First Nations Peoples will only be negotiating arrangements, in respect of their own individual domestic affairs.

The colonisers knew what they were doing when they were 'clearing the land' of the Peoples of the First Nations through massacre and poisoning. The fundamental basis of colonisation is to exterminate 'native' populations, if the land is not already *terra nullius.* This was not achieved in Australia, much to the disgust and surprise of Britain. Rules were then set in place at the behest of the British Parliament to set aside lands for the 'native' population and thereby bring them under the protection of the British law, in order to prevent further killings, as was reported to the British Select Committee inquiry of 1836-37.

It is an absolute imperative that the Yorta Yorta investigate and fully understand treaty-making. To not be entirely informed on this subject will be to the detriment of the Yorta Yorta Nation.

END OF THE NAC TREATY PROCESS

The extensive NAC treaty research was terminated by the Hawke Labor Government, which withdrew the NAC's funding at budget time in mid-1985, thus shutting down the whole Treaty process. The NAC was defunded within a month of a major 'Land is Life' gathering on the steps of Parliament House in Canberra, where over a thousand grassroots people had travelled, even in cattle trucks, from the Northern Territory, Western Australia and from all over the continent. After discussing their pressing issues, they took their sovereignty stand to the steps of Parliament House. The 'Land is Life' gathering asked the NAC where they stod on sovereignty. The Chair at that time was the late Rob Riley, who replied that he would have an answer in 24 hours. After consulting, he returned with NAC delegates and stood together on sovereignty with the grassroots gathering. This was May 1985. By June 1985 the NAC was defunded, such was (and is) the governments' fear of the sovereignty movement.

From mid-1985 onwards Kevin Gilbert (1933-1993), who was active at the 'Land is Life' meeting, began the Treaty 88 campaign to educate grassroots First Nations people on the meaning of 'sovereignty' in the lead-up to the 1988 Bicentennial Boycott. He carefully explained how the early so-called treaties with Native Canadians and Native Americans were actually, by definition, contracts, by definition in contemporary international law. The Victorian offer of 'treaty' differs little. It is only sovereign treaties negotiated between sovereign powers that are treaties by contemporary definition.

International treaties can affirm a Nation's sovereignty and agree on power-sharing arrangements, without cession. [Gilbert, Kevin, *Aboriginal Sovereignty, Justice, the Law and Land*]

The Hawke Labor government's hypocrisy was highlighted when, on 12 June 1988, former Prime Minister Bob Hawke falsely agreed to a Treaty process through the Barunga Statement. This never saw the light of day, because he is now on record as back flipping the day after agreeing to negotiate a treaty, instead calling it a 'compact', just another name for a domestic agreement between parties.

AUSTRALIA ACT 1986

After the NAC was shut down in 1985, Prime Minister Hawke, his Attorney-General, Michael Lavarch, and Foreign Affairs Minister, Gareth Evans, travelled to England and there negotiated the 1986 *Australia Act* which the British Parliament legislated.

If the Yorta Yorta are to proceed with negotiations for a so-called Treaty, then it is essential for the people to understand the *Australia Act 1986*, as passed by the British Parliament. It was agreed that Australia shall continue its existence under the British Crown's sovereignty and maintain its status as a self-governing State in the global community, exercising a right of self-determination to govern for and on behalf of the citizens of Australia.
It was also legislated in the *Australia Act 1986* that the British Parliament shall no longer have parliamentary powers to make any laws for the State colonies, nor for the Federated Commonwealth Government.

The *Australia Act* also stated that Australian courts can establish their own legal precedents without having to observe British common law legal precedents.

Another telling factor that arises from the 1986 *Australia Act*, is the fact that Australia and its federated colonial states can now pass laws that are repugnant to the laws of Britain.

These are some of the key factors that were the outcomes from the Labor Government's negotiations in England. Despite these outcomes, Australia continues to govern under a jurisdiction that is authorised by the sovereignty of the Crown of a foreign power.

This must be considered in light of the fact that there are only three possible ways by which colonising authorities could gain beneficial title to the land. Complications arise for the colonial States, however, when they argue that this was a settled country, peacefully (sic) annexed to Britain, but the history of frontier conflicts tells a very different story. See for example: www.australianfrontierconflicts.com.au

This is why the teaching of Australian history is not widespread in schools and tertiary institutions throughout the country, because the colonies did, and later Australia as a nation . have *benefitted* from the proceeds of crime.

Take away the Crown's assertion of sovereignty over Australia, then Australia will no longer be a legal State, because it has no sovereignty of its own.

First Nations are still the sovereigns of the soil. Our continuing Law, culture and customs are the Laws of the Land and remain as such until otherwise ceded, acquiesced or traded away by way of agreements and/or so-called treaties, unless there is due diligence by First Nations Peoples to ensure that there are clear and unambiguous clauses that specifically state that any and all agreements or so-called treaties do NOT, nor can be construed in any way, shape or form, to indicate that you, as a Nation, have traded away your sovereignty through cession, or acquiescence.

I recommend that the Yorta Yorta do not permit any ambiguities or uncertainties to occur on the question of your sovereignty. Do not to allow your words to be construed or implied in any way that may suggest that you have traded your sovereign rights away. It must be made very clear that your sovereignty remains fully intact, without any intentions to the contrary, if this is your choice. Always remember that Yorta Yorta comes from your Law, culture and customs, which to this day remain the Law of the land. This will only be altered if the Yorta Yorta agree, by way of a referendum among yourselves, to a process of cession in favour of domestic rights, as negotiated.

The alternative decision is to be an independent Nation. Your negotiations should focus on power-sharing, exchanging certain things, provided the Victorian State, (along with the Commonwealth Government), agrees to compensation, reparation, restitution and your right to exercise your head of power to govern yourselves as a self-determining Nation.

If you do not choose to be an independent Nation with your own self-governing powers to rule your lands and your Peoples, then you will return to where you are at present. The only difference being you will have a legal contract in place, recognising the limitation of your power to govern yourselves, in accordance with what the State of Victoria permits.

UNDERSTANDING POWER of a SOVEREIGN TREATY versus a DOMESTIC AGREEMENT, COMPACT, or CONTRACTS – often wrongly referred to as Treaties

The concern that caused Bob Hawke and his entourage to go to England in 1986 was partly influenced by the letter dated 15 July 1980 to the Department of Aboriginal Affairs from the Attorney-General's office in relation to the use of the word 'Treaty'. Please read my 2009 paper *That Word Treaty* at: http://nationalunitygovernment.org/content/word-treaty-value-historical-insights

It will be noticed in this paper that the Commonwealth Government was extremely concerned with the NAC's use of the word Treaty. Firstly, because of its international connotations, and secondly because of the outcome of the court case *Cherokee Nation v State of Georgia, 1831*. I recommend that prior to any negotiations taking place, your key negotiators become very familiar with what was held in that case. It established the right of the Cherokee Nation to have sovereign powers to govern themselves within their own territories.

Extract from *That Word Treaty,* 2009*:*

> The NAC knew full well the Federal Government would only have a single position on the issue of sovereignty while, on the other hand, the NAC was already exploring various other options, both domestically and internationally. Our African tour was the NAC's way of informing the Government that we knew other options were available to us, as colonised Nations and Peoples.
>
> The NAC was fully aware of the position the Federal Government had chosen for themselves, because the Government was constantly arguing over what we considered were semantics. This was best illustrated in the Government's written response by the Minister for Aboriginal Affairs, Peter Baume, to the Makarrata/Treaty sub-committee declaring on 3 March 1981:
>
> > Although the word 'Treaty' is occasionally used in the domestic context (e.g. a sale of land by way of a private treaty), the word 'treaty' is ordinarily used to refer to a kind of international agreement. In that sense it is clearly

> inapplicable to any form of agreement between the Commonwealth and Aborigines since the latter are not a 'nation' ...

The real measure of the Federal Government's seriousness and commitment to these negotiations can be best demonstrated by understanding the depths of their thoughts in their written response.

In fact, in the same document on the issue of nationhood of Aboriginal Peoples, Minister Baume expressed concern that if the government were not diligent and serious enough about the Treaty negotiations, they were facing a potential disaster. He wrote:

> The material available to me suggests that the social organisation of Aboriginal tribes and other communities in Australia is different in significant respects from those other communities...

He went on to cite the United States court case The Cherokee Nation v The State of Georgia (1831). Using this case, Minister Baume continued:

> It may be that, the development of the NAC - albeit a development based on Australian law - an Australian Aboriginal 'community' is developing and will develop to the point where, if the United States models are followed, it might conceivably become appropriate to speak of an arrangement of that organised community and the Commonwealth as a 'treaty'. However, the Attorney-General recently advised the Prime Minister in a letter dated 15 July 1980, that having regard to the connotations of the word 'treaty' in international context, it would be very desirable to avoid the word 'treaty' in relation to the agreement, and that instead a term such as 'Makarrata' might be used if, upon full examination, it was found appropriate. He went on to say that it would be possible to include in the arrangement as if they were a community separate from the Australian community, and provisions to ensure that the arrangement was not conceived as being analogous to a treaty between separate nation States.' In considering whether such provisions should be included account should be taken of any risk that, in the absence of sufficiently explicit provisions to the contrary, a claim might be made that the agreement accorded

> a status on which Aboriginals could base a right of 'Self-determination' as a 'people'.

At the end of this quote, the Minister cited in brackets an example when he referred to the United States (sic) Charter, Article 1, and the Declaration on the Granting of Independence to Colonial Countries and Peoples.

In concluding this point Minister Baume said in clause 8:

> I note that the resolution by the NAC requests a treaty of commitment between the Australian government and the 'Aboriginal nation'. For the reasons mentioned above the use of *that word* should be avoided by the Commonwealth. [added emphasis]

FIRST NATIONS TREATYING WITH EACH OTHER

It may be an advantage for the First Nations in Victoria to first treaty amongst themselves, where they establish their sovereign powers and governance and thereby recognise their right to govern under their Law and culture. Furthermore, such a treaty, or treaties, can and will establish a united commitment to support each other's rights by observing their Law and culture, as we have done for thousands of years.

QUESTION of FIRST NATIONS CITIZENSHIP

I draw your attention to a very important statement made by the former Prime Minister Sir Robert Menzies. I strongly urge Yorta Yorta to be mindful of what Menzies was saying in an oration to the Federal Parliament on 1 April 1965, when the Commonwealth Parliament debated the proposed amendment to two sections of the Australian Constitution. Prime Minister Sir Robert Menzies expressed concern about the possible legal outcomes when he said:

> …the removal of what has been called the "discriminatory provisions" of section 51. On that I would, with great respect, challenge the assumption that is made. May I read

the provision to the House in order to refresh its memory? Section 51 states—The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:—(xxvi.) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws: It has been suggested that that provision discriminates against the Aborigines of Australia.

I would have thought that the contrary was the fact. Parliament has been given power to make discriminatory laws in relation to the people of any race—special laws which would relate to them and not to other people; laws which would treat them as people who stood outside the normal grasp of the law, enjoying its benefits and sustaining its burdens in common with all other citizens. I would have thought that the perfect state of affairs in Australia would be that any Aboriginal citizen felt that he did stand equal with every other citizen before the law, enjoyed its benefits and took his own part on a proper basis in sustaining its burdens. I have no doubt whatever that this provision in the Constitution was designed having regard to conditions that existed at that time and the possibility of having to make a special law dealing with, for example, kanaka labourers—perhaps a special law to deport them from the country or to confine them to some particular area. There was a good deal of discussion about this at the time this provision was framed. Therefore the framers of the Constitution inserted this provision, but they left out the Aboriginal race because they did not want to discriminate against the people of the aboriginal race. All we have to do now is to cross out this reference “other than the aboriginal race" and we confer on this Parliament a power to make a special law which relates to the Aborigines and to no other people.

MR REYNOLDS.—But

Sir ROBERT MENZIES.—If you do not mind I want to pursue this. I do not think it is at all out of place. There is a second point about it, and this does concern me. If the Commonwealth, as one of its heads of power under section 51, has the right to pass special laws with respect to the Aboriginal race, I wonder what limitations will be on that separate head of power. Would this enable the Parliament to set up a separate body of industrial laws relating to Aborigines or some other kind of law— health laws, quarantine laws or laws under any of the other powers of the Parliament? It may well be true that it could because, make no mistake about it; this would be a head of

> power standing not inferior to any other power contained in section 51. That is a matter that requires a great deal of thought. I do not want honorable members to think that I have arrived at some positive conclusion about it. I am raising it here in order to indicate that it wants a good deal of thought and that we would want to give it a great deal more investigation than we have before we favoured changing the provision in section 51. But we would be very happy to see the end of section 127.
>
> [at 533 and 534 Hansard No. 13, Thursday, 1 April 1965 25th Parliament First Session—3rd period]

Without going into too much detail, Sir Robert Menzies was cautioning the Commonwealth Parliament about some serious material legal matters. The first was that the parliament could make laws that were to the detriment of First Nations Peoples and he illustrated this point when he referred to the Kanak labourers. That is, if the referendum were to be successful then a rogue authoritarian minister, representing the portfolio of Aboriginal Affairs, could recommend legislation to imprison Aboriginal people at will and take away all their rights, just as a prisoner would lose his or her rights once committed into custody.
The second part to Menzies' statement is that because Aboriginal people were not seen by the Commonwealth as British subjects, or for that matter, citizens of the Commonwealth of Australia, any laws that the Commonwealth may care to address could be made as a 'special measure' under the Australian Constitution for members of the 'Aboriginal race' only.

As we have seen from experience, Menzies' considerations have won through, because Australia in its reporting obligation to the United Nations speaks of 'special measure' programs especially targeting the Aboriginal and Torres Strait Islander race.

The Northern Territory Emergency Response legislation (NTER) is a classic example of an abuse of power under section 51 (xxvi). This abuse of power could only be effected by a rogue Minister for Aboriginal Affairs, Mal Brough, and a rogue Prime Minister, John Howard, who showed their racist colours. The Northern Territory Emergency Response legislation (NTER) only became legal because the Commonwealth abused its parliamentary powers, when it suspended the *Racial Discrimination Act 1975* (RDA) to achieve this outcome. We should be reminded that the Minister, Mal Brough, got executive approval for his rogue actions without having to go through the full parliamentary process. There was no debate at all.

INTERNATIONAL LAW – SELF DETERMINATION & TREATY

If the Yorta Yorta Nation and its Peoples choose not to be domesticated through a domestic so-called 'Treaty' process, or a local comprehensive settlement agreement, then the Yorta Yorta Nation's only other recourse is to decide if it wants to exercise the right of self-determination as a free and independent Nation under international Law. If this course is taken, then the reality will be that the Yorta Yorta Nation and its Peoples will be seeking, or should I say demanding, to be recognised as a sovereign independent State under international law.

In respect of such an option being agreed to, the Yorta Yorta need to understand that the question on the legality of this course of action has already been affirmed in international law. The United Nations, through the Security Council and the UN General Assembly, sought legal opinion and advice from the International Court of Justice (ICJ) on similar actions taken by different States and their Peoples. These cases relate to:

- the right of self-determination and the right to decolonise for the Western Sahara Bedouins from the colonising state of Spain;

- the actions of the Albanians in Declaring Independence from the dominant state of Yugoslavia, where they were suffering an humanitarian crisis and discrimination. In freeing themselves, Yugoslavia broke up into five new states, which are now recognised under international law. The Albanians' Nation is now known as Kosovo. The other states are Bosnia-Herzegovna, Croatia, Serbia and Montenegro;

- the illegal building of a wall between Palestine and Israel in the occupation of Palestinians' lands by Israel, as a foreign occupying power. The ICJ ruled that Palestine is entitled to its sovereign rights and to maintain sovereignty and control of its own lands. Despite these rulings there are no legal or enforceable powers that the UN could engage while ever the UN Security Council is controlled by the USA, France, China, Russia and Britain, each of whom have a single veto power;

- The fourth case was initiated by Portugal, regarding Timor Leste's right of self-determination and its right to be independent. Timor Leste also became a new UN Member Nation State.

Each of these International Court of Justice cases mirror many of the questions the Yorta Yorta Nation negotiators need to ask, if they were to seek similar advice from the ICJ.

I therefore recommend that the Yorta Yorta Nation obtain copies of these International Court of Justice cases, in order to understand your legal position in the international community and the rights that you have, if the Yorta Yorta Nation choses to pursue its independent statehood under international Law. I attach an extract from these relevant ICJ opinions.

SHORT LIST of RELEVANT INTERNATIONAL COURT of JUSTICE CASES

Western Sahara (Advisory Opinion), (16 October 1975) Western Sahara Case (62) (1975) International Court of Justice, ICJR

Accordance with international law of the unilateral declaration of independence in respect of Kosovo, 27 July 2010, ICJ

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Summary of the Advisory Opinion of 9 July 2004

East Timor (Portugal v. Australia) ICJ, 30 June 1995 Dissenting opinion of Judge Weeramantry.

AN ICJ OPINION on SELF-DETERMINATION

In *East Timor (Portugal v. Australia)* 1995, Judge Weeramantry's dissenting opinion defined for the first time the right of self-determination for Peoples and the consequences that flow from self-determination.

> The rights of self-determination and permanent sovereignty over natural resources are rights *erga omnes* belonging to the people of East Timor, and therefore generate a

> corresponding duty upon all States, including the Respondent, to recognize and respect those rights. The act of being party to a treaty recognizing that East Timor, (admittedly a non-self governing territory and recognized as such by the United Nations), has been incorporated in another State, which treaty deals with a valuable non-renewable resource of the people of East Timor for an initial period of forty years, without reference to them or their authorized representative, raises substantial doubts regarding the compatibility of these acts with the rights of the people of East Timor and the obligations of Australia. The Court could have proceeded to determine whether a course of action had been made out against Australia on such actions, without the need for any adjudication concerning Indonesia.
>
> *East Timor (Portugal v. Australia)* ICJ, 30 June 1995

Erga omnes means 'towards all' or 'towards everyone'. In legal terminology, *erga omnes* rights or obligations are owed toward all. For instance, a property right is an *erga omnes* entitlement, and therefore enforceable against anybody infringing that right. It is an established legal norm that cannot be derogated from.

A second important norm is *jus cogens* which refers to certain fundamental, overriding principles of international law, known as pre-emptory norms, from which no derogation is ever permitted, e.g. prohibition of genocide.

Judge Weeramantry's dissenting opinion is important. Indonesia's refusal to accept the jurisdiction of the ICJ meant that the matter could not be fully litigated, as one would have expected in a court action. Significantly, Judge Weeramantry's judgement clarified the facets of exercising the right of self-determination and the consequences that flow from this, i.e. permanent sovereignty over natural resources and the People's right to be self-determining.

This dissenting opinion has now set the legal benchmark on the rights of Peoples seeking to be self-determining and independent.

After Timor Leste gained full independence in 2002, it challenged Australia over the unjust and exploitative 2003 *Timor Sea Treaty.* After several years of negotiation, Timor Leste and Australia agreed on the amended *Timor Sea Treaty* that was signed on 6 March 2018 in New York: http://timor-leste.gov.tl/wp-content/uploads/2010/03/R_2003_2-Timor-Treaty.pdf

The 2018 *Timor Sea Treaty* is a recent example of a sovereign treaty negotiated between Australia and a newly formed self-determining Nation, regarding its permanent sovereignty over its natural resources for their economic development.

In 1975 the late Prime Minister, Gough Whitlam, initiated a process to transfer all powers of governance to the Peoples of Papua Nuigini/Papua New Guinea, in order for them to become a self-determining independent Nation. Prior to Whitlam coming into office, Papua Nuigini was a colony, a protectorate under Australian administrative powers granted to Australia by the British parliament in 1901.

The second country that Australia liberated was Nauru. Like Papua Nuigini, Nauru was a protectorate administered under Australian rule. Upon transferring power and independence to Nauru, it was Australia that assisted them to draft their constitution as a self-determining free country. It is very relevant to know that Nauru is a very small island with a permanent population of around 11,000, with little ability to generate any significant wealth from their natural resources or industries, once the non-renewable phosphate resource is exhausted.

The Catalonian dispute is an ongoing struggle for independence is similar to our struggle. The Catalonians most recent effort to free themselves was to conduct a referendum amongst themselves. They were voting to chose whether they maintained their own national identity as Catalonians, but his referendum was violently squashed by the occupying Spanish regime. Like First Nations in Australia, Catalonians are by definition 'Catalonians' with their own cultural identity, language, and resources, which are not Spanish. Catalonians, like the Palestinians, seek to have their own lands and identity recognised and demand the right to be free from subjugation and domination by a colonial occupying State. There are numerous Peoples around the world who are in the same situation as First Nations in Australian and are, and have, continue a violent struggle for independence.

HUMAN RIGHTS

UN Declaration on the Rights of Indigenous Peoples

While many First Nations Peoples focus on the UN *Declaration on the Rights of Indigenous Peoples*, we should never allow ourselves to be restricted to this declaration. In the true legal

sense under international law, it sets out the fundamental principles of asserted rights that are already imported into domestic law, through ratified international conventions on Human Rights for all Peoples: see https://undocs.org/A/RES/61/295

The *Declaration on the Rights of Indigenous Peoples* is frequently described by the Australian Government as an 'aspirational' document, but, in fact, the articles are already international laws, ratified by Australia and brought into domestic law as demonstrated in the table included in *Human Rights at Your Fingertips* page 8: https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-your-fingertips

It is article 46 of the *Declaration on the Rights of Indigenous Peoples*, which could deny self-determination and independence for First Nations because it states:

> Article 46
> 1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
>
> 2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
>
> 3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

This control by the UN Member States was balanced by the previous Article 45:

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Australia continues to be recalcitrant and plays dumb knowing full well that these rights will be argued by First Nations.

HUMAN RIGHTS COVENANTS

I strongly recommend that the Yorta Yorta Nation maintains a very strong push to ensure that all the rights that are provided for under the UN Charter, International Covenant on Civil and Political Rights (ICCPR), International Covenant of Economic Social and Cultural Rights (ICESCR), International Covenant for the Elimination of All Forms of Racial Discrimination (ICERD), and others are enshrined in any agreement. All these rights must underpin all future negotiations and agreements. There can be no deviation from the rights that are prescribed by these international legal covenants.

The UN CHARTER 26 June 1945 affirms that it applies to nations large *and small*:

> WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of *nations large and small*, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, AND FOR THESE ENDS to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form,

have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

The difficulty for many First Nations in this case is having the ability and time to truly examine all of these rights and articulate them in such a way that they form the basis upon which you can take your People's arguments forward in a carefully articulated manner.

Whichever way the Yorta Yorta Nation and its Peoples chose to go, you need to have a very clearly defined position on the chosen pathway forward. That is, does Yorta Yorta become a self-governing territory under the Victorian colonial State laws, as negotiated with the occupying State, on the conditions agreed to from your negotiations. Or does Yorta Yorta assert your sovereign right be recognised and accepted as an independent State with all those rights associated with being a self-governing Nation?

In this case, the Yorta Yorta Nation must understand that exercising unceded Sovereignty means that the limits of your power are boundless and prescribed only by Yorta Yorta Nation Law, culture and customs as the governing Nation. This is Yorta Yorta's authority and your head of power to be self-governing.

LAWS THAT GOVERN TREATIES

Treaty of Westphalia

The original treaty-making process commenced in 1648 with *Treaty of Westphalia, a Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies*.

The Treaty itself and its purpose is defined on several international websites, e.g. http://avalon.law.yale.edu/17th_century/westphal.asp

The reason I refer to this Treaty is because it defines the ancient territorial boundaries of the different 'tribes' of Europe in the 1600s. These 'tribes' were war-like and constantly violently confronting each other for territorial rights and resources. The strongest leaders within the group became known as kings and each of these kings headed up their own military group, fighting for their land and existence as independent Peoples.

The Treaty of Westphalia, therefore, set out and recognised the boundaries of these kingdoms, which ultimately became known as 'Nation States' based on linguistic associations. There was a series of Peace Treaties, which became the Treaty of Westphalia that created modern Europe and freed the European States from dictatorship and domination by foreign leaders and the Catholic church.

We still see and hear remnants of these arguments to this day in terms of boundaries and territorial rights. So, history teaches us a lesson about the process you are about to enter into as a sovereign Nation. The rules have already been made that govern these Treaty-making processes in international law, which can also be used to guide First Nations Peoples.

It is also important to realise that *The Vienna Convention on the Law of Treaties* sets out the fundamental legal framework that establishes the validity of Treaty-making under international law: http://www.austlii.edu.au/au/other/dfat/treaties/1974/2.html

The Vienna Convention on the Law of Treaties creates a safety net, since international treaties need to conform to Human Rights covenants: https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-your-fingertips

RIGHT TO DECOLONISE

First Nations' aspiration to be free of the scourge of colonialism in all its manifestations is encapsulated in the Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by General Assembly resolution 1514 (XV) of 14 December 1960:

> The General Assembly,
>
> Mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom,
>
> Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of,

human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence,

A ware of the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples, which constitute a serious threat to world peace,

Considering the important role of the United Nations in assisting the movement for independence in Trust and Non-Self- Governing Territories,

Recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations,

Convinced that the continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace,

Affirming that peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law,

Believing that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,

Welcoming the emergence in recent years of a large number of dependent territories into freedom and independence, and recognizing the increasingly powerful trends towards freedom in such territories which have not yet attained independence,

Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory,

Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations;

And to this end Declares that:

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.
http://www.un.org/en/decolonization/declaration.shtml 1/2

Many UN Member States gained their independence through decolonisation, but First

Nations in Australia missed out due to the 'Blue Water Principle', which excluded Australia from decolonisation. Now is our time.

CONCLUSION

I have attempted to set out some fundamental issues that must be considered, when choosing to negotiate a comprehensive settlement for the Yorta Yorta Nation and Peoples.

We know that the occupying power is fearful of the First Nations assertion of sovereignty. Dr Stephen Davis of the Samuel Griffith Society of constitutional lawyers advised the Howard government in 1998:

> The issue of domestic sovereignty is set to dominate future international discussions of indigenous rights, and decisions made by the United Nations, together with precedents in other countries, could potentially change the map of this country. Land rights and native title in Australia are examples of a very dynamic debate which is open-ended, and which can be simply linked to international conventions and trends to develop a credible basis for a range of outcomes with far reaching and irreversible consequences.
>
> Australians tend to take their sovereignty for granted. That sovereignty is now being contested. We must become more aware of the issues, the players and be prepared to defend our sovereignty if we are to maintain it.
>
> [Stephen Davis, 1998, Native Title: A Path to Sovereignty, http://samuelgriffith.org.au/docs/vol9/v9chap11]

John Howard was very familiar with the possible consequences of negotiating sovereign treaties with First Nations. He also understood, based on the advice quoted above, that Australia could in no way take things for granted because First Nations' sovereignty is a real and live issue.

The terms and content of the Treaty is a decision for the Yorta Yorta Nation and its Peoples. The *Timor Sea Treaty* provides an example of the level of detail involved in negotiating a Treaty and the fact that if Australia can be part of negotiating the liberation of Papua Nuigini, Nauru and Timor Leste, then the same can happen for Sovereign First Nations of the island continent and its islands, now known as Australia.

Further reading:

- Timor Sea Treaty (with Australia, regarding economic resource development) http://timor-leste.gov.tl/wp-content/uploads/2010/03/R_2003_2-Timor-Treaty.pdf
- Anderson, Michael, 2009, *That Word Treaty*, http://nationalunitygovernment.org/content/word-treaty-value-historical-insights
- Gilbert, Kevin, 1987, Aboriginal Sovereignty, Justice, the Law and Land, Burrambinga Books
- Western Sahara (Advisory Opinion), (16 October 1975) Western Sahara Case (62) (1975) ICJR;
- Accordance with international law of the unilateral declaration of independence in respect of Kosovo, 27 July 2010, ICJ;
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Summary of the Advisory Opinion of 9 July 2004
- East Timor (Portugal v. Australia) ICJ, 30 June 1995 Dissenting opinion of Judge Weeramantry.
- https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/human-rights-your-fingertips
- http://nationalunitygovernment.org/content/uniting-understanding-digging-deep-source-and-denial-contested-sovereignties
- http://nationalunitygovernment.org/content/makarrata-v-treaties
- http://nationalunitygovernment.org/content/decolonisation-be-or-not-be-included-constitution
- http://nationalunitygovernment.org/content/overview-treaty-treaties-udis-and-recognise
- http://nationalunitygovernment.org/content/dangers-single-treaty
- http://nationalunitygovernment.org/content/statement-bush-songlines-can-bring-us-home
- https://www.ohchr.org/Documents/Issues/IPeoples/Seminars/Treaties/BP5.pdf
- http://nationalunitygovernment.org/content/first-nations-sovereignty-now-international-agenda
- Davis, Stephen, 1998, *Native Title: A Path to Sovereignty*, http://samuelgriffith.org.au/docs/vol9/v9chap11

- Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations July 1997, reported to the UN for the "Working Group on Indigenous Peoples" Final report by Mr. Miguel Alfonso Martinez Special Rapporteur http://hrlibrary.umn.edu/demo/TreatiesStatesIndigenousPopulations_Martinez.pdf
- http://www.austlii.edu.au/au/other/dfat/treaties/1974/2.html
- http://avalon.law.yale.edu/17th_century/westphal.asp
- General Assembly resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resources"
- https://www.ohchr.org/EN/ProfessionalInterest/pages/NaturalResources.aspx
- https://www.aljazeera.com/indepth/features/australia-recognise-sovereigns-queen-180711052948923.html

ATTACHMENTS:

- Anderson, Michael, 2009, *That Word Treaty*, http://nationalunitygovernment.org/content/word-treaty-value-historical-insights
- Some International Court of Justice cases in more detail.

THAT WORD

... Treaty ...

The Value of Historical Insights

Formation of the National Aboriginal Consultative Committee (NACC)

In a meeting at the Aboriginal Embassy, Canberra, in February 1972 opposition leader, Mr. Gough Whitlam, and Mr. Kep Enderby, Labor MP for the ACT, came to the Aboriginal Embassy and squeezed into the small tent with Paul Coe, Gary Foley, Chicka Dixon, Gary Williams and myself, Michael Anderson. In those days we did not worry too much about confidentiality because the Tent Embassy did not have a glass dome we could sit under. While Mr. Whitlam and Mr. Enderby congratulated us for our stand and our willingness to take on the Federal government, Mr. Whitlam made the point that we were a small militant movement with a limited constituency. In saying this Mr. Whitlam stressed there was a need for Aboriginal people to elected a true legal representative body, who could represent the views of Aboriginal Australia to the Federal Government, thus being policy advisers on significant matters in their own affairs.

Mr. Whitlam became Prime Minister in 1972 and was true to his word, by ensuring that an elected Aboriginal body formed. The Department of Aboriginal Affairs engaged a specialist working party of Aboriginal people to create and found the first

Aboriginal representative body to be the voice of their people to the national Parliament. The key members who made up this specialist working committee included Charles Perkins, Lois O'Donoghue, Chicka Dixon, John Moriarty, Ted Egan (non-Aboriginal who spoke more than eight Aboriginal languages of the Northern Territory), Ted Loben of the Torres Strait, Darcy Cummings and myself.

First ever Aboriginal vote - for the NACC

Within four months we had engaged Aboriginal staff throughout the country to sign up and register adult Aboriginals and Torres Strait Islanders, in order to establish an electoral roll for the election of the National Aboriginal Consultative Committee (NACC). This staff had four weeks to sign people up. Having compiled a register, we were absolutely astounded that this first national roll of the Aboriginal electorate consisted of over sixty-seven thousand adults, who could enroll for the National Aboriginal Consultative Committee elections *without* having to be on the Commonwealth electoral roll. The Commonwealth electoral office who assisted us in conducting the elections provided us with a report detailing the voter turn out. We were overwhelmed when we learnt that the percentage of electors on our roll, and who then voted, far exceeded the number of voters who turned out to elect the first national government of Australia. All subsequent National Aboriginal elections never worked off an electoral roll. The first review of the NAC obviously recommended that there would be no need to maintain an Aboriginal electoral roll.

The NACC becomes the NAC

By mid 1973 Aboriginal people had cast their first ballot for what became known as the Black Parliament of Australia. Between 1973 and 1975 the inaugural body, the National Aboriginal Consultative Committee, was subjected to continuous political and bureaucratic interference. At the end of the National Aboriginal Consultative Committee's first two years, it was also subjected to a name change with the review of its purpose and the winding back of representation from forty to thirty-six elected members. The new name given to the organisation was the National Aboriginal Conference (NAC). Within two more years a second review was conducted that

wound back the terms of reference of the elected representatives. Each of these reviews was conducted by Nugget Coombs and Lois O'Donoghue.

Capital Hill Protest, Canberra, calls for a Sovereign Treaty

In 1979 during the Capital Hill 'National Aboriginal Government' protest a call came from Kevin Gilbert and the protesters for the Federal Government to enter Treaty negotiations with Aboriginal people. The then Prime Minister, Malcolm Fraser, sent a response to the protesters through his driver. The advice was he would discuss the matter of a Treaty with the NAC since it was the only elected body.

The NAC, without hesitation, agreed to commence proceedings towards the formulation of a Treaty, however, they were made well aware of the Government's opposition to the word Treaty through oral communications with the Minister for Aboriginal Affairs. The NAC chose to use a Yolgnu word 'Makarrata', which was first published as meaning 'the resumption of normal relations at the end of a conflict'. I later learnt from the Yolgnu themselves that 'Makarrata' referred to pay-back killings between families or tribes.

The NAC Makarrata/Treaty sub-committee

The founding members of the Makarrata/Treaty sub-committee were Mr. Jim Hagan, Chairman, Queensland, Ms Lois O'Donoghue South Australia, Mr. Lyall Munro Snr, New South Wales, Mr. Cedric Jacobs, Western Australia and Mr. Minyipirriwuy Dhamarrandji, Galiwinku Island, Northern Territory. Staff members to the sub-committee were Pauline Brown, stenographer, and Theresa Colosimo, travel clerk and recordist. They published a report setting out a number of key issues. This report was widely circulated throughout Australia and the NAC began community consultations. It was this brochure of issues that prompted the Federal Government's written response.

Prime Minister Fraser prepared to discuss the Treaty

Within two years from Prime Minister Fraser's announcement that he was prepared to discuss a Treaty with Aboriginal people through the NAC, Nugget Coombs established a non-Aboriginal treaty support committee, designed to promote within the non-Aboriginal population support for this major political initiative. But to Nugget Coombs' dismay he was to learn that the Government had no intentions of giving any support to any non-Aboriginal body to assist in the formation of this Treaty. I know that Prime Minister Fraser held the view that this was something Aboriginal people themselves had to do.

At the conclusion of the World Council of Indigenous Peoples' Conference (WCIP) in 1981 hosted by the NAC, Nugget Coombs realised that the NAC had a higher level of professionalism and a deeper understanding of domestic and international politics and laws associated with human rights than he had originally anticipated. For some reason I could not understand Nugget Coombs' attitude towards the NAC and why he never attempted to engage with the NAC on a personal and professional level. But we were soon to learn of his apparent disdain for the NAC, so much so that he inspired and coordinated the founding of the Federation of Aboriginal Land Councils to replace the NAC.

1981 Senate Standing Committee on Constitutional and Legal Affairs on Makarrata

While all this was going on the Fraser-led government had appointed a Senate Standing Committee on Constitutional and Legal Affairs. On 26 October 1981 the Minister for Aboriginal Affairs, Mr. Peter Baume, wrote to the then Chairperson of the NAC, Mr. Bill Bird, in response to a letter that he had received on 1 October that advised him in a brief of the twenty-seven items that had emerged as a preliminary list of matters that were being considered for inclusion in the Makarrata/Treaty. In his letter he advised two things. One, that:

> "The Government is examining the new proposals. If it wishes I am prepared to discuss them with the incoming executive."

The Minister continues:

> "I should perhaps remind you that the Senate resolved on 24 September 1981 that the Senate Standing Committee on Constitutional and Legal Affairs should examine the feasibility, whether by way of constitutional amendment or other legal means, of servicing a compact or Makarrata between the Commonwealth Government and Aboriginal Australians."

The Minister then added:

> "The Committee will examine the constitutional and legal issues surrounding the Makarrata, but not the social issues or its content."

Land Rights regime

During the community consultations on the Treaty, the sub-committee of the NAC responsible for the development of the Treaty was quick to realise that, in every sector of the Aboriginal communities throughout Australia, Land Rights was the priority issue. By 1983 the NAC subcommittee for the Treaty had authorised me as the Research Director for the Treaty, to engage specialist legal advice on land and property law in Australia. This led to the engagement of Brian Keon-Coen (now deceased) of the Mabo case notoriety.

In 1984 the NAC, through its sub-committee and legal researchers had formulated a Land Rights regime that was in its final draft form. Once completed it was to be presented to the next meeting of the full plenary session of the NAC for their consideration for approval or rejection. This Land Rights regime was to represent an Aboriginal Land Rights settlement package that was to be presented at a tripartite meeting between the Federal Government, State and Territory governments and the NAC. The terms of the Land Rights regime never saw the light of day thanks to the Federation of Aboriginal Land Councils and Clyde Holding, Minister for Aboriginal Affairs.

Proposed mining moratorium

In 1983, during the formative stages of this Land Rights regime, the Deputy Prime Minister, Minister for Natural Resources and National Party leader, Mr. Doug Anthony, referred a question to the NAC regarding establishing a set of negotiating protocols with Traditional Owners throughout Australia on the question of mining on their lands. The advice sought was not restricted nor limited to North Queensland, Northern Territory, West Australia and South Australia. Instead it was to be a set of policies and protocols that would guide all negotiation nationwide on mineral explorations and mining on or adjacent to or near Aboriginal Traditional lands. In response to this request, the NAC instructed me to take whatever steps necessary to formulate a series of recommendations on this matter.

I prepared a preparatory document for circulation and discussion and published it as a booklet on ways forward. This was done so that the NAC could put this as a ways forward policy for mineral exploration on Aboriginal Lands. I convened a meeting with all the main multinational corporations associated with mining in Australia. The New South Wales Coal Board, learning of this meeting, sought leave to attend and leave was granted by the NAC. The meeting was held at the Boulevard Hotel in William Street, Sydney. It was agreed by all parties present that a moratorium be held on the issuing of exploration permits throughout Australia for five years and that all existing applications to the date of the meeting be processed. It was also agreed by the mining companies that the proposal put by the NAC to identify all tribal boundaries throughout Australia and the locating of the people who had the right to speak for and make decisions for Country were to be placed on a register and to be made known only to the Minister for Minerals and Energy and the Prime Minister.

The NAC would maintain all rights to initiate all future negotiations for those Traditional Owners. However, the NAC would have no rights to participate in any negotiations between the Traditional Owners and mining companies. It's only role was to act as a catalyst. All decisions on mining had to be pursued according to traditional protocols and decision making processes.

The development of this Traditional Owners' register and the writing of all protocols associated with future negotiations was to be funded by every mining company, including the New South Wales Coal Board, with the Federal government being asked to pay two dollars for every one raised by the mining companies. It was agreed the NAC would be responsible for the management of this research project.

Moves by Bureau of Northern Land Council

Unfortunately, the Bureau of Northern Land Council got whisper of this emerging agreement and immediately contacted the NAC Secretary-General and Chairperson. A request was made for me to attend an urgently convened meeting of the full membership of the Bureau of North Land Council in Darwin to brief them on the proposals put by the NAC and the tentative agreement reached. I attended the conference in Darwin, one week after the meeting with mining companies. I flew to Darwin and addressed he full membership of the Northern Land Council. Having explained what the moratorium meant, the NAC was surprised at the support shown by the membership for this initiative, however, the immediate hierarchy of the Bureau of Northern and Council, led by Gerry Blitner, quickly shut down the meeting after the NAC had spelt out the details.

It soon became apparent that Mr. Blitner was not a supporter of this initiative. The NAC was later surprised when they spoke to various individual members of the Northern Land Council. The former Chairperson of the Bureau of Northern Land Council, Mr Gularwuy Yunupingu, quietly confided that Mr. Blitner's objection was on the basis that he had not yet negotiated a mining deal on behalf of Traditional Owners thereby failing to reach his first million dollars.

Mr. Blitner and his administrative bureaucracy within the Bureau of Northern Land Council flew to Canberra after this meeting and gained an audience with the Minister for Mineral Resources. They expressed their objections and threatened to use their own resources to derail any agreement reached, by campaigning amongst their

constituency in the northern part of Australia to not participate in this ‘southern initiative’.

The Bureau of Northern Land Council’s threats won the day for themselves, but denied the rest of the Australian Traditional Owners the right to establish a true and proper series of protocols for negotiating mining deals across Australia with the true and correct people.

It is this type of policy making and discussions on Aboriginal Rights in Australia that the NAC had previously been involved in. The loss of the NAC was detrimental to all future planning on Aboriginal matters. No government after has ever sought this type of inclusive practice of policy development and planning.

The lesson during this experience was, unlike the democracy that the rest of Australia cherishes, majority rule is of no consequence in Aboriginal decision-making. Aboriginal initiative in Aboriginal affairs was different. The governments demand Aboriginal people must have one hundred percent endorsement of plans and programs for their communities with no dissension. This rule, if it continues, could destroy Aboriginal people forever.

Two scenarios leading to the demise of the NAC

With the benefit of hind sight I can propose two possible scenarios for the demise of the NAC. One is simply that the Hawke Labor government had no intentions of pursuing the Treaty. This knowledge must have pleased Nugget Coombs because he had already disbanded his Treaty Support Committee and then began a campaign to discredit the NAC as a true representative voice of Aboriginal Peoples.

Before Nugget Coombs’ campaign I gained approval from the NAC Makarrata/Treaty sub-committee to offer Dr Coombs a role to establish a specialist socioeconomic working group, from amongst his chosen colleagues, to formulate advice to the NAC on ways forward, regarding reparations, compensation, royalties and any other businesses that would flow. The NAC needed this advice in order for us to be able to

commence in depth discussions on how the NAC would facilitate a major surge of funds into the respective Aboriginal communities throughout Australia, should the negotiations be successful. This proposed working group would have complemented the already established NAC working group, chaired by Professor Colin Tatz, on the politics surrounding the Treaty and its negotiations.

Having had some discussions with Nugget Coombs at the University of New South Wales; he chose to decline the offer without providing any explanation. The NAC was quite surprised that Dr Coombs refused the offer, given his once held enthusiasm for a Treaty.

Role of Nugget Coombs and the Federation of Land Councils

A year later Nugget Coombs coordinated and established the Federation of Aboriginal Land Councils in Alice Springs. I was personally invited to this inaugural meeting by Nugget Coombs, and was asked to provide an overview and, in particular, the status of the issues that were being considered by the NAC. I briefed them on issues such as the return of material culture from Australian and international museums; reparations and compensation; the call for reserved seats at all levels of government, but not on the issues that were currently being work-shopped and explored by our expert working groups. I also advised that we had other specialist working groups. I also explained that we had an intention to explore with great vigor the Equal Employment Opportunities of the United States, where Federal lawmakers had established by law a compulsory program that would see one percent of African Americans represented in the workforce (which was their percentage of the total American population). The American model arose from the recommendations of the Kennedy Report of the late 1970s. The one percent did not stop at the public sector workforce but it also included, by law, one percent in the private sector workforce as well. Additionally, all tertiary levels of education were

obligated, also by law, to set aside one percent of students' places for African Americans.

I assumed that by being cooperative with this new Federation of Aboriginal Land Councils, the NAC may be strengthened by their support, had they chosen to take that path, but such was not to be the case. Quite the contrary, the Federation of Aboriginal Land Councils knew that they already had forty percent of the existing the NAC elected representatives supporting their new agenda. In other words, this forty percent were not loyal to the organisation that paid them their salaries. In some cases they abused their position by using the financial resources of the NAC to travel and coordinate a coup within the NAC, to clear the way for the Federation of Aboriginal Land Councils to assume the mantle of absolute national leadership in Aboriginal Affairs.

Interestingly enough, I have a very vivid recollection of Nugget Coombs arguing that the Federation of Aboriginal Land Councils would have a broader based membership than the NAC, which would provide them with authority and legitimacy. This statement is quite ironic considering that Nugget Coombs coordinated and personally invited the small group who attended in 1983. It is imperative now for those persons to be named. Key people at this inaugural meeting were: the New South Wales government appointed interim Aboriginal Land Council including Barbara Flick; Northern Territory delegates Pat Dodson and Geoff Shaw; Queensland was represented by the North Queensland Land Council; West Australia was represented by Peter Yu from Kimberley Land Council who was also a representative of the NAC and Michael Mansell represented Tasmania. Marcia Langton was also present.

The NAC were of the view that the formation of the Federation of Aboriginal Land Councils had an ulterior motive, with a clearly defined hidden agenda. After the emergence of the Federation of Aboriginal Land Councils, the issues surrounding the politics of Aboriginal affairs became very clouded. As a consequence the political division within the NAC failed to comprehend the political dimensions associated with personal political ambitions of some of its representatives.

The more politically minded representatives within the NAC were betrayed by colleagues who were unable to work for the benefit of the Aboriginal Peoples as a single voice. These individuals now found themselves playing both sides of the coin, being themselves members of the Federation of Aboriginal Land Councils, or were themselves strong supporters.

1984 Alarm bells - the NAC infiltrated

I recall ringing the alarm bells related to my concern that the NAC was being infiltrated by very strong supporters of the Federation of Aboriginal Land Councils. During my presention I sought an explanation from Mr. Lyall Munro, Snr, the Chair of the sub-committee on Makarrata/Treaty as to why the Executive had decided to engage Les Malezer as the Director of Research on Policy Formation and, at the same time, engage an Aboriginal lawyer from Tasmania, Heather Sculthorpe, to be the legal officer for the NAC. I queried the need to expend large amounts of money on engaging highly paid staff within the NAC bureaucracy.

I recall the only explanation given to me was that the NAC has experienced a high demand, from 1981 to 1983, for policy advice on various matters from the Fraser-led coalition government. Mr. Munro then **went** on to advise the sub-committee that the NAC had adopted the view that the Makarrata/Treaty was ending its formative stage. The next stage would require all of my energy, because of the need for me to be working with all the expert committees that we had engaged.

Proposal for aggressive leadership on Makarrata/Treaty

At this time the Makarrata/Treaty sub-committee consisted of Lyall Munro Snr, Ossie Cruise, Nessie Skuta (deceased) and Vincent Forrester. The next sub-committee meeting was held in Sydney. It was at this meeting that I proposed that, since we were now beginning the critical stage in the formation of the Makarrata/Treaty, it would be a good for the NAC, to restore a focus and to show aggressive leadership

in regards to our political standing. We had to come up with a strategy that would gain maximum media attention, not to mention all governments' attention.

Gough Whitlam agrees to accompany the NAC to Africa

I submitted to the sub-committee that we needed to have a serious look at the revolutionary wars for liberation that had taken place in Africa against the dominant white regimes. To this end I first proposed that we engage a high profile Australian journalist to travel with us, thereby ensuring sensational media reporting of the trip. A number of people's names were thrown about. While these discussions were going on in the sub-committee I phoned a person I deemed to be a very close friend, who would attract worldwide media attention if he would agree to accompany us on a high level diplomatic mission. This person was the former Labor Prime Minister, Gough Whitlam. Having explained what we intended to do and the reason why, to my great surprise and pleasure, he asked me to call him back in twenty minutes while he dealt with some business. I returned his call and to my delight he said that he had rearranged all his schedules and the answer to our question was yes, he would accompany our delegation to Africa. I returned to the sub-committee and advised them that the former Labor Prime Minster of Australia, Mr. Edward (Gough) Whitlam, has agreed to accompany us on this diplomatic mission.

The sub-committee immediately planned the trip and I was instructed to make all appropriate arrangements on my return to Canberra and to set an itinerary for a three Nation visit. My first port of call was to the Nigerian High Commissioner, Mr. Bronson Dede, with whom I discussed the purpose of the proposed trip which was, in short, to make these former British colonies aware of our negotiations for a Treaty; secondly, to learn of their own experiences during the process of decolonisation; thirdly, to learn of all social, political and economic pitfalls associated with liberation; and fourthly, to win their support should we have any trouble from the Australian Government and for them to raise these matters in the Commonwealth Heads of Government Meetings (CHOGM).

Arrangements were then finalised and the countries to be visited were Nigeria, Tanzania and Zimbabwe. The media surmised that the purpose of the trip was to have these countries call upon other African nations to boycott the forthcoming

Commonwealth Games to be held in Brisbane. But we had a larger agenda. In fact, at no time during our visit were the Commonwealth Games discussed.

Prior to our departure, we were advised that the World Council of Churches in Geneva had also heard of our forthcoming diplomatic mission and extended an invitation for us to address the full plenary session of the World Council of Churches, as this international conference coincided with our mission to Africa. The NAC willingly accepted. Mr. Whitlam then arranged us to meet with the lawyer and CEO of the International Labor Organisation in Geneva. This meeting was important because the International Labor Organisation had just announced that they were reviewing Articles 107 and 169 concerning Indigenous Peoples' rights.

Meeting with India's foreign minister during stop over

Ossie Cruise and I were impressed with the itinerary organised by the Nigerian High Commissioner, who had played a leading role in organising the whole of our visit. In fact, having set the itinerary, the High Commissioner alerted other countries that we were passing through and arranged us to be treated with the highest regard and importance. We learnt this when we arrived in India on a stopover. We were led from the plane to the VIP room at the international airport. We were pleasantly surprised to be introduced to India's Foreign Minister and a number of other Foreign Affairs officials. During the meeting we informed them of the NAC's ambition to have our Peoples decolonised by way of the proposed Makarrata/Treaty. We also took the opportunity to advise them that we would be seeking their support in the event of Australia failing to negotiate with us as equal partners.

Saudi Arabia

Our next stopover was in Rhyad in Saudi Arabia, where we were treated as visiting international dignitaries. No-one was allowed out of the plane until we were escorted by Arabian Foreign Affairs officials and placed in a small entourage on the tarmac, then driven by way of police escort to the VIP room of the Rhyad International

Airport, where we were met by senior Foreign Affairs officials. The stopover time was long enough to advise them of the purpose of our trip.

We were quite alarmed during our transit stop in Ethiopia, because the officials who met us were demanding to take our travel documents and passports for a time and left us amongst the crowd, Mr Whitlam included. We objected and said this was highly inappropriate. I have vivid memories of this experience because it was like no other airport I had ever visited in the world. It was total bedlam and chaos. It appeared that there was only one long counter with everyone wanting to be served immediately, just like an out of control bar in Australia on a Friday night. We became very agitated when we realised our connecting flight had less than ten minutes to go before boarding. We had agreed earlier only to hand over our travel documents, but not our passports and we were left standing in the airport. We became frustrated and a little angry because we could not sight anyone who looked official and we were without our travel documents. We realised that we had little hope of catching our connecting plane to Nigeria. Then with very little time to go a lady and two men emerged and apologised for the delay, saying that they would now escort us to our departure area. We became extremely concerned when we were taken to a different departure area from where the commercial flight was to depart. We maintained decorum, but it was very trying. We were then advised that the single jet that was sitting on the tarmac in front of us was an official Nigerian Government aircraft sent to fly us to Lagos.

Nigeria

On our arrival in Nigeria there was a full motorcade with military gunships at both ends waiting for us and Ossie Cruise was absolutely bewildered that they had sent one car for each of us. When we realised this was the case, Mr. Whitlam and Ossie Cruise said: Thank you, but we will all travel in the one car! Whilst in Nigeria we had meetings with the Vice-President, as the President was out of the country, the Foreign Affairs Minister and the Speaker of Parliament. After this initial meeting we were advised that arrangements had been made for us to address the Nigerian Parliamentary Foreign Affairs committee.

Tanzania

Our next stop was Tanzania, where we were met by senior officials of the Foreign Affairs Department and representatives from the President's office, who advised us of the program that had been organised. Our first port of call was a private audience and luncheon with President Julius Kambarage Nyerere, who at the time was also the Chair of the Joint African Heads of Government Organisation, the Organisation for African Unity (OAU), which was basically the African equivalent of the South Pacific Forum of today.

An anecdote to this visit left a lasting impression on myself and Ossie Cruise as well. During our meeting, the President invited us to accompany him to his opening of the Tanzanian Expo. Being part if his motorcades made us two Blackfellas feel for the first time proud that we were being treated as two Senior Diplomats, representing their people, a status we would never be afforded in our own country. The most impressive experience we had, was sitting in the official cordoned area with other foreign dignitaries, during the opening of the Expo. However, to be invited to walk beside the President during his official walk about at the Expo, gave us a firsthand inside look at the reverence of this man in the eyes of his people. Never before, nor since, have we ever witnessed this type of leadership. The people had full confidence, trust and hope in this man. Tanzania was not a country full of violent disorders and haunted by military coups against their elected government that exist in other parts of the world. Tanzanians may be poor, but they strive to build their Nation by themselves.

Zimbabwe

We were met in the Zimbabwean airport by officials and by the Whitlam-appointed High Commissioner to Zimbabwe, Mick Young, who was a former high profile Labor official prior to and in the early days of Whitlam's government. Our first meeting was in the Presidential office with the President himself, Mr. Robert Mugabe. It was a private meeting between our three NAC delegates, the President and his senior

advisor on Foreign Affairs. We were very well received by the President and were surprised when he asked Mr. Whitlam why, when he was Prime Minister, he failed to offer a reparations/compensation package to settle, once and for all, the issue of invasion and dictatorship of the lives of Aboriginal people. He expressed alarm that a country as wealthy as Australia did not have the moral capacity to offer a reparations/compensation arrangement to give closure the historical injustices. I recall Mr. Whitlam's response, which suggested that governments of the past, including his own, had considered this as an option. Mr. Whitlam, however, advised the President that this option had a number of possible pitfalls and it was because of these pitfalls that the Government never raised it as an option. The two matters that were expanded on were - if we dealt with every man, woman and child of Aboriginal descent and they were paid a reparations/compensation package, it would leave the Aboriginal people who were semi-literate or illiterate open to confidence people, whose only objective was to deceive and cheat the people of their wealth. He explained that no form of protectionism would be able to prevent such people engaging with Aboriginal people for the purpose of divesting them of their wealth and thereby leaving them with absolutely nothing. The second reason was that, if Aboriginal people received these monies, they potentially could or would have had the power to take absolute ownership of land businesses, commerce and trade within the greater percentage of rural Australia. It was, because of these two factors, the Whitlam Government decided not to encourage a reparations/compensation program, instead opting to increase welfare assistance to communities and individuals.

Not only was President Mugabe shocked at this response, but so too were Ossie Cruise and myself.

WCC and ILO in Geneva

Our next port of call was to be Geneva, where both Ossie Cruise and myself learnt about another side of our former Prime Minister. Before addressing the general plenary session of the World Council of Churches (WCC), we sat in a room with about thirty church groups from various religious denominations. I was amazed that the world had so many sects for a single religious belief. But to Ossie's and my

surprise, Mr. Whitlam provided a brief explanation of the various religious sects, including the ability to point out which religious sects the most ruthless and unforgiving dictators belonged to, including Hitler's sect of the Lutheran church.

When introducing himself to the World Council of Churches, he stated that he was a lapsed Catholic. I don't know how or if the World Council of Churches were able to see the funny side of Mr. Gough Whitlam. After introductions we then proceeded to each tell our stories. Mr. Whitlam expressed his eagerness to support Aboriginal people in their struggle for justice. He never said anything else other than that.

The following day we met with the principal lawyer and the CEO of the International Labour Organisation (ILO), where we discussed our thoughts and conclusions on the rights of Aboriginal Peoples, including the ILO Articles 107 and 169 that deal with Aboriginal rights. I strongly believe that it was important for us to have met these officials of the International Labor Organisation.

Our journey was over after this meeting and we returned to Australia only to be falsely accused of having a constant difference of opinion throughout the trip with the former Prime Minister of Australia. These unfounded allegations no doubt had evil expectations but in this case I can say goodness and truth prevailed.

International recognition and success of NAC Diplomatic Mission

The international recognition, which we had sought to gain for our Diplomatic Mission, succeeded beyond all expectations. I was not surprised that Mr. Whitlam should say that he had learnt from authoritative sources that never before had there been such a wealth of dispatches between Australia and the African States on any other issue.

Despite the success of this mission, we came home to where we were met with absolute dysfunctionalism within and without the NAC. It seemed to me that the only group that had a certain destiny was the sub-committee on the Makarrata/Treaty. I recall talking to the sub-committee's Chair, Mr. Lyall Munro Snr., about the fact that

we knew our job and we did not attempt to involve ourselves in anyone else's business. Rather we were settled and focused on the task for establishing for our people a Treaty based upon their hopes and aspirations and that only time would judge whether we were correct or wrong.

I now come back to my expressed concern for the NAC being infiltrated by the Federation of Land Councils sympathisers and supporters.

Last days of the NAC

The following passages are my story of the last days of the NAC and the shutting down of the Makarrata/Treaty negotiations. 1985 was the year that saw the end of the Fraser Liberal coalition and Mr. 'Hope and Expectations' Hawke was elected to office. I had previously worked with Bob Hawke, (who at the time was the ACTU President) to defend the right of the communities at Mornington Island, Aurukun and Doomadgee not to be re-designated from Aboriginal Reserves to local shires by the Joh Bjelke -Peterson Government. This would have placed them under the management of Russ Hinze, the then Minister for Local Government. The Aboriginal Councils' view was that they would be thrown out of the pot into the fire, a destiny they did not want to be faced with.

From my previous experience with Mr. Hawke I had personally assumed that he would be much more proactive in his efforts by working with Aboriginal Peoples to cast off the horrors of the past two centuries. I was so wrong. The lack of integrity to stand by their stated policy to improve the plight of Aboriginal Peoples astounds me. Maybe we, as Aboriginal Nations, should accept the fact that irrespective of which political party is elected to office they each follow a single objective - "assimilation". Maybe we should accept the notion that, like the military, the Government will decide not go off course to change their strategic plan, because it is consistent with international programming to stabilise and keep in check any possible challenges to the current order of power.

Colonial power over Aboriginal lands

There is another scenario, which is associated with the guilt of all colonial powers, who have invaded the lands of Indigenous Peoples throughout the world. The most significant aspect of these invasions and the taking over of Aboriginal Peoples' ancestral lands was, according to the religious minders of this period, a decreed divine right that was entrenched in their minds influenced by the covenants between God and Abraham. By divine decree, his children had the right to spread throughout the known world and take over the lands of others and they would become kings and queens.

We now know, that prior to the early period of the colonial expansion when explorers set sail from their homelands to find new places and settle new lands, the main players were - the French, Dutch, Spanish, Portuguese and the British - who had become locked into a constant state of war in Europe. Realising they had no capacity to locate peaceful solutions, they appealed to the Pope in Rome for a solution. His solution came from core Christian beliefs and he prepared Papal Bulls (bulletins) dividing the unknown world between the waring European parties. Having located new lands and Peoples, the Europeans exerted their right to rule over Aboriginal Peoples, because their God said so. The colonisers made every effort to assimilate the pagans into their fold, through conversion to their religious beliefs and, in doing so, destroyed all that the Aboriginal Peoples knew.

Today, Aboriginal Peoples throughout the world find themselves confronted with the ramifications from this western reality, that is, in different parts of the world, war was acknowledged and declared between the invader society and the Aboriginal people, e.g. New Zealand and North America. To settle these disputes treaties were entered into. For us here in Australia, despite the guerilla wars and the constant slaughtering of Aboriginal people throughout the continent, every Governor resisted the call for treaties to be entered into. Research shows that the view held was that we were regarded as British subjects with all rights being afforded to us, when, in reality, we were considered vermin to be eradicated.

Our resilience and will to survive

Our resilience and will to survive exceeded all expectations of those who sought to exterminate us and, instead of locating humane solutions, the authorities chose to imprison us. Experimental eugenic programs were set in place to forcefully assimilate us by the rule of law. Surviving this horrible history now causes grave concerns for the modern politicians, for they now realise that no matter what mould they design for Aboriginal people they can never terminate our inherited connection to our Dreaming and Country.

In our brief history of freedom from the clutches of the prison camps and child institutions we remain proud and dignified Peoples. Using the invader's system we have proven that even their highest court in the land cannot locate a legal affirmative that would grant the unconditional sovereign title to this country, thereby affirming that this decision belongs to another jurisdiction that cannot be located within Australian law.

According to Brennan J in the High Court Mabo No.2 Judgment:

> 1. The Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court.
> [at para 83]

We know that the only international legal jurisdiction that can decide the sovereignty question is the International Court of Justice, but we are stuck between a rock and a hard place, because only Member States accepted by the United Nations have a right to have issues such as this heard. On the other hand, we can have this matter heard in the International Court of Justice providing a Member State sponsors an application on our behalf.

Mabo No.2

Let me return to the Mabo judgment No. 2. This landmark High Court case emanated from the NAC Makarrata/Treaty sub-committee and our legal consultant, Mr. Brian Keon Cohen, when concluding the land regime proposal. The NAC legal research directed us to a possible flaw in the land laws of this country and it was agreed by the Makarrata/Treaty sub-committee that maybe the NAC should locate Traditional Owners and run a test case on our findings. After the NAC was disbanded Mr. Keon Cohen, supported by Barbara Hocking, pursued our legal hypothesis, which resulted in the High Court's decision in Mabo No.2. Significantly, the two prerequisites chosen by the NAC for any negotiations on a Makarrata/Treaty were, one, that the Federal Government recognise the pre-existing possessory rights of Aboriginal people to their land; the second being the continuing sovereign status of Aboriginal Peoples. We argued this was not just a matter of fact but was, in fact, the law.

Federation of Aboriginal Land Councils

The newly founded Federation of Aboriginal Land Councils never made any efforts to engage in negotiations with the NAC, requesting to be fully briefed on what we were proposing on the land rights issue. Had they done so I know what is presented in this document would have eased their anxiety. They would have learnt of the extent of the Land Rights regime that was being finalised as part of the ongoing Makarrata/Treaty negotiations.

The Makarrata/Treaty sub-committee was keen to start the tripartite negotiations between the Commonwealth, States and the NAC, because they had felt that they needed to show to their Aboriginal constituency and the general Australian public that we had the capacity to diplomatically negotiate a settlement on one of the most politically sensitive issues confronting Australia at that time. The view held by the NAC was that we needed to instill confidence in both the Aboriginal community and the non-Aboriginal community that the Makarrata/Treaty process was of a beneficial nature to the whole of this country.

I believe that Nugget Coombs deliberately wielded a stick of interference to deny us the right to take control of our own destiny. Unfortunately he was able to create false hopes and expectations within a dissenting minority Aboriginal group, who presided

over the Federation of Aboriginal Land Councils. History now shows that the efforts of this group not only threw out the bath water, but the baby as well. Since that day Aboriginal Peoples have lost all that we had gained in the lead up to this time. Maybe one day members of that Federation of Aboriginal Land Councils can publish what they had hoped to gain by destroying the NAC and the Treaty process. Members of the Federation now owe it the Aboriginal population of Australia to explain what they had hoped to gain by taking the course that they did.

One thing is for sure, they cannot claim the origins and success of Mabo No.2. They may be able to claim recognition for working with the Keating government to assist in draughting the Native Title Act. If this is the case then before they boast success it will be necessary for them to visit a statement made by their mentor and founder, Nugget Coombs, when he wrote that the Native Title Act was not an Act for Aboriginal people, but rather the mining companies. What makes this whole Native Title Act creation even more bizarre was Noel Pearson's realisation, after the Wik judgment came down in the High Court when he admitted a major strategic blunder, referring to the Magnificent Seven's agreement that leased lands had extinguished Native Title. The Magnificent Seven of seven chosen Aborigines appointed by the Keating Government to advise and have input into the draughting of the Native Title Act, included Noel Pearson, Mick Dodson, David Ross, Darryl Pearce, Marcia Langton, Gularwuy Yunupingu and Peter Yu.

The Dismissal of the NAC

My concerns for the future of the NAC were well founded when Mr. Lyall Munro, Snr, the then Chair of the NAC came to my office and informed me that the National Executive had decided to shut down the Makarrata/Treaty negotiations. Mr. Munro Snr then explained to me that the Queensland, West Australian and the top end of the Northern Territory representatives had colluded by stacking the vote to shut down the whole operation of the Mkarrata/Treaty process. This gave free access to the Federation of Aboriginal Land Councils to assume the leadership role on all matters relating to mining and land issues. When I questioned Mr Munro about all

the other outstanding issues of the Makarrata/Treaty, he said nothing was said and this appeared to be of no concern to the new power brokers. The greatest shock came when Mr. Munro Snr advised me that Mr. Rob Riley (now deceased), a representative from Perth, and Mr. Peter Yu had attended the Canberra hearing of Senate Standing Committee on Constitutional and Legal Affairs, who were looking at the feasibility of a Makarrata /Compact. Unknown to myself and the Makarrata/Treaty sub-committee, Rob Riley and Peter Yu advised the Senate Standing Committee, no doubt to their shock as well, that they would not be speaking to our written submissions as the NAC had decided to no longer pursue the Makarrata/Treaty.

I was further informed by Mr. Munro Snr that the executive had resolved to retire Mr. Graham Poulson, the Secretary-General of the NAC to fully paid leave of absence. I was then informed that despite my senior standing as the Deputy Secretary-General of the NAC, I was overlooked by the executive in favour of Mr. Norman Johnston, a Queenslander and the recently appointed Les Malezer was made his Senior Deputy, with Heather Sculthorpe in charge of all legal matters. I recall my response being one of shock and horror, not for myself, but for what I could see coming. Both Les Malezer and Heather Sculthorpe were strong supporters and believers in the Federation of Aboriginal Land Councils.

Time for election of a new NAC Chairperson

From my perspective, the end of the NAC came in the following manner. Mr. Munro Snr, Chair of the NAC, was requested by the National Executive to convene a plenary session in Perth of the full National Aboriginal Conference body to elect a new Chairperson. There was no mention, nor reference to the idea that the recent actions, relating to the termination of the Makarrata/Treaty, taken by the Executive were to be raised and validated or rejected as the course of action for the NAC. That is, the decisions taken by the Executive before this national plenary forum were absolute and could not be overturned.

Having been shocked into disbelief, I walked out of the offices of the NAC to gather my thoughts. During my walk I recall very vividly my attempt to find reason why our Aboriginal colleagues could be so foolish.

I am reminded of a verse by Kevin Gilbert (1933-1993) in his poem “Look Koori”

> ... better to die than to live a life
> as gutless scum, Koori.

I also recall asking myself: If the Federation of Aboriginal Land Councils wanted total and absolute control for issues around land and mining, then why did they choose not to commence negotiations on this matter with the NAC Executive, given that we had learnt that they had a majority on the Executive, which would have ensured the transfer of this power and corporate knowledge.

Return of sacred material culture

That evening Mr. Munro and Mr. Ossie Cruise came to my home in Canberra for dinner. My wife, Pat, and I were devastated, especially Pat because Pat had been assigned the responsibility of dealing with museums and other such matters. She had commenced negotiations on behalf of the NAC on the return of all sacred objects to Traditional Owners. Her duties called for her to deal with lifting the oppressive rules that had denied our people the right to religious freedoms. Her negotiations for the return of the sacred material culture to the Traditional Owners would permit them to restore that part of the rituals and sacred ceremonies that could not be practiced without the objects themselves.

Within twelve months of Pat’s appointment, she facilitated the reuniting of Traditional Owners from Central Australia with their sacred objects that had sixty years before been taken and deposited with the South Australian Museum ethnology department. I recall at the time Pat’s excitement, yet being saddened at seeing these old men crying and hugging her after being left alone with their sacred objects.

It is outcomes like this, and the fact that the NAC was the only Aboriginal body to have ever been afforded the status of equal parties with the Federal Government during the Treaty deliberations that shocked us into disbelief that our colleagues could be so foolish as to be manipulated to this degree. Never before, nor after Prime Minister Malcolm Fraser, has a Prime Minister and his full Cabinet ever met with an elected Aboriginal representative body to discuss the settlement of issues in Aboriginal affairs that had dominated all proceedings since invasion in 1788.

Vote for new NAC Chairperson in Perth

I recall asking Mr. Munro the next day if he was going to be asked to brief the full meeting in Perth on the status of the Makarrata/Treaty. I did this because I was of the belief that I may have been able to salvage the Makarrata/Treaty, given that the full membership of the NAC had not been consulted on the shutting down of the Makarrata/Treaty process. Mr Munro advised me that he would make an effort to have the matter put on the agenda. History shows that we never made it.

On the Monday morning of this plenary in Perth, Mr. Ossie Cruise phoned me and advised me that Mr. Malezer, who was responsible for coordinating and organising this meeting had not made travel arrangements for the members who supported Mr. Munro's effort to continue as Chairperson of the national body. Mr. Cruise said that the New South Wales group realised that this was a very deliberate act, as the vote for Chairperson was listed as the first item on the agenda and that the Munro camp supporters had no possible way of attending in time for this vote. I then advised Mr. Cruise that the New South Wales delegation should not return to the conference for the rest of the day, because the Federation of Aboriginal Land Councils' supporters would not have the appropriate number for a quorum. Within three hours of these discussions I learnt that Mr. Rob Riley was elected Chairman and Mr. Munro the Deputy Chairperson. I was absolutely confused as to how this could possibly happen. I then learnt that the New South Wales block did return to the conference room and sat in the back without intending to participate. The number crunchers, however, included them as attending just by their presence in the room, thereby establishing a quorum to do business.

On the second day of the conference I was informed that the new Chairperson, Mr. Rob Riley, had taken leave from the conference for its remaining duration and Mr.

Munro took up the Chair. Later I learnt why Mr. Riley absented himself. Mr. Riley caught the midnight flight from Perth to Melboune where he had a series of meetings with the Minister for Aboriginal Affairs, Mr. Clyde Holding. Within a few months of this political coup the NAC was advised that the Government intended to sack them.

Unfortunately for Aboriginal people, 1985 saw the demise of the NAC courtesy of Clyde Holding, Minister for Aboriginal Affairs, under the Bob Hawke-led Labor government. Clyde Holding used existing national organisations to justify and demonstrate that the NAC no longer had a role to play in providing policy advice to the Federal government on Aboriginal issues. Holding gave the impression that the National Aboriginal Education Committee (NAEC), the National Aboriginal and Islander Legal Service (NAILS) and the National Aboriginal Health Organisation (NAHO) each provided their own policy advice to him on these matters.

A report was commissioned by the Hawke government on the purpose and function of the NAC and its future. It was authored by Nugget Coombs, Lois O'Donoghue and Patrick Malone. This report recommended the amalgamation of the policy advisory role, which the NAC had, the economic and enterprise operations of the Aboriginal Development Commission (ADC) and the managerial and administrative role of the Department of Aboriginal Affairs into one body called the Aboriginal and Torres Strait Islander Commission (Aboriginal and Torres Strait IslanderC).

Mr. Munro in his role as Deputy Chair secretly sought legal advice from his legal team on the powers of the Minister and the Government to sack the NAC. I recall the advice quite vividly. The advice was very adamant that neither the Minister, nor the Parliament had the power to dismiss the NAC. This was on the premise that the NAC itself was an independently registered corporation under the Federal Government's *Aboriginal Councils and Associations Act.*

Last NAC National Executive meeting

Being still employed by the NAC, I was invited to attend the last National Executive meeting at the Deakin Hotel conference room in Canberra. Mr. Munro presented the

legal advice that he had obtained and I was asked for an opinion. With that invitation I rose to my feet and presented them with my written resignation from the NAC. In doing so made my last comments to them. I recall expressing my great disappointment and asked them: How could they have done this? I continued: You were trusted with a great responsibility when you were elected to put everything above yourself and to work towards improving the plight of our people Australia wide. My resignation was on the basis that all the work that we had done to that date had been completely disregarded and was subsequently shut down. My parting words were in relation to the legal advice that was provided to Mr. Munro about the Minister's and Government's inability to sack them. I said to them that the Government already knew this and that the Achilles Heel of the NAC, like every other Aboriginal community in Australia, we are totally financially dependent. This meant that the Minister could shut the NAC down simply by refusing to sign the next cheque, which is exactly what happened.

Barunga statement

Twenty-four years have now passed since the demise of the NAC and a number of former representatives have concluded in their minds that the Hawke Labor government followed advice from its senior bureaucrats and specialist advisors, that the Fraser-led Liberal Coalition Government were far too generous in supporting the Treaty campaign. The Labor party no longer wanted this to be an issue during their term in office.

The irony, on the other hand, was Prime Minister Bob Hawke's gamesmanship with Aboriginal Peoples at Barunga in the Northern Territory. He so proudly hoisted and boasted of the Barunga Statement, which under Hawke's leadership led down a dead end road and nothing ever came from it. This showmanship was an insult to all those involved in the Makarrata/Treaty negotiations. In 2007 Gularwuy Yunupingu personally called for the Barunga statement to be returned to the Yolgnu because he was angry over the continuing appalling treatment of his people.

Impact of the African Diplomatic Mission

I now realise that the success of the African Diplomatic Mission had triggered major concern and a hive of activity within the bureaucracies and the corridors of power within Canberra. This activity focused, I now believe, on self preservation and maintaining the *status quo* of the colonial authoritarian rule over Aboriginal affairs. I must admit the last thing I expected was for the NAC to implode, as I believed that the NAC had by this time emerged as a serious power within Australian politics. To destroy this emerging power from within has the markings of a very professional and elite operation.

I can also see another influence that I had not considered at the time. In a speech given by Dr Henry Kissinger, the then American Secretary of State, in Sydney that Mr. Ossie Cruise and I attended. During his speech, he revealed that Australia's ambition to be considered a key international economic power was totally dependent upon how the government of Australia dealt with Aboriginal Land Rights.

I now believe that we have come full circle and the Australian government continues to be repugnant and void of any concern for locating true and meaningful solutions.

During the first three years of the 1970s a small group of Aboriginal youth set aside their differences to commence an Aboriginal movement that took the mountain to Muhammad because we knew Muhammad would not come to the mountain. Carrying this massive weight of uncertainty, the Black Power Movement as it was known, made great strides and significant changes occurred, but more importantly it laid the foundation for all to come. What was achieved by this movement has now been totally eroded and all administrative decisions for Aboriginal people reside in the power of the bureaucracy of Australia. There is only one thing that continues to haunt the Australian Government and that is the threat that Aboriginal Nations and Peoples may form a collective union to prosecute their case.

Patrick Dodson says No to Treaty

I find that I must go back in time to the Senate Standing Committee on Constitutional and Legal Affairs at their hearing in Alice Springs that I attended. Mr. Patrick Dodson, Chairperson of the Federation of Aboriginal Land Councils, is recorded in the transcript of that Senate hearing as saying, during his oral submission, words to the effect:

> We withdraw from any notion of a Treaty, while believing that the issue of sovereignty is too difficult to deal with and can only serve to delay any that could possibly flow from a Treaty. The issue of Land Rights is the Aboriginal priority.

Sovereignty

Now, more than ever, the issue of sovereignty stands alone as the sole beacon that can possibly help us to finally rewrite the history of this country as a nation. We do know that this is an issue that must one day be dealt with. I firmly believe that in this new millennium the time has come.

I should point out that during the NAC cross-table discussions with Prime Minister Fraser, it was generally agreed that the issue of the recognition of continuing Aboriginal sovereignty, as being a pre-requisite for Makarrata/Treaty negotiations, has always been of major concern to the Government. Everyone understood that, whilst this was a major concern, it would not preclude our ability to proceed on all other pertinent matters that had emerged.

The fundamental issue of sovereignty was put in a practical context by the Prime Minister when he said to the NAC Executive with words to the effect:

> I realise the high level of importance that the NAC has for recognition of Aboriginal sovereignty. The problem for the Federal government, however, is what would flow from our recognition of Aboriginal sovereignty. In effect, the moment we recognise Aboriginal sovereignty all that we know of as the

> Australian Nation will be invalidated. Even though there would be a clause in the Treaty that acknowledges that the Aboriginal people, represented by the NAC, would cede their sovereignty to a Federally United Australia and thereby agreeing to be governed by one Government, we still have a problem.
>
> What if we sign the Treaty as the Executive Government on behalf of the Australian Nation and then we pass it to you on the other side of the table for your signatures and you decide not to sign it? Where will that leave us?

I recall Mr. Munro Snr responding with humour:

> That would mean you could call me Mr. Prime Minister! The boot would be well and truly on our foot!

The NAC was mindful that this was the reason the Federal Government would only canvas one option for a Treaty and that is why the Federal Government reaffirmed and asserted that the Federal Government of Australia would then represent the entire population, which included Aboriginal Peoples.

The NAC knew full well the Federal Government would only have a single position on the issue of sovereignty while, on the other hand, the NAC was already exploring various other options, both domestically and internationally. Our African tour was the NAC's way of informing the Government that we knew other options were available to us, as colonised Nations and Peoples.

The NAC was fully aware of the position the Federal Government had chosen for themselves, because the Government was constantly arguing over what we considered were semantics. This was best illustrated in the Government's written response by the Minister for Aboriginal Affairs, Peter Baume, to the Makarrata/Treaty sub-committee declaring on 3 March 1981:

> Although the word 'Treaty' is occasionally used in the domestic context (e.g. a sale of land by way of a private treaty), the word 'treaty' is ordinarily used to refer to a kind of <u>international</u> agreement. In that sense it is clearly

> inapplicable to any form of agreement between the Commonwealth and Aborigines since the latter are not a 'nation' ...

The real measure of the Federal Government's seriousness and commitment to these negotiations can be best demonstrated by understanding the depths of their thoughts in their written response.

In fact, in the same document on the issue of nationhood of Aboriginal Peoples, Minister Baume expressed concern that if the government were not diligent and serious enough about the Treaty negotiations, they were facing a potential disaster. He wrote:

> The material available to me suggests that the social organisation of Aboriginal tribes and other communities in Australia is different in significant respects from those other communities...

He went on to cite a United States court case *The Cherokee Nation v The State of Georgia* (1831). Using this case, Minister Baume continued:

> "It may be that, the development of the NAC - albeit a development based on Australian law - an Australian Aboriginal 'community' is developing and will develop to the point where, if the United States models are followed, it might conceivably become appropriate to speak of an arrangement of that organised community and the Commonwealth as a 'treaty'. However, the Attorney-General recently advised the Prime Minister in a letter dated 15 July 1980, that having regard to the connotations of the word 'treaty' in international context, it would be very desirable to avoid the word 'treaty' in relation to the agreement, and that instead a term such as 'Makarrata' might be used if, upon full examination, it was found appropriate. He went on to say that it would be possible to include in the arrangement as if they were a community separate from the Australian community, and provisions to ensure that the arrangement was not conceived as being analogous to a treaty between separate nation States.' In considering whether such provisions should be included account should be taken of any risk that, in the absence of

> sufficiently explicit provisions to the contrary, a claim might be made that the agreement accorded a status on which Aboriginals could base a right of 'Self-determination' as a 'people'."

At the end of this quote the Minister cited in brackets an example when he referred to the United States (sic) Charter, Article 1, and the Declaration on the Granting of Independence to Colonial Countries and Peoples.

In concluding this point Minister Baume said in clause 8:

> "I note that the resolution by the NAC requests a treaty of commitment between the Australian government and the 'Aboriginal nation'. For the reasons mentioned above the use of **that word** should be avoided by the Commonwealth.'
>
> [added emphasis]

I have been recently reminded that within the first few months of Mr Patrick Dodson being made Chair of the Reconciliation Council of Australia he publicly stated that Treaty was not on the agenda.

I respectfully submit that we, as Aboriginal Nations and Peoples throughout Australia, must take control of all decisions that affect our future and the destiny of our grandchildren. We must not relegate ourselves to the level of the proverbial gambler, who is not happy when he wins, but is satisfied knowing that he had won once, despite later losing it all.

The NAC preliminary list of Aboriginal demands as a basis for negotiation of an Agreement (Makarrata) between the Australian Government and the National Conference on behalf of all Aboriginals.

The terms of these negotiations are on the basis that the Federal Government recognises.

1. Land to be acquired by the Commonwealth for and on behalf of Aboriginal people and vested in freehold title to the Aboriginal people and given in perpetuity not subject to mortgage and or sale outside the Aboriginal community and or communities.

It is further suggested that:

1A. The Commonwealth acquire all lands that were originally set aside for the use and benefit of Aboriginals since colonisation, and where possible the Commonwealth acquire an equivalent size parcel of land adjacent or within close proximity to such reserves and that these lands be given to Aboriginal communities in perpetuity with inalienable Freehold Title, if original lands are not able to be acquired.

1B. That all vacant Crown Land throughout Australia be acquired by the Commonwealth Government and given to Aboriginal Communities who are within close proximity and that such land be given in perpetuity with inalienable Freehold Title.

2. The development of self-Government in each respective tribal territory take due respect for the culture of Aboriginals and to ensure their political, economic, social and educational advancement, and by virtue of this, the right to freely pursue their economic social cultural development.

3. A National Aboriginal Bank be established with branches in each State of the Commonwealth.

4. Payment of 5% of the Gross National Product per annum for a period of 195 years come into effect upon the date of this section being given assent and or upon the signing of the agreement.

5. All national parks and forests to be returned to the Aboriginal communities whose territorial jurisdiction prevail.

6. All artifacts, artworks and items located by archaeological diggings from museums and other art centres in Aboriginal territories where the items were located and or found, be returned.

7. Rights to be granted to hunting, fishing and gathering on all lands and waterways under the jurisdiction of the Commonwealth of Australia.

8. Rights over all minerals and other resources that may exist on all lands be given in perpetuity to Aboriginal people and or communities and all minerals from the earth's surface to the centre of the earth, and all air space from the earth's surface to the outer perimeters of earth's atmosphere.

9. Recognition be given to Aboriginal customary law in those territories which deem it necessary.

10. Aboriginal schools (pre-schools, infants, primary, secondary and colleges) be established within those Aboriginal territories which deem it necessary.

11. Freehold title and full ownership of all houses currently occupied by Aboriginal people throughout Australia be given in perpetuity.

12. Aboriginal medical centres be established in the Aboriginal territories which deem it necessary.

13. Aboriginal legal aid offices be established in all territories which deem it necessary.

14. Of land vested in freehold title to Aboriginal people throughout Australia for a period of 195 years from the commencement of this section and or agreement be exempt from all forms of taxes.

15. Any monies derived by Aboriginal businesses and or commercial ventures within their respective territories for a period of 195 years from the commencement of section and or agreement be exempt from all these taxes.

16. On monies derived from the Commonwealth as cash compensation from the Gross National Product for Aboriginals for a period of 195 years from the commencement of section and or agreement be exempt from all these taxes.

17. That Parliament makes laws for the carrying out by the parties thereto on any agreement.

18. Any laws established for Aboriginals by the Federal and State Parliaments prior to the commencement of this section become null and void upon the commencement of this section 129 or agreement. Except for those pieces of legislation that refer to land.

19. Any such agreement may be varied or rescinded by the parties thereto and every such agreement and any such variation thereof shall be binding on the Commonwealth and the Aboriginals who are party to such agreement thereto, not withstanding anything contained within this section or agreement.

20. The Parliament make laws for validating such agreement contained in this section and or agreement.

21. The powers conferred by this section are not to be construed as being limited in any way by the provisions of section and or agreement.

22. Timber rights to all forests and timbered areas within Aboriginal territories including rights to all waterways be granted.

23. The right to move freely across State borders without prejudice due to the differences in State Laws be granted.

24. The right to have all Laws and By-Laws of Aboriginal self-governed territories apply equally across State borders where Aboriginal territories involve two or more States be granted.

25. One seat be made available in both Houses of Federal Parliament per State and that one seat per House be available for Torres Strait Islander Representation, further, that each State Parliament make available one seat in each House for representation for each Aboriginal territory and the Torres Strait Islands. And that all the representatives be elected by Aboriginal and Torres Strait Islander people at the same time as ordinary State and Federal elections. Such elections should not jeopardise their normal voting rights.

26. The studying and diggings of all lands by anthropologists and archaeologists are to cease. Any further studies by the said groups can only be conducted with the approval of those Aboriginal people whose Territorial Jurisdiction prevail.

27. The rights to the waterways flowing between Australia and the Torres Strait Islands including the right to control the shipping lanes.

Some International Court of Justice cases in more detail:

When the International Court of Justice delivered its Advisory Opinion in 1975 to the United Nations in the Western Sahara Case (62) (1975) ICJR, Judge Ammoun made an independent opinion and clearly articulated the concept of sovereignty for the Peoples of the Western Sahara. He referred to Mr Bayona-Ba-Meya, Senior President of the Supreme Court of Zaire, who defines sovereignty by

dismissing the materialist concept of terra nullius and substitutes a spiritual notion:

> '... the ancestral tie between the land, or `mother nature', and the man who was born therefrom, remains attached thereto, and must one day return thither to be united with his ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty... .'

6. The theory of terra nullius has been critically examined in recent times by the International Court of Justice in its Advisory Opinion of 16 October 1975 - Western Sahara (62) (1975) ICJR, at p 39, para 79. There the majority judgment read:

> '…'Occupation' being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid 'occupation' that the territory should be terra nullius - a territory belonging to no-one - at the time of the act alleged to constitute the 'occupation' (cf. Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No.53, pp 44 f. and 63 f.). In the view of the Court, therefore, a determination that Western Sahara was a 'terra nullius' at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of 'occupation'.

7. Furthermore, the Western Sahara (62) (1975) ICJR, majority judgment said at p 39 para. 80:

> 'Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as terrae nullius. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of terra nullius by original title but through agreements concluded with local rulers. On occasion, it is true, the word 'occupation' was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an 'occupation' of a "terra nullius" in

the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual 'cession' of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of terrae nullius'.

8. Regarding Peoples' right to self-determination and to be free from repression and oppression by a dominant society, Judge Cancado Trindade of the International Court of Justice commented on the Unilateral Declaration of the Albanian Peoples of Kosovo and said in the Advisory Opinion of 22 July 2010: Accordance with international law of the unilateral declaration of independence in respect of Kosovo at pages 523-614 :

> '53. The advent of international organisations not only heralded the growing expansion of international legal personality (no longer a monopoly of States), but also shifted attention to the importance of fulfilling the needs and aspirations of people.'

9. The 1941 Atlantic Charter was an agreement between Churchill and Roosevelt, during the Second World War to have Great Britain and other European countries enter into a process of de-colonisation. Australia and Great Britain failed to advise the League of Nations and the newly developing United Nations that they had carriage and responsibility for a Protected Indigenous Peoples under a mandate from Great Britain.

10. In regards to a Mandate, Judge Trindade stated in the Kosovo Advisory Opinion that:

> '54. The mandates system emerged from human conscience, as a reaction to abuses of the past, and in order to put an end to them: the annexation of colonies, the policy of acquisition of territory (as an emanation and assertion of State sovereignty) practised by the great powers of epoch, the acquisition and exploitation of natural resources. All such abusive practices used to occur in flagrant and gross disregard to the already adverse conditions of living, and defenceless, of the native peoples. The reaction to such abuses found expression in Article 22 of the Covenant of the League of Nations, which

shifted attention to the peoples to be assisted and protected.'

11. Judge Trindade goes onto explain in detail the development of Peoples rights and advances the argument:

'55. Article 22 (1) and (2) of the Covenant left it clear that, under the emerging mandates system, the mandatory powers were entrusted with the 'well-being and development', and 'tutelage' of the people placed thereunder. State sovereignty was alien to the mandate system: it had no effect on, or application in, its realm. State sovereignty was clearly dissociated from mandatories, duties and responsibilities towards the mandated peoples, as a "sacred trust of civilisation", to promote the well-being and development of those peoples.'

12. In advancing the United Nations Trusteeship System, Judge Trindade stated that:

'59. In the United Nations international trusteeship system, under Chapters XII and XIII of the Charter, attention remained focused on the peoples concerned. There was, in addition, Chapter XI, on non-self-governing territorie: thereunder, Article 73 reiterated the notion of "sacred trust", in the protection of the peoples concerned "against abuses", and in the progressive development of their "self-government" pursuant to their "aspirations". As to the trusteeship system itself (Chapter XII), Article 76 listed its basic objectives, namely: "(a) to further international peace and security; (b) 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 as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement; (c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the independence of the peoples of the world; and (d) to ensure equal treatment in social, economic, and

commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice . . . .'

13. Judge Trindade continues:

71. "Yet, however clarifying an analysis of the kind may be (no one would deny it), it would remain incomplete if not accompanied by an examination of the teachings of the so-called "founding fathers" of the law of nations (le droit des gens). This latter is remarkable by its essentially humanist outlook — which is the one I have always espoused. Human conscience soon awakened, and reacted to the news of atrocities perpetrated at international level, in the epoch of formation of the jus gentium (already detached from its origins in Roman law), the droit des gens (derecho de gentes). The attention was turned to the victims, the people victimized by the violence and cruelty of power-holders of the time. Peoples assumed a central position in the early days of the emergence of the droit des gens.

72. Thus, as early as in the mid-sixteenth century, in his memorable account of the cruel destruction of the Indias (1552), Bartolomé de Las Casas, invoking the recta ratio and natural law, boldly denounced the massacres and the destruction of the villages, of the inhabitants of the Indias, perpetrated with impunity by the colonizers. … Despite the fact that the victims were totally innocent, not even women and children and elderly persons were spared by the cruelty and violence of those who wanted to dominate them, at the end killing them all; in some regions the whole population was exterminated. [Fray Bartolome' de La Casas, Relacio'n de le Destruction de la Indias (1552), Barcelona, Ediciones 29, 2004 (reprint), pp. 7, 9, 17, 41, 50 and 72]. The violence was characterized by its inhumanity and extreme cruelty; notwithstanding, injustice prevailed. But the reaction of the droit des gens emerged therefrom".

In the ICJ Advisory Opinion on the Albanian Unilateral Declaration of Independence in Kosovo, Judge Trindade articulated that:

"169. In the past, expert writing on statehood seemed obsessed with one of the

constitutive elements of statehood, namely, territory. The obsessions of the past with territory were reflected, in the legal profession, in the proliferation of writings on the matter, in particular on the acquisition of territory. Those past obsessions led to the perpetration of the abuses of colonialism, and other forms of dominance or oppression. All this happened at a time when international law was approached from the strict and reductionist outlook of inter-State relations, overlooking — or appearing even oblivious of — the needs and legitimate aspirations of the subjugated peoples.

170. The preconditions for statehood in international law remain those of an objective international law, irrespective of the "will" of individual States. As to the classic prerequisites of statehood, gradually greater emphasis has shifted from the element of territory to that of the normative system[185]. In more recent times, it has turned to that of the population — pursuant to what I would term as the people-centred outlook in contemporary international law — reflecting the current process of its humanization, as I have been sustaining for many years. In fact, the law of nations has never lost sight of this constitutive element — the most precious one — of statehood: the "population" or the "people", irrespective of the difficulties of international legal thinking[186] to arrive at a universally accepted definition of what a "people" means.

(185 Cf., e.g., K. Marek, Identity and Continuity of States in Public International Law, 2nd ed., Geneva, Droz, 1968, pp. 1-619.

186 The endeavours of conceptualization of "people", in connection with the exercise of)

171. Even some exercises of the past — which have proven to be long lasting and still valuable — disclosed concern with the conditions of living of the "people" or the "population", in an endeavour which at their time was perhaps not grasped with sufficient clarity. Thus, the célèbre 1933 Montevideo Convention on the Rights and Duties of States was adopted at the VII International Conference of American States as the most significant achievement of a Latin American initiative prompted by a regional resentment against interventionist and certain commercial policies. The Proceedings (Actas) of the Montevideo Conference reveal that the travaux préparatoires of

the aforementioned 1933 Convention were marked by reliance on principles of international law, so as to protect "small or weak nations"[187].

172. Those principles emanated from the "juridical conscience" of the continent[188]. In the course of that Conference's debates on the Draft Convention, there were in fact reiterated expressions of concern with the conditions of living of the peoples (pueblos) of the continent[189]. It comes, thus, as no surprise, that the 1933 Montevideo Convention, adopted on 26 December 1933 (having entered into force on 26 December 1934), in dwelling upon the prerequisites of statehood, already at that time referred first to the population, and then to the other elements. In the wording of its Article I, "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory ; (c) government; and (d) capacity to enter into relations with the other States."

187 [Actas de la] VII Conferencia Internacional Americana (1933) — II Comisión : interventions of Haiti (pp. 12-13), Nicaragua (pp. 15 and 60-61), Ecuador (p. 34), Argentina (pp. 38 and 40-41), El Salvador (p. 52) and Cuba (p. 60) (original document deposited in the Columbus Memorial Library, OAS, Washington, DC; copy of the document on file with me).

188 Ibid., interventions of Colombia (pp. 43-45 and 57-59), Brazil (p. 55), Nicaragua (pp. 62-63 and 72) and Uruguay (pp. 65-67).

189 Ibid., interventions of Mexico (pp. 20-21), Ecuador (p. 34), Chile (p. 48) and Nicaragua (pp. 62-63)].

173. In our age of the advent of international organizations, the former experiments of the mandates system (in the League of Nation sera), and of the trusteeship system (under the United Nations), to which the contemporary (and distinct) UN experiments of international administration of territory (such as Kosovo and East Timor) can be added, display one common denominator: the concern with the conditions of living, the well-being and the human development of the peoples at issue, so as to free them from the abuses of the past, and to empower them to become masters of their own destiny (cf. supra).

174. The historical process of emancipation of peoples in the recent past (mid-twentieth century onwards) came to be identified as emanating from the principle of self-determination, more precisely external self-determination. It

confronted and overcame the oppression of peoples as widely known at that time. It became widespread in the historical process of decolonization. Later on, with the recurrence of oppression as manifested in other forms, and within independent States, the emancipation of peoples came to be inspired by the principle of self-determination, more precisely internal self-determination, so as to oppose tyranny.

175. Human nature being what it is, systematic oppression has again occurred, in distinct contexts; hence the recurring need, and right, of people to be freed from it. The principle of self-determination has survived decolonization, only to face nowadays new and violent manifestations of systematic oppression of peoples. International administration of territory has thus emerged in UN practice (in distinct contexts under the UN Charter, as, for example, in East Timor and in Kosovo). It is immaterial whether, in the framework of these new experiments, self-determination is given the qualification of "remedial" or another qualification.

The fact remains that people cannot be targeted for atrocities cannot live under systematic oppression. The principle of self-determination applies in new situations of systematic oppression, subjugation and tyranny.

176. No State can invoke territorial integrity in order to commit atrocities (such as the practices of torture, and ethnic cleansing, and massive forced displacement of the population), nor perpetrate them on the assumption of State sovereignty, nor commit atrocities and then rely on a claim of territorial integrity notwithstanding the sentiments and ineluctable resentments of the "people" or "population" victimized. What has happened in Kosovo is that the victimized "people" or "population" has sought independence, in reaction against systematic and long-lasting terror and oppression, perpetrated in flagrant breach of the fundamental principle of equality and non-discrimination (cf. infra). The basic lesson is clear: no State can use territory to destroy the population. Such atrocities amount to an absurd reversal of the ends of the State, which was created and exists for human beings, and not vice-versa.

In the Summary of the Advisory Opinion of the ICJ, 9 July 2004, on the Question set

forth by the United Nations resolution ES-10/14 (8th December, 2003)

"The Consequences of the Construction of a Wall in the Occupied Palestinian Territory", the ICJ advised of the following inter alia;

> 'As to the principle of self-determination of peoples, the court points out that it has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) pursuant to which "Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution]…of their right to self-determination". Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon State parties the obligation to promote the realisation of that right and to respect it, in conformity with the provisions of the United Nations Charter. The Court recalls its previous case law, which emphasised that the current developments in "International Law in regards to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]", and that the right of peoples to self-determination is today a right erga omnes.

On the Question of a People's right to 'revolt' against tyranny and subjugation, oppression and repression, the ICJ at the Request of the United Nations, provided another Advisory Opinion on the Question of a Unilateral Declaration of Independence. On this issue the United Nations referred the matter to the ICJ:

> 'The Court observes that the question posed by the General Assembly is clearly formulated. The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It notes that the question does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State. The Court accordingly sees no reason to reformulate the scope of the question.

It considers however that there are two aspects of the question which require comment. First, the question refers to "the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo" (General Assembly resolution 63/3 of 8 October 2008, single operative paragraph; emphasis added). In addition, the third preambular paragraph of the General Assembly resolution "[r]ecall[s] that on 17 February 2008 the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia". Whether it was indeed the Provisional Institutions of Self-Government of Kosovo which promulgated the declaration of independence was contested by a number of those participating in the present proceedings. The identity of the authors of the declaration of independence, as is demonstrated below, is a matter which is capable of affecting the answer to the question whether that declaration was in accordance with international law. It would be incompatible with the proper exercise of the judicial function for the Court to treat that matter as having been determined by the General Assembly. Nor does the Court consider that the General Assembly intended to restrict the Court's freedom to determine this issue for itself. The Court notes that the agenda item under which what became resolution 63/3 was discussed did not refer to the identity of the authors of the declaration and was entitled simply "Request for an advisory opinion of the International Court of Justice on whether the declaration of independence of Kosovo is in accordance with international law.'

In his separate judgement Judge Trindade concluded at para 205-208:

"205. Grave breaches of fundamental human rights (such as mass killings, the practice of torture, forced disappearance of persons, ethnic cleansing, systematic discrimination) are in breach of the corpus juris gentium, as set forth in the UN Charter and the Universal Declaration (which stand above the resolutions of the United Nations political organs), and are condemned by the universal juridical conscience. Any State which systematically perpetrates those grave breaches acts criminally, loses its legitimacy, and ceases to be a State for the victimized population, as it thereby incurs into a gross and flagrant reversal of the humane ends of the State.

206. Under contemporary jus gentium, no State can revoke the constitutionally

guaranteed autonomy of a “people” or a “population” to start then discriminating, torturing and killing innocent persons, or expelling them from their homes and practising ethnic cleansing — without bearing the consequences of its criminal actions or omissions. No State can, after perpetrating such heinous crimes, then invoke or pretend to avail itself of territorial integrity; the fact is that any State that acts this way ceases to behave like a State vis-à-vis the victimized population.

207. An international organization of universal vocation and scope of action like the United Nations, created on behalf of the peoples of the world (supra), is fully entitled to place under its protection a population that was being systematically discriminated against, and victimized by grave breaches of human rights and international humanitarian law, by war crimes and crimes against humanity. It is fully entitled, to my understanding, to assist that population to become master of its own destiny, and is thereby acting in pursuance of its Charter and the dictates of the universal juridical conscience.

208. In a historical context such as the one under review, the claim to territorial integrity, applicable in inter-State relations, is not absolute as some try to make one believe. If one turns to intra-State relations, territorial integrity and human integrity go together, with State authority being exercised harmoniously with the condition of the population, aiming to fulfil their needs and aspirations. Territorial integrity, in its intra-State dimension, is an entitlement of States which act truly like States, and not like machines of destruction of human beings, of their lives and of their spirit 216. By the same token, self-determination is an entitlement of “peoples” or “populations” subjugated in distinct contexts (not only that of decolonization) systematically subjected to discrimination and humiliation, to tyranny and oppression. Such condition of inhumane subjugation goes against the Universal Declaration and the United Nations Charter altogether. It is in breach of the Law of the United Nations.