DEFINITIONS

SOVEREIGNTY is the 'supreme controlling power'. In communities not under monarchal government, it is the supreme dominion and authority. (1)

The criterion used to establish the sovereign status of Aboriginal people must avail itself of explicit and conceptual comparison with international law. The rights of 'first discoverers' alone gave Aboriginal people an original root title that extends back to the beginning of time. Alberico Gentili, the sixteenth century jurist and professor of law, considered 'natives' equal to other people under the law of nations. (2)

Vattel declared in his Law of Nations:

> Every nation that governs itself, under what form soever, ... is a *Sovereign State*. Its rights are naturally the same as those of any other state .... it is sufficient that it be really sovereign and independent, that is, it governs itself by its own authority and laws. (3)

The complex rules of Aboriginal sovereign law in their application and attainment of social equality, well-being of our citizens and the order of overall universal peace prevailed to a greater extent than that which obtained in Britain at the time of their invasion of our land (1770).

That all nations recognised the sovereignty of indigenous peoples in the 'New Worlds' is also an indisputable fact, even when indigenous sovereignty has been denied legal status. Such denial of legal recognition within the statutes of the invaders cannot remove that original sovereign right.

In 1537, Pope Paul III declared:

> The said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property, nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect. (4)

In 1975, the International Court of Justice confirmed in the *Western Sahara Case* that, where an indigenous people exercise a traditional use of passage and/or, a usufructuary right, that land cannot be regarded as *terra nullius*, - land belonging to no-one. (5) Aboriginal sovereignty continued unextinguished despite the Spanish colonists' claim that the land was *terra nullius*.

In a separate opinion, Judge Ammoun referred to Mr Bayona-Ba-Meya, Senior President of the Supreme Court of Zaire, who dismisses 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)

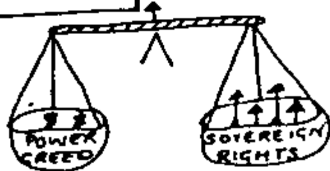
In the Western Sahara Case the claim of *terra nullius* had to give way to the original sovereignty of the indigenous owners due to evolving International legal standards.

It is quite clear that the principle of establishing sovereignty on the basis of *terra nullius* is an untenable basis of claim for Australia. International jurisprudence maintains that: '... acts contrary to law - cannot become a source of legal rights for the wrong-doer.' (7)

ROOT TITLE TO LAND is that ultimate title clear of any claim or encumbrance by another party, eg. the sovereign root-title. It can be established on occupation, unowned wasteland, by first discovery and subsequent possession. Where a land is inhabited by a People, who exercise their possessory right, the derivative root title is obtained for these lands by ceding, through the instrument of Treaty. (8)

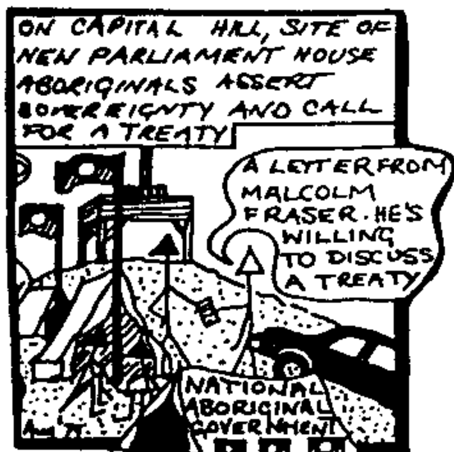
TREATY is an international agreement concluded between Nation States in written form and governed by international law. It is an exchange of powers and duties between two or more Nation States, who are prepared for any dispute arising under the Treaty to be arbitrated according to international legal principles and by international legal instructions. (9)

A Treaty is automatically constitutional and overrides internal laws (10).



A Treaty cannot contravene 'any relevant rules of international law' (11) eg. Civil and Political Rights; Elimination of Racial Discrimination; and Economic, Social and Cultural Rights; all of which Australia has ratified.(12)

Treaties affect only the rights explicitly mentioned, so there can be no loss of any Sovereignty by signing a sovereign Treaty, unless specified in the Treaty itself. On the contrary, when other governments make Treaties it is taken as evidence of the recognition of 'international personality'. So making Treaties can actually become a way of proving and maintaining sovereignty.



INDIAN or MAORI 'TREATIES' or MAKARRATA are, according to the law of nations, a 'legislative action on the part of the State'. They are domestic unilateral acts. (13) The Canadian Government recently described them as: '... those treaties are merely considered to be nothing more than contracts between a sovereign group and its subjects.' (14)

When studying the legislative methods for a Makarrata, a domestic treaty, or 'social compact' in Australia, the Senate Standing Committee warned that the methods were vulnerable '...to the possibility of amendment or repeal by subsequent Parliaments.' (15)

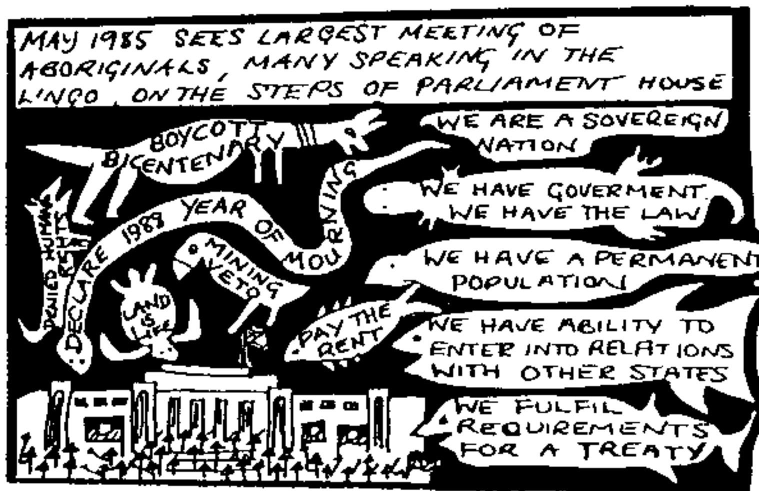
Even in a domestic treaty under the Australian Constitution's external affairs powers (section 51xxix) the 'Commonwealth Government' is able to ignore their constitutional power over the internal states, as we have witnessed by the failure of the 'Commonwealth Government' to use the powers, granted to it by the 1967 referendum, to over-ride racist laws.

Only a Treaty under international law is constitutional, over-rides internal laws and is enforceable.

STATE OR NATION STATE is a centralised legal order. (16)

In international law it is a sovereign nation. The qualifications for Statehood are:

a) Permanent population



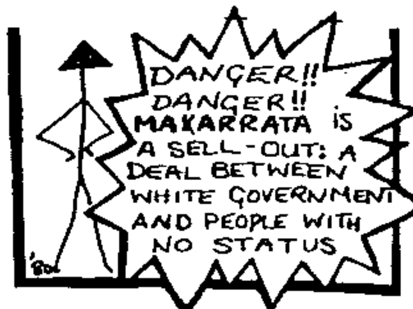
b) Effective Government capable of maintaining order within its territory.

c) Ability to enter into relations with other States

d) Sovereign personality, ie. recognised by other Nation States (17)

Aboriginal People fulfil the requirements of Statehood. We are a Nation State. Our root title to land has remained intact since time began.

Aboriginal/Indigenous People are a sovereign State if they have law, root title to land by original 'discovery' and possession of the land, since time began.



AIATSIS Library, B G465.13/A1
"Aboriginal sovereignty: justice, the law and land", Kevin Gilbert
Canberra 1988.
(m0066865_p28_a.pdf)

To cite this file use :
http://www.aiatsis.gov.au/lbry/dig_prgm/treaty/t88/m0066865_a/m0066865_p28_a.pdf
© Kevin Gilbert