

**United Nations Permanent Forum on Indigenous Issues  
Ninth Session - New York  
19-30 April 2010**

**Intervention of the Indigenous Peoples Organisations of Australia**

**Agenda Item 7: Preliminary study on the impact on indigenous peoples of the international legal construct known as the ‘doctrine of discovery’, which has served as the foundation of the violation of their human rights**

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**JOINT INTERVENTION DELIVERED BY Ms. Tammy Solonec ON BEHALF OF:**

National Native Title Council (NNTC)  
Foundation for Aboriginal and Islander Research Action (FAIRA)  
New South Wales Aboriginal Land Council (NSWALC)  
National Indigenous Higher Education Network (NIHEN)  
Aboriginal Legal Service Western Australia (ALSWA)  
Aboriginal Legal Rights Movement (ALRM)  
Bullana, The Poche Centre for Indigenous Health  
National Aboriginal Community Controlled Health Organisation (NACCHO)  
Indigenous Peoples Organisation Network Youth Delegation  
Amnesty Australia  
Oxfam Australia  
The Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner

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Thank you Mr Chairperson.

This intervention on the Doctrine of Discovery is delivered on behalf of the Indigenous Peoples Organisations of Australia present at this forum.

The Doctrine of Discovery has a shameful history in international law and in the domestic law of the United States (US). The Doctrine is akin to the Doctrine of Terra Nullius applied in Australia. Both have a history of entrenched racism. The Doctrines have been used to rationalise the dispossession of Indigenous peoples from their lands and waters and to justify non-recognition of their political sovereignty. This has resulted in a disgraceful history of dispossession, degradation and genocide.

The Doctrine of Discovery was first adopted into US law in 1823 to justify the taking of Indian lands in the US Supreme Court case of *Johnson v. McIntosh*, where it was observed that Christian European nations had assumed "ultimate dominion" over the lands of America during the Age of Discovery. Under the Doctrine, the Indians lost their rights to complete sovereignty, as independent nations and only retained a right of occupancy in their lands.

In Australia, a similar story played out with the Doctrine of Terra Nullius, which is Latin for 'land belonging to no one'. Some say that rather than *terra nullius* meaning vacant or empty land, which it clearly was not, that it was interpreted as being an absence of 'civilized' society.

The first Australian mention of the Doctrine of Terra Nullius was in 1835, when the New South Wales Governor implemented the Doctrine and proclaimed that Aboriginal peoples could not sell, assign or acquire land, other than through distribution by the Crown. Although this explicit use of the term was used this early on in British settlement to refuse Aboriginal ownership of land and to continue taking land, it was not endorsed by the Privy Council in England until 1889 in *Cooper v Stuart*.

The main difference between the Doctrine of Terra Nullius as it was used in Australia and the Doctrine of Discovery as used in the US, was religion. In the US, the term "unoccupied lands" was used to refer to "the lands in America which, when discovered, were 'occupied by Indians' but 'unoccupied' by Christians." The Indians were considered heathens because they lacked Christianity.

In Australia, it wasn't that the Aboriginal peoples were considered lesser humans because they lacked Christianity, it was that they were not considered human at all. In Australia, Aboriginal peoples were provided for under State Flora and Fauna legislation, without being referred to as human.

Regardless of the justification, the Doctrines had the same result, which was to significantly reduce the ability of Indigenous peoples' to own their land or acquire other land. This is recent history for Australia, with the Doctrine only being repudiated by the Australian High Court in 1992 in the famous *Mabo* decision.

Like the Doctrine of Discovery, the legacy of the legal fiction of terra nullius lives on. In Australia today, we see Aboriginal peoples with epidemically low levels of freehold ownership and complicated and watered down native title rights.

**Recommendations:**

In that regard, we recommend that the Permanent Forum conduct and coordinate a comprehensive review of the Doctrines of Discovery and Terra Nullius and other similar doctrines around the world that have been used as a legal basis to dispossess Indigenous peoples of their lands.

We further recommend that the study consider current laws which perpetuate the doctrines, such as the law of inheritance and make recommendations as to how their impact may be unraveled, including through compensation and reparation schemes.

Thank you Chairman.