

# **Geopolitics of Aboriginal Sovereignty: Colonial Law as ‘a Species of Excess of Its Own Authority’, Aboriginal Passport Ceremonies and Asylum Seekers**

**Joseph Pugliese\***

## **Introduction**

In her trenchant critique of the manner in which settler-colonial law, in its seemingly progressive manifestation through the *Mabo* Native Title legislation, in fact operated as a ‘particularly problematic form of neocolonial practice’, Penny Pether (1998: 130) demonstrates how this assertion of contemporary neocolonial practice was predicated on the High Court’s refusal to address the charged issue of Aboriginal sovereignty – with all the attendant foundational ramifications that this would have entailed. In adjudicating on this issue, Australian settler-colonial law was, in Pether’s (1998: 124) memorable phrase, acting as ‘a species of excess of its own authority’. If, Pether (1998: 116) argues, *Mabo* was marked by what ‘the judgment refuses to do’ (that is, acknowledge Aboriginal sovereignty), then it is also inscribed, paradoxically, by what it ‘makes imaginable’: that Aboriginal sovereignty has never been extinguished – despite over two hundred years of colonial rule (of law).

Taking my point of departure from Pether’s illuminating insights, in the course of this essay I proceed to examine the continued exercise of Aboriginal sovereignty as an instantiation of social justice praxis

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in the face of settler-colonial law's ongoing production of deaths in custody in the context of Australia's refugee and asylum seeker prisons. I situate this exercise of Aboriginal sovereignty in the context of two Aboriginal Passport Ceremonies.

In the course of 2012, Uncle Ray Jackson, President of the Indigenous Social Justice Association (ISJA), working with an Indigenous and non-Indigenous collective, worked to realise the first Aboriginal Passport Ceremony. On 15 September 2012, the ceremony was staged at The Settlement, Redfern (Figure 1).



Figure 1: Uncle Ray Jackson stamping an Aboriginal Passport at the Aboriginal Passport Ceremony.

Photograph by the author.

A second Aboriginal Passport Ceremony was also staged at The Settlement, Redfern, on 13 September 2014. In the course of this essay, I discuss the complex range of meanings that these ceremonies generated. My discussion is oriented by the perspective of a non-

Indigenous activist working with ISJA to materialise these events and from the position of an academic committed to decolonising scholarship. These events, I contend, marked the counter-discursive resignification of the very technology – the passport – deployed by the settler-colonial Australian state in order to consolidate and reproduce the ongoing usurpation of Indigenous sovereignty.

Precisely by resignifying the passport as an Aboriginal technology crucial in legitimating non-Indigenous people's movement through Australia's Aboriginal Nations, the ceremonies at once marked Aboriginal people's unceded and unextinguished sovereignty over Country *and* their right to offer welcome and hospitality within their own lands. It is in this context that I proceed to examine the critical intersection of the settler-colonial state's violent treatment of refugees and asylum seekers, deaths in custody, the ongoing assertion of Aboriginal sovereignty and the possibility of justice.

In the latter part of the essay, and in the wake of my discussion of these Aboriginal Passport Ceremonies, I proceed to situate Aboriginal sovereignty within the very geopolitical relations of power that, I argue, are effectively disavowed and effaced by the hegemonic force of the settler-colonial state. This hegemonic force, specifically as exercised and reproduced through settler-colonial law, repeatedly works to neutralise and erase the inter- and intra-state dimensions that inscribe the ongoing usurpation of Aboriginal sovereignty by the Australian state and its juridical apparatus.

### **1 Aboriginal Contestations of the Settler-Colonial State's Usurpation of Indigenous Sovereignty and Its Violent Immigration and Border Control Policies**

Over the course of the last decade, I have been documenting and writing about the serial deaths in custody of Australia's refugees and asylum seekers. These are the very subjects that, in Pether's (1998a: 18) words, 'are embodied and/or discursively and socioculturally positioned differently from the paradigmatic man of law', that is, that hegemonic-normative figure that sets the legal schema that

determines who can count as a human-rights-bearing subject. I commenced my documentation and analysis of refugee and asylum seeker deaths by writing on the case of Habib Wahedy, who died on 11 April 2003 (Pugliese 2003). Wahedy was an Hazara Afghani asylum seeker fleeing persecution in Afghanistan, who, on the day he was to be deported, flung himself onto power lines and electrocuted himself. More recently, I examined the death of Josefa Rauluni in Villawood's immigration detention prison, who, again on the day he was due to be deported back to Fiji from whence he was fleeing political persecution, flung himself from one of the detention prison's balconies and died on impact with the ground (Pugliese 2011).

As I have discussed elsewhere, in looking back over a decade of writing on the traumatic events unfolding in Australia's immigration prisons, I can perhaps best sum up my work as constituting the limited keeping of a necroethical record of deaths and self-harm produced by Australia's necropolitical immigration detention regime in the face of a systemic national forgetting (Pugliese 2011: 29-30). This catalogue of refugee deaths has recently culminated in two more harrowing deaths: the violent murder of Reza Barati and the self-immolation of Leo Seemanpillai. Reza Barati, an Iraqi asylum seeker, was killed by G4S security guards in a frenzied attack that included rocks, machetes and the stomping on his head with boots.

Leo Seemanpillai, while waiting for over a year to hear the outcome of his application for asylum, lived in fear that he would be returned to Sri Lanka, where the government stands accused of genocidal crimes against the Tamil population. In despair, on 21 June 2014, Leo Seemanpillai set himself alight and burned to death. In a searing analysis of Seemanpillai's death, Suvendrini Perera (forthcoming) movingly articulates what exactly was at stake for Seemanpillai: 'To burn himself to death was to ensure the impossibility of a yet more agonizing fate, to choose the certainty of no-return. Leo was burning his boats' rather than risk the terror that awaited him, as a persecuted Tamil, back in Sri Lanka. In the wake of these most recent asylum seeker deaths, and in the light of a recent report that has found that

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'More than 90 per cent of asylum seekers who arrive by boat [to Australia]' have been 'found to be genuine refugees' (Hall 2013), I want to return to the staging of the Aboriginal Passport Ceremony as a way of attempting to articulate the possibility of justice for Australia's imprisoned refugees and asylum seekers.

The first Aboriginal Passport Ceremony was organised by Uncle Ray Jackson together with a group of Indigenous and non-Indigenous activists. Uncle Ray Jackson describes the aims of the ceremony thus: 'the issuing of the Passports covers two areas of interactions between the Traditional Owners of the Lands and migrants, asylum seekers and other non-Aboriginal citizens in this country. Whilst they acknowledge our rights to all the Aboriginal Nations of Australia we reciprocate by welcoming them into our Nations' (ISJA Media Release 2012). In the course of the ceremony, non-Indigenous Australians were required to purchase an Aboriginal passport and to pledge a formal acknowledgment of unceded Aboriginal sovereignty over the various Indigenous Nations that cover the Australian continent (Figure 2).



Figure 2: The Aboriginal Passport desk with Uncle Ray Jackson.

Photograph by the author.

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The Australian government's excision of the larger part of the continent and its islands from the migration zone, which therefore precludes asylum seekers from claiming asylum on landfall, and its establishment of a neocolonial gulag of immigration prisons in offshore places such as Manus and Nauru, must be seen as foundationally enabled by the ongoing usurpation of Aboriginal sovereignty over their own nations. This is something that both Suvendrini Perera (2007, 2009) and Maria Giannacopoulos (2007, 2011) have documented in compelling detail. Australia's immigration gulag archipelago, then, must be seen in terms of a transnational matrix of settler-colonial violence that inextricably binds an ensemble of diverse subjects (Aboriginal people and asylum seekers) and seemingly unrelated geographical sites (Villawood Immigration Detention Centre, Sydney, and Manus Detention Centre, Manus Island).

In his unpacking of the double logic that constitutes the exercise of state sovereignty, Jens Bartleson (1995: 180) writes that 'Without a "foreign policy" there can be nothing domestic, since the former has as its task precisely to define the latter by *domesticating* what initially was *foreign* to it, buried in the depths of its violent prehistory and inserted as a state of nature in its contractual justification'. In contemporary formations of state sovereignty, Bartleson (1995: 244) adds, 'what is now Other to the state is not primarily contained in its own prehistory, but temporally simultaneous yet spatially distinct from it'.

I want to flesh out Bartleson's acute theoretical unpacking of state sovereignty by transposing it to the concrete territorial operations of the settler-colonial Australian state. Australia's immigration policy re-enacts the violent domestication of what was 'foreign' to it even prior to its formal constitutional establishment: Aboriginal peoples. The 'violent prehistory' that comes before the enunciative foundation of the Australian state through its formal Federation figures precisely as a time synchronous with 'a state of nature' in which Aboriginals and Torres Strait Islanders are made, through the violence of the biopolitical caesura,<sup>1</sup> coextensive with nature and are thereby relegated to the vestibule of settler-colonial culture where, categorised by colonial law

and policy as animals and lawless savages, they are forced to undergo the colonial practices of 'violent domestication'.

What is operative here is what Pether (2008: 2298) saw as constitutive 'in founding modern nations on principles of hierarchy and exclusion that circumscribe the reach of law's protective aegis, and/or carve out zones for selective applications of legal violence, as, for example, in the denying of what I will carefully call the status of subjects to [I]ndigenous Australians'. Through the denial of the status of subjects to Indigenous Australians, and their subsequent dispatch to zones (reserves, missions, welfare institutions and so on) governed by the targeted application of legal violence, domestication of the internal other works to establish the political sovereignty of the settler-colonial state. This settler-colonial 'dispatch' of Indigenous people is driven by what Patrick Wolfe (2006: 387) appositely terms a 'logic of elimination' in order to 'access territory'. Only after this fact can the Australian state delineate its territorial sovereignty, proceed to name its external/foreign others, and work to manage and control them through its foreign policies – all the while relegating its Indigenous peoples to the 'spatially distinct' zones of reservations.

In a letter to former Prime Minister Kevin Rudd titled 'A Cruel and Crass Act of Colonialism' (2013), Uncle Ray Jackson names and identifies the material reality of this foreign/domestic nexus as crucial to the operation of the Australian settler-colonial state: 'The invasion of the Aboriginal Nations that began in January, 1788 continues to this day but after time it also allowed, under statute, a xenophobic and racist Law that was used against my peoples and immigrants/refugees'.

These two indissociable time-spaces, as chronotopes that found the settler-colonial state's sovereignty, continue to inscribe the present: they topologically conjoin the violent 'prehistory' of the Australian state to contemporary trans/national geopolitical iterations of state violence. In the exercise of sovereignty, Bartleson (1995: 180) contends that a state's foreign policy is 'as much a policy for dealing with a traumatic past, as it is a policy for dealing with a spatial outside'. The topological fold that inscribes this particular exercise of colonial sovereignty instantiates

the conjoined double movement of deploying foreign policy in order to deal with the internal trauma of the past *and* the trauma of an alien exteriority.

The unresolved trauma of the Australian state's Indigenous past is sutured to its contemporary trauma of alien exteriority in the conduct of its contemporary Operation Sovereign Borders. Operation Sovereign Borders entails the militarisation of Australia's maritime borders through the deployment of the Australian Defence Force in order to thwart the arrival of asylum seekers on Australian land. The topological manifestation of this sovereign double trauma is made manifest through the scandalous regime of deaths in custody that encompass both the continuing escalation of Aboriginal deaths in custody in Australia's criminal-justice system and the ongoing deaths in custody of Australia's refugees and asylum seekers in its immigration prisons.

A number of Indigenous scholars, artists and activists have brought into critical focus the inextricable connection between Australia's violent immigration detention policy and the ongoing usurpation of Indigenous sovereignty. Furthermore, a number of Indigenous scholars have both theorised and enacted the contestation of the settler-colonial state's usurpation of sovereignty (Birch 2000, Watson 2007, Moreton-Robinson 2007). In the context of the first Aboriginal Passport Ceremony, Uncle Ray Jackson not only issued passports to a number of asylum seekers and refugees, but he also proceeded to acknowledge, in a profoundly moving gesture, the absent asylum seekers and refugees who could not attend the ceremony because they were locked up in Australia's immigration prisons or because they had died within those prisons. He placed centre stage an empty chair over which was draped the Aboriginal flag (Figure 3).





Figure 3: The Aboriginal flag-draped chair at the Aboriginal Passport Ceremony.

Photograph by the author.

In the context of the Aboriginal Passport Ceremony, this domestic piece of furniture, a chair, became charged with a complex range of significations. It was at once a quotidian piece of furniture and a loaded symbol of both usurped *and* unextinguished Aboriginal sovereignty: usurped Aboriginal sovereignty precisely because the law of the settler-colonial state has overridden Indigenous law and continues to imprison asylum seekers *and* unextinguished Aboriginal sovereignty as, in the face of this ongoing settler-colonial violence, Uncle Ray Jackson proceeded to offer welcome to Australia's refugees and asylum seekers in the face of their incarceration by the Australian state.

Let me emphasise, before I proceed any further, that precisely what

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I do not intend to do here is to configure some sort of homogenised and unitary Indigenous response to asylum seekers and refugees. This is something that Uncle Ray Jackson (2011) clearly underscores in all of his position statements on refugees and asylum seekers. He writes, for example, that:

I realise, of course, that other Aborigines may have different views to mine and, of course, that is their right. But I will state most strongly in their defence that these refugees did not invade us, they did not steal our lands, they did not suppress our culture and language, they did not commit genocide, they did not steal our children, they did not steal our wages, they did not steal our human rights as a first people to exist and to grow. The parliament of the invaders have done that and more.

Again, I say to the asylum seekers, you are welcome to our lands.

The utilitarian status of the domestic chair situated centre stage of the Aboriginal Passport Ceremony is transcended by Uncle Ray's cloaking of the chair with the Aboriginal flag. The Aboriginal flag transmutes the chair into a political symbol that gestures to the preclusion of Aboriginal people from the seat of governmental power and the attendant right to decide who can or cannot enter their Aboriginal Nations. In an open letter to Kevin Rudd, then Australia's Prime Minister, Uncle Ray Jackson (2013) writes in order to vent his outrage at the government's violent immigration policies and then proceeds to say that:

I am further insulted and denigrated that you Politicians even believe you have any moral right to say who can and who cannot come to this country, to the Aboriginal Lands of the Aboriginal Nations. Always was, always will be Aboriginal Land. Your disgusting premise is built on theft and Genocide so perhaps it should not come as too much of a surprise that you wish to force it upon others outside of your ethnic and religious kind.

In addition to these politically-inflected meanings, the chair signifies otherwise. As Aboriginal flag-draped *vacant* chair, it magnetises a number of funereal meanings. The Aboriginal flag that drapes this chair as shroud marks the absent-presence of those killed

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by the Australian government's exercise of state violence through its juridico-penal apparatus. And I deploy the term 'killed' in the biopolitical sense of the word, that is, even when these refugee deaths are named as 'suicides', they must be understood as deaths that have been enabled by bio-and necropolitical relations of power that facilitate and enable the process of 'letting die' (Foucault 2003: 256). In this context, the Aboriginal flag as shroud also evokes those other settler-colonial state deaths: Aboriginal deaths in custody that now number in the hundreds. As Suvendrini Perera and I have argued elsewhere, these Aboriginal deaths in custody must be seen as structural outcomes of what we have termed the *standard operating procedures* of the white settler-colonial law (Perera and Pugliese forthcoming).

The flag-draped chair, covered with its funereal shroud, evokes the names of the refugee dead who could not attend this ceremony: Habib Wahedy, Mehmet al Assad, Alamdar Kakthiari, Adeeb Kamal Al-Deen, Hassan Sabbagh, Josefa Rauluni, Reza Barati, Ahmad al-Akabi, Hamid Kehazaei, Leo Seemanpillai and all the other named and unnamed asylum seekers who, in the Australian context, have died in the process of claiming asylum. I name these dead in order to disrupt the Australian government's imposition of a regime of censorship and secrecy that renders the suffering and loss that transpires daily within Australia's immigration prisons as both disembodied and anonymous. This catalogue of the dead that I have just articulated is anachronic in its movement and structure. Viewed in Levinasian terms, these refugee and asylum seeker dead already precede me within a genealogy of indefinite temporalities of the past dead that always already instantiate the necroethical call for the assumption of responsibility for the other person (Pugliese 2011: 34). The funereal dimensions evoked by the flag-draped chair were movingly embodied in Uncle Ray Jackson's (2014) conferring of a posthumous Aboriginal passport, during the 2014 ceremony, to the family of Hamid Kehazaei:

after consultations with the family of hamid kehazaei, agreement has been made to give his family an aboriginal passport, in his name, to honour both their son and their decision to donate his organs to

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australian citizens. this magnificent gesture by his family totally shames the foul abbot government and, especially, his disgraceful and shameful minister for incarcerating innocent asylum seekers in this country. (Lower case in the original).

The Aboriginal Passport Ceremony marked, for me, the counterdiscursive resignification of the very technology – the passport – deployed by the settler-colonial Australian state in order to consolidate and reproduce the ongoing usurpation of Indigenous sovereignty. Precisely by resignifying the passport as an Aboriginal technology crucial in legitimating non-Indigenous people’s movement through Australia’s Aboriginal nations, the ceremony at once marked Aboriginal people’s unceded and unextinguished sovereignty over Country *and* their right to offer welcome and hospitality within their own lands. Significantly, the Aboriginal Passport Ceremony evoked and politically resignified and reclaimed the citizenship ceremonies that are held annually across Australia in order to confer citizenship on non-native subjects (Figure 4). These are ceremonies that labour to confirm the unresolved (il)legitimacy of the settler-colonial state precisely by enacting and reproducing the ongoing governmental expropriation and effacement of Aboriginal sovereignty through acts of ‘naturalisation’ that work symbolically to nativise, and thereby occlude, the outsider and illegitimate status of the subject of the settler-colonial state engaged in acts of conferring citizenship.



Figure 4: Non-Indigenous supporters holding up their Aboriginal Passports.

Photograph by the author.

## 2 'Illegal Occupation by Way of a Fraud': The Eualhlayi People's Contestation of *Terra Nullius* by Other Means

In speaking of the ongoing expropriation of Aboriginal sovereignty by the settler-colonial state, I do not intend this to signify in purely rhetorical terms. On the contrary, I situate this violent act of ongoing usurpation within the ongoing struggle by Aboriginal people to regain their lands and their sovereignty over Country in the Australian courts – not through, let me stress, the flawed process of Native Title claims, but through the legal contestation of settler-colonial title over Indigenous lands. In her writing on the High Court's *Mabo* judgment, Pether (1998: 118) brings into critical focus precisely what is at stake in the High Court's majority decision:

The High Court's explicit refusal to address the sovereignty question is, then, I would suggest, both a critical ethical blindspot in the judgment and curiously symptomatic. The High Court's protection of the source of its own (illegitimate?) power as the judicial arm of Australia's national

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government and its act of containment masquerading as recognition are both symptoms of the covert yet insistent assertion of its own (colonial) power. That the 'Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court' (*Mabo* 1992: 2) was the one thing on which the entire court agreed.

What Pether terms as an 'act of containment' effectively worked to qualify the terms of access to Native Title so as to render it almost impossible for the majority of Australia's Indigenous people to achieve justice for colonial dispossession. In the face of this, I want to draw attention to a case that is unfolding even as I write, and that is attempting to challenge the very possibility that Pether (1998: 118) marks as having been structurally precluded by the High Court judgment: 'That the "Crown's acquisition of sovereignty cannot be challenged in an Australian municipal court"'. I refer here to the case of the Eualhlayi Peoples of north-western New South Wales and southwest Queensland, who have lodged a subpoena in the NSW Supreme court requesting a range of key documents, including: 'All original documents including but not limited to deeds, file notes, records of conversations, instructions and orders by virtue of which the Crown, the New South Wales Government and Brewarrina Shire Council claim to be the proprietor of the ancient tribal Allodial Title from time immemorial of the lands over which it claims it lawfully operates as a shire' (Anderson 2014: 2).

In a perverse response that inverts the relations of power that actually inscribe the Indigenous and settler-colonial dyad, the 'Notice of Motion from the Crown sought Orders from the Supreme Court to dismiss the subpoena,' claiming it was 'oppressive' (cited in Anderson 2014: 3). Ghillar Michael Anderson (2014: 3) unpacks what actually lies behind the Minister of the Crown's assertion that the Eualhlayi Peoples' claim was 'oppressive': 'Clearly, the NSW government has no such documents regarding land titles, other than an exercise of a deceit by fraud, using the protection of the right of the English Crown. This is their protection as they have no legitimate law of their own that comes from the consent of the Eualhlayi Peoples.' The foundation of

the Australian settler-colonial state's claims to sovereign ownership of Aboriginal lands is here exposed as something founded on a series of fraudulent legal ruses. Anderson (2014: 3) tracks and discloses this dubious legal genealogy:

We understood that Brewarrina Shire Council's frustration, because they are merely a construct from the Letters Patent and by a subsequent NSW Legislative Act. This council was imposed upon the region and the Euahlayi Nation and Peoples without any free prior and informed consent and commenced illegal occupation by way of a fraud. We did not expect them to have any of the documents that were sought regarding land title transfer. As a consequence Brewarrina Shire Council yielded to the powers of the NSW Minister responsible for lands to protect their illegitimate regime.

Even as the NSW government has no documents to verify and legitimate its title over the Euahlayi People's land through treaty or some other legal text evidencing land title transfer, it does possess, as Anderson (2014: 3) accentuates, the records that document the violent colonial process of dispossession:

They do, however, have all the records relating to the removal of children since 1909. When the Duty Judge, Justice Campbell, enquired of my reason in respect of subpoenas, I pointed out that the State is illegally occupying our lands as a consequence of the murder of the Euahlayi Peoples under the colonial regime of "clearing the land of vermin."

In the face of this colonial violence, and its ongoing official erasure in Australian courts of law, one can clearly see how the *Mabo* decision worked to play a constitutive role in the national drama of what Pether (1998: 130) terms 'violent forgetting', precisely as she calls for 'the necessity of a detailed and contextualised rhetorical critique of the majority decision in *Mabo*'. Pether (1998: 30), indeed, posits that its 'humaneness' and 'activism' were in fact cloaks for a particularly problematic form of neocolonial practice, and that the subsequent history of post-*Mabo* Native Title in Australia was predictable because of the 'violent forgetting which characterises the majority judgments in *Mabo*'.

Anderson, in his response, refuses to engage on the coloniser's terms. He exposes the violence that must be elided in order for *Mabo* to appear as an embodiment of the 'humaneness' of Australian law precisely by bringing into focus the flawed regime that is Native Title, with its demand that Indigenous people evidence unbroken occupation of their lands in their claim to Native Title. Anderson notes that 'this was exacerbated by the legislatively approved acts of the State to forcibly remove children of the Euahlayi, and others, in order to de-Aboriginalise them and thereby deny them a future claim to their inherent right to their Country and heritage' (2014: 3). Anderson here underscores Pether's foundational insight in her analysis of *Mabo*: 'that the High Court's decision in *Mabo* operated as a denial of responsibility on the part of the common law for the colonisation of Australia' (Pether 1998: 118-19). In his trenchant analysis of the Crown's framing of the Euahlayi People's case as 'oppressive', Anderson (2014) both names and exposes the role of common law as instrumental in the colonisation of Australia.

Nan Seuffert (2006: 135) succinctly encapsulates the colonial dimensions of common law native title that Anderson is working to overturn: 'Common law native title', she writes, 'is a colonial legal invention, a view of [I]ndigenous laws, customs and relationships with the land through the lenses of colonial courts, most often in the interests of colonisation; it is not power sharing or self-determination'. Anderson (2014: 3) ends his forensic analysis of Australian colonial law on a compellingly terse and decisive note, a note that underlines the outrageousness of the use of the term 'oppressive' by the governmental representatives of the settler-colonial state: 'The NSW State said my request was "oppressive" to the Minister. I need not say more on this matter'.

In the wake of the *Mabo* decision, Pether (1998a: 21) writes that '*Terra nullius* has been transubstantiated into a non-constitutional legal fiction and been debunked'. 'However', she immediately adds, 'the neocolonial constitutional story which says our municipal courts cannot scrutinise the validity of the acquisition of sovereignty which



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effectively brought them into being has become the brittle skeleton on which the law of this land depends'. As Anderson so powerfully illustrates in his pursuit of the case of the Eualhlayi Peoples of north-western New South Wales and southwest Queensland through the 'municipal courts', Aboriginal people are still demanding the scrutiny of the very validity of the acquisition of sovereignty which brought the settler-colonial nation-state into being – even if this should cause the 'fracture' of 'the brittle skeleton on which the law of this land depends'. The relation between *Mabo* and the continuing suppression of Indigenous sovereignty is brought into acute focus in Anderson's (2014a: 1) scripting of *Mabo* as actually enabling the ongoing juridical reproduction of the doctrine of *terra nullius* by other means:

Although *Mabo (No.2)* supposedly removed *terra nullius* from the Australian legal system as its basis of sovereignty, the truth is very different. I can summarise the outcome of the Queensland Supreme Court's 'Rates Dispute' case, which clearly relies on an expanded notion of *terra nullius* to deny us justice. Justice Phillipides in the Supreme Court of Queensland confirmed the difficulty associated with Aboriginal Peoples' ability to gain any kind of justice within the legal system established within the colonies of Australia. The courts now hold themselves the protectors of the early illegal regimes.

### **3 Settler-Colonial Law as 'a Species of Excess of Its Own Authority'**

Emerging from this dense and stratified assemblage of settler-colonial law, its expansive 'logic of elimination' (Wolfe 2006: 387) and ongoing Indigenous contestations of the Australian state's relentless efforts to usurp and extinguish their sovereignty, the Aboriginal flag-draped chair calls into question the legitimacy of the Australian state, even as it enunciates an Indigenous call for justice. A number of Aboriginal activists and writers have addressed this issue of Indigenous sovereignty in relation to the offer of hospitality to asylum seekers and refugees. Tony Birch (2000: 21-2), in an essay that interlocks the violent history of attempted colonial genocide, the history wars, and the regime of

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terror inflicted upon Australia's imprisoned refugees and asylum seekers, argues that, as Aboriginal people:

we must also assert moral authority and *ownership* of this country. Our legitimacy does not lie within the legal system and is not dependent on state recognition. It lies within ourselves ... We need to claim our rights, beyond being stuck in an argument about the dominant culture's view of land rights or identity. And we need to claim and legitimate our authority by speaking out for, and protecting the rights of others, who live in, or visit *our* country.

Citing this same passage in her analysis of the relation between Aboriginal sovereignty and the question of welcome for refugees and asylum seekers, Perera (2009: 63) underscores the cluster of issues that are at stake in this assertion: 'To assume the role of host is to claim and enact ownership of the land. But Indigenous people, while retaining moral authority over the land, also share with asylum seekers experiences of being physically dislocated and dispossessed'.

Birch's ethical exhortation offers the possibility to begin to envisage a future in which a different dynamic determines the outcome and fate of those seeking asylum in this country. This different future is one that is being materialised in the context of the practices of everyday life across different sites in Australia. The contemporary Aboriginal artist, Richard Bell (2014), for example, in a recent public lecture, staged a scathing indictment of Australia's brutal refugee policy, calling it an 'unspeakable abomination'. In his talk, Bell (2014) articulated his strong commitment to a multi-ethnic Australia in opposition to the manner in which a type of white Australia Policy is being redeployed in the context of the exclusion of refugees and asylum seekers arriving by boat – all people of colour, in contradistinction to the white over-stayers who come into Australia by plane and who rarely ever get sent to immigration detention prisons. In his public lecture, he affirmed the critical role that a number of Greek, Lebanese and Italian migrants played in breaching the apartheid practices in his native town of Charleville, Queensland. Bell (2014) remarked how these non-Anglo migrants, who established milk bars, fish and chip shops and grocery

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stores, refused to exclude Aboriginal people from their shops and proceeded to serve them, thereby overturning the unwritten racist laws that had systematically discriminated against Aboriginal people in his town.

In a personal conversation,<sup>2</sup> Bell also outlined how he had taken on board the welfare of a young Tamil refugee who had recently been released from Australia's immigration prisons. Unemployed and penniless, the young Tamil refugee was going from door-to-door selling the only commodity he could produce: hand-made drawings. He knocked on the door of Bell's studio asking him if he would like to buy a drawing. Bell asked him if he could paint and then proceeded to take him in and to pay him a stipend as an assistant. Bell made clear in the course of his public talk, and in private conversation with me, that Aboriginal people have never ceded their sovereignty and that they were beholden to exercise their sovereignty as a way of marking their emancipation from Australia's white settler-colonial regime and as a way of materialising their self-determination.

Following in the wake of Birch's exhortation, an Aboriginal Summit was held in January and February 2010 in the Australian Capital Territory. The Summit was titled the New Way Forward for Aboriginal People. One of the participants, Uncle Ray Jackson, as I discussed above, has been at the forefront of interlinking the reinstatement of Aboriginal sovereignty with the issue of non-Indigenous Australia's treatment of refugees and asylum seekers. He has offered his official welcome to refugees and asylum seekers during his visits to immigration detention prisons, while also drawing attention to the structural relations between Aboriginal deaths in custody and refugee deaths in the immigration prisons. In his discussion of the aims of this Indigenous Summit, Jackson declares that the time has come:

for our people to take full control of our own every day affairs. These include our Sovereignty within our own Traditional Nations and Australian Government Treaties with those Nations that want them ... We must operate and manage all of our Resources on our own Lands, Waterways and Seas. We must operate our own civil and

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social structures within our independent Nations as decided by the members of each Nation. In fact, a return to the Traditional practices and procedures of the pre-invasion times but modernised as decided by each Nation. We must take full responsibility for our own Law, Lore and Culture, each within their own borders. (nd)

In her analysis of the foundational role of Australian colonial law role in the process of settler-colonial nation-building, Pether (1998: 117) tracks how ‘The colonial taking of Australia was accounted for as settlements of lands “terrae nullius”; that is, either as belonging to no-one, or belonging to no-one “civilised”, or not cultivated in a way recognisable to contemporary Western Europeans’. The ‘corollary of this’, Pether (1998: 117) concludes, ‘was that no system of law (thus no system of land law) was recognised as existing in lands *terrae nullius*’. At the historical moment of the foundation of colonial Australian law, it is the dissension of Aboriginal people against the invaders and their illegitimate laws that confronts the white settlers. Precisely in order to ‘contain’, and thereby neutralise this ‘other law’, Pether (1998: 117) demonstrates how ‘the common law was rewritten to recognise a law predating it and persisting alongside it, but always subject to subordination and indeed extinguishment’.

In acting to subordinate Indigenous law *and* to extinguish Indigenous sovereignty, what is brought into sharp focus, again reiterating Pether’s (1998: 124) memorable phrasing, is ‘the law’s characteristically hierarchical and monologic discourse of self-authorisation – there is no justiciable issue, yet the court pronounces the law which is ... no law at all, but rather a species of excess of its own authority’. Operative here, in other words, is a legal system constituted by its own unspeakable aporias, aporias that can only be occluded through a seemingly rational and procedural process of regulated incoherence and suppressed contradictions. I view Uncle Ray Jackson’s aforementioned call – for a ‘return to the Traditional practices and procedures of the pre-invasion times but modernised as decided by each Nation. We must take full responsibility for our own Law, Lore and Culture, each within their own borders’ – precisely as

a concrete instantiation of Pether's brilliant insight: Uncle Ray Jackson at once interrogates the legitimacy of a colonial law that for him and his people is, in effect, 'no law at all' – even as he underscores, in his continued assertions of unextinguished Aboriginal sovereignty, the outrageousness of a foreign law that presumes to act in 'excess of its own authority'. Uncle Ray Jackson's call, in effect, works materially to embody what Pether (1998: 134) calls the 'return of that which is repressed in that [Native Title] jurisprudence – the question of [I]ndigenous sovereignty'.

In the critical failure to address the foundational issue of Indigenous sovereignty, the *Mabo* decision in effect reproduced yet another act of deception: even while seemingly dispatching the legal fiction of *terra nullius* to the dust heap of history, it continued the deception of maintaining that both the Australian government and its courts had final say on the exercise of sovereignty within the body of the nation. This entailed the enactment of a double deception that required repressing the fact of unceded Indigenous sovereignty *and* the fact that this needed to be repressed – precisely because it could not possibly be countenanced without placing the very foundation of the settler-colonial state at stake. As Seuffert (2006: 27) has observed, 'The repression of these acts of deception in pivotal cases become law's deceptions, the resurfacing of the deception in the cases requires repetition, but repetition is never only repeating, it always opens space for the exercise of ethical decisions and the practice of justice'. The *Mabo* case opened the very possibility for Australian colonial law finally to acknowledge the centrality of Indigenous sovereignty in the jurisprudential landscape of the nation – yet, even as this possibility was obliquely and anxiously glimpsed, it was structurally foreclosed. 'Each case in which the ethical moment for justice is declined', Seuffert (2006: 27) observes, 'is a re-enactment of the founding violence of the nation state'. The *Mabo* decision emblematises the failure of the High Court to seize the ethical moment for justice for Australia's Indigenous peoples.

Encoded in Uncle Ray Jackson's call for the defiant exercise of Indigenous sovereignty over their unceded lands is a return to that

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very Indigenous difference that could not be countenanced by the Australian state at the moment of its colonial foundation or in its subsequent iterations. In the reckoning of possibles and the ensuing work of realising justice, it is this negated genealogy of colonial law – of its violences and its Indigenous dissensions – that needs to be reflexively addressed. Following Bartleson's (1995: 180) critical work, as I discussed in the opening sections of this essay, in the exercise of sovereignty a state's foreign policy must be seen 'as much a policy for dealing with a traumatic past, as it is a policy for dealing with a spatial outside'. The topological fold that inscribes this particular exercise of colonial sovereignty instantiates the conjoined double movement of deploying foreign policy in order to deal with the internal trauma of the past *and* the trauma of an alien exteriority. The unresolved trauma of the Australian state's Indigenous past is effectively tied to its contemporary trauma of alien exteriority through the violent biopolitical management of its refugees and asylum seekers. Settler-colonial Australia's immigration policy is inextricably tied to the unresolved issue of unextinguished Aboriginal sovereignty and the illegal occupation of the continent.

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In her closing comments on *Mabo* and the discursive constitution of the nation, Pether (1998: 139) brings into lucid focus what continues to remain 'unspeakable' in the various courts of the Australian nation:

Claims for the recognition of [A]boriginal sovereignty, that which is unspeakable in the High Court's discourse on native title, remind the Australian constitutional imaginary that there is something anterior to the text of the 'common' law and the territory of the realm that undermine both their foundational claims, that disable the imperial body of Australian law from remaining 'wrapped in its self-evident and productive virtue'.

This 'something anterior' that Pether identifies correctly as Aboriginal sovereignty continues to magnetise the polity of the Australian nation, and its various law-making institutions, precisely

as that which cannot be acknowledged or countenanced – even as it continues, as an embedded and stratified form of the repressed, to inform in its own convoluted ways such things as immigration policy. As Pether (1998: 117) demonstrates in her *Mabo* essay, the law-making activities of an institution such as the High Court, and its ‘legitimizing legal discourses,’ are indissociably tied to the ongoing process of ‘nationmaking’. This settler-colonial process of nationmaking is enabled by what Pether (1998a: 19), citing one of the High Court’s *Mabo* judges, sardonically terms ‘the body of our law’ – as that which is predicated on ‘shutting out the possibility of Aboriginal sovereignty and subordinating Aboriginal land law to settler land law’.

For me, the corollary that clearly emerges from Pether’s critical articulation of the manner in which a foreign, settler-colonial power achieves its nationmaking status through violent and illegal processes of colonisation, subordination and repression, is that the foundational issue of Aboriginal sovereignty must be understood, I contend, in *geopolitical* terms. To pose this foundational issue in geopolitical terms only appears counter-intuitive precisely because of the normalising effects generated by the hegemonic discourses of the settler-colonial state. The settler-colonial state’s hegemonic discourses (of law) effectively set the epistemic parameters that work to reduce the issue to a merely domestic one. The fact of unextinguished Aboriginal sovereignty must be seen as a geopolitical issue as it involves a number of Indigenous Nations that have been illegally occupied, dispossessed and displaced by a foreign colonial power: originally the British Crown and its subsequent incarnation in the form of the federated Commonwealth of Australia. Anderson, indeed, situates the Euahlayi People’s case within the purview of international law and the International Court of Justice’s decisions on similar Indigenous sovereignty cases. He cites Justice Phillippedes’ agreement with Balonne Shire Council’s argument that *Mabo (No 2)* established that:

At the time of acquisition of Australian sovereignty, international law recognised acquisition of sovereignty not only by contest, and occupation *terra nullius*, **but also by the settlement of inhabited**

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**lands whether that process of “settlement” involved negotiations with or hostilities against the native inhabitants.** The High Court recognised this last mentioned method of the acquisition of sovereignty as applicable in the case of sovereignty. (Anderson 2014a: 3. Emphasis in original)

‘This position’, Anderson (2014a: 3) states, ‘is clearly contrary to the International Court of Justice decision in the *Western Sahara Case*, which concluded that sovereignty remains with the Peoples. [Western Sahara Advisory Opinion of 16 October 1975]’. Anderson (2014a: 4) elaborates his understanding of precisely how Aboriginal sovereignty falls squarely within the domain of international law:

there is a pre-existing and continuing sovereignty of the Euahlayi Nation and Peoples under our Law and custom; we govern and governed and did ceremony through our connection to Country; have relationships with other tribes and Nations which were and continue to be religious in nature through the Dreaming Songlines, which govern what we consider to be inter-nation relations and intra-nation relationships domestically. These were, and are, central to our governing principles on inter and intra state relations between the Nations, and these processes were, and are, Acts of State.

Here Anderson brings into sharp focus the geopolitical dimensions of the case of Aboriginal sovereignty precisely by drawing attention to the inter- and intra-state relations between the Indigenous Nations of Australia. Situating the issue of Aboriginal sovereignty in the context of a geopolitical frame, rather than a circumscribed domestic one, underscores the illegality of the status of the Australian Commonwealth government on two decisive counts: one, as the illegitimate outgrowth of the act of colonial invasion, and the attendant refusal of Aboriginal people to cede sovereignty over their lands; and, two, as continuing to assert and legitimate its occupying status under the imprimatur of the ‘Crown’ – as a foreign-state entity that continues to source its sovereign claims under the aegis of the British monarchy.



## **5 Australia's Geopolitical Acts of War and Aggression on Aboriginal Peoples: 'Refugees in Our Own Country'**

A number of Aboriginal scholars have drawn attention to the invader status of the various modalities of colonial governance that have been exercised over Australia's Indigenous peoples by identifying the position of Indigenous people in terms of 'refugees' and 'asylum seekers' in their own country. Tony Birch (2000: 17) tracks the violent genealogy of this positioning back to the establishment of the *Aboriginal Protection Acts* and their various state-based Boards and Protectors, with the result that an Aboriginal person was 'now regarded as a landless and homeless refugee'.

In the contemporary context, and in the face of the massive excision of vast swathes of the Australian coast and islands from the Australian Migration Zone, Tiwi Islanders have declared: 'we're asylum seekers' (cited in Hodson 2003). Furthermore, they have stated their open solidarity with the very asylum seekers who have unsuccessfully attempted to claim asylum on reaching their islands: 'We watch the news and read the paper. We're not stupid people, we're educated. We know what it means to be non-Australians. If that [asylum seeker] boat comes back, we'll welcome them and give them food and water. You know why? Because we're all one group – non-Australians' (cited in Hodson 2003).

As I write, the positioning of Australia's Indigenous peoples as refugees within their own lands is being further evidenced by the unfolding crisis in Western Australia's Aboriginal communities due to the 'Western Australian government's policy of shutting down up to 150 Aboriginal homelands and communities, which they have wrongly stated to be financially "unsustainable" and economically unviable' (Anderson 2015: 1). Ghillar Michael Anderson (2015: 1) again underscores the geopolitical dimensions of this latest move by the settler-colonial state by stating that 'We [the Sovereign Union of First Nations and Peoples in Australia] regard these actions as an act of war and aggression against the various tribal Nations in Western Australia'. Operative here is the invasion of sovereign Aboriginal Nations by a

foreign occupying power that is effectively reducing Aboriginal peoples to the status of refugees in their own country.

As a result of this attempt to further displace and dispossess Aboriginal people from their own country, the people of the Djurin Republic, Nyoongar Nation, have established a 'refugee camp ... on Matargarup also known as Heirisson Island in the middle of the Swan River adjacent to the city of Perth itself' (Anderson 2015: 2). Marianne McKay, Nyoongar activist, summed up the reasons for the establishment of this refugee camp: 'this is how we feel as Aboriginal people. We feel like refugees in our own country' (cited in McQuire 2015).

Evidenced in these past and unfolding Indigenous histories of resistance in the face of the exterminatory moves of the settler-colonial state is the complex and layered geopolitical intermixing of two seemingly disparate categories: Aboriginal peoples and refugees. The very points of crossover between these two categorically different groups of people work to underscore the geopolitical understanding of Aboriginal sovereignty – again as that which is predicated on the inside/outside, intra-/inter-state, domestic/foreign policy nexus. This nexus only achieves its political and conceptual intelligibility once it is situated in the context of the Australian Commonwealth government's ongoing usurpation of Aboriginal sovereignty. As the Australian Commonwealth government has never negotiated a formal treaty that legally acknowledges the ceding of Aboriginal sovereignty over their lands, it continues to mark and exercise its own illegitimate sovereignty through its immigration/foreign policy, even as it works violently to preserve and secure this same sovereignty through its ongoing internal displacement of Indigenous peoples from their Nations. This ongoing expropriation of Indigenous lands is graphically exemplified by the Western Australian government's latest attempt to shut down 150 Aboriginal communities. Anderson (2015: 2) elucidates what is at stake here – precisely by exposing both the biopolitical and geopolitical production of Aboriginal people as 'refugees in their own country':

The majority of the people of these homelands have never been

displaced and have at all material time maintained their cultural norms and beliefs to their Country and natural Law for millennia. For the Western Australian government to now dispossess and displace the Peoples of these homelands is designed to facilitate the expeditious expansion of mining interests and other developments ... This action on the part of the Western Australian government, aided and abetted by the Commonwealth government of Australia, has now created community despair, which has resulted in hundreds of Aboriginal people becoming refugees in their own country.

The contemporary neoliberal face of settler-colonialism is perhaps nowhere more clearly evidenced than in the Prime Minister's support of the closure of the 150 Indigenous communities in Western Australia. 'What we can't do', Prime Minister Tony Abbott declared, 'is endlessly subsidise lifestyle choices if those lifestyle choices are not conducive to the kind of full participation in Australian society that everyone should have' (quoted in Medhora 2015). Here the inextricable Indigenous connection to the land is effaced and recoded as just another fungible and commodified 'lifestyle choice', in keeping with dominant neoliberal discourses of fluid and mobile consumer subjects. Anderson (2015a: 1) unpacks the critical issues that are at stake in this latest exercise of settler-colonial governmentality: 'We all know that the Western Australian government and Tony Abbott seek to clear the interior land mass and every resisting Aboriginal person, so they don't have to deal with Land Rights issues, water rights issues and environmental issues ... Letting people die as a consequence of being removed from Country is a continuation of old colonial regimes'. Anderson (2015a: 3), furthermore, situates this latest necropolitical move in an explicitly geopolitical context, whereby the Australian government is shown to be breaching international law and the *UN Convention on the Prevention and Punishment of the Crime of Genocide*, specifically:

- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.

This latest governmental move to remove Aboriginal people from

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their nations works violently to override and attempt to extinguish the deep and ineradicable connection that Aboriginal people have to Country. This move must be seen as yet another attempt by the settler-colonial state to expropriate Aboriginal lands and to divest Aboriginal people of their Indigenous identities through assimilation. Bryan Wyatt, chairman of the Native Title Council, articulates what is at stake: ‘The cultural DNA of our people is connected to their land, [so] forcing them off it, to assimilate, amounts to cultural genocide’ (cited in Mitchell 2015).

The geopolitical understanding of Aboriginal sovereignty that I have delineated in the course of this essay is incisively illuminated by Uncle Ray Jackson’s (2013) concluding statement in his letter to former Prime Minister Rudd on Australia’s treatment of refugees and asylum seekers. Uncle Ray Jackson (2013) catalogues the violent acts of colonial dispossession and the ongoing usurpation of Indigenous sovereignty; he then defies the settler-colonial state’s ongoing attempts to silence his voice as an Aboriginal elder of this country and his right to offer welcome and hospitality to asylum seekers and refugees seeking refuge in his lands. Through the exercise of a counter-discursive move of Indigenous sovereignty, he enunciates what he terms an ‘Act of State’ in offering welcome to refugees and asylum seekers, simultaneously as he enacts the instantiation of Indigenous justice – precisely as *praxis*:

We have one very clear and simple message to give to ‘our representatives’ in Canberra and that is to loudly confirm that Refugees are welcome here. From whence ever they come.

You Parliamentarians do not speak in my name!

FOR KOORI JUSTICE

Ray Jackson  
President, Indigenous Social Justice Association  
(Jackson 2013)

## Pugliese

### Notes

\* Professor Joseph Pugliese is Research Director of the Department of Media, Music, Communication and Cultural Studies, Macquarie University ([joseph.pugliese@mq.edu.au](mailto:joseph.pugliese@mq.edu.au)).

This essay is inscribed by a double dedication: to the late Penny Pether, dear friend, passionate social justice advocate and brilliant scholar, and to the late Uncle Ray Jackson, who died some time after I wrote this essay. Uncle Ray was a dear friend, irreplaceable mentor and tireless social justice activist.

- 1 I discuss the relation between the biopolitical caesura and the exercise of state violence in Pugliese 2013: 32-55.
- 2 Personal conversation with Richard Bell on 24 April 2014.

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