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Offshore Hospitality: Law, Asylum and Colonisation

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Abstract

The purpose of this essay is to trace the ongoing relevance of two cases, which might too readily be dismissed as irrelevant to contemporary border debates and asylum policy developments. The critical questions of sovereignty and hospitality that arose from *Mabo and others v Queensland (No 2)* (1992), High Court of Australia ('Mabo') and *Ruddock v Vadarlis* (2001), Full Court of the Federal Court of Australia ('Tampa') have lost none of their urgency or currency since the most profound questions of justice contained within them were cast as non-justiciable and so remain unresolved. The continued effacement of Aboriginal sovereignty and the refusal by the Australian state to provide refuge for asylum seekers continue to structure national and international spaces even as the legal issues of the cases are pronounced resolved and closed. In this essay, I argue that Mabo and Tampa continue to be worthy of attention since the developments in sovereignty undertaken in their name, continue to provide an unacknowledged precedent for contemporary border developments. I deploy Derrida's work on law's violence and hospitality in order to unpack the relations that hold between hospitality, law and violence.

Offshore Hospitality: Law, Asylum and Colonisation

Maria Giannacopoulos

The purpose of this essay is to trace the ongoing relevance of two cases, which might too readily be dismissed as irrelevant to contemporary border debates and asylum policy developments. The critical questions of sovereignty and hospitality that arose from *Mabo and others v Queensland (No 2)* (1992), High Court of Australia ('*Mabo*') and *Ruddock v Vadarlis* (2001), Full Court of the Federal Court of Australia ('*Tampa*') have lost none of their urgency or currency since the most profound questions of justice contained within them were cast as *non-justiciable* and so remain unresolved. The continued effacement of Aboriginal sovereignty and the refusal by the Australian state to provide refuge for asylum seekers continue to structure national and international spaces even as the legal issues of the cases are pronounced resolved and closed. In this essay, I argue that *Mabo* and *Tampa* continue to be worthy of attention since the developments in sovereignty undertaken in their name, continue to provide an unacknowledged precedent for contemporary border developments. I deploy Derrida's work on law's violence *and* hospitality in order to unpack the relations that hold between hospitality, law and violence.

1 Law, Violence and Hospitality

In *Hostipitality*, Derrida spoke of the way that the term hospitality has a 'troubled and troubling origin, a word which carries its own contradiction incorporated into it' (2000:3). Derrida informs us that

hospitality allows itself to be ‘parasitised by its opposite, “hostility”’ (2000:3). Elsewhere, Derrida has written about a similarly troubling relation that appears oppositional. Law, as Derrida argues, is vacuous without the force that is contained within it. In his famous essay *The Force of Law* Derrida unpacks ‘enforceability’ which

reminds us that there is no such thing as law (droit) that doesn’t imply in itself, a priori, in the analytic structure of its concept, the possibility of being ‘enforced’, applied by force. There are, to be sure, laws that are not enforced, but there is no law without enforceability, and no applicability or enforceability of the law without force (1992: 6).

Derrida’s work points to the inherent violence of all law, even if that violence is present in its dormancy. In addition to this Derrida points to the ‘originary violence’ required to found a legal regime. He asks,

How are we to distinguish between the force of law of a legitimate power and the supposedly originary violence that must have established this authority and that could not itself have been authorized by any anterior legitimacy, so that, in this initial moment, it is neither legal or illegal – or, others would quickly say, neither just nor unjust? (1992: 6)

In the Australian context, this Derridean question makes it possible to frame the imposition of white colonial law as ‘originary violence’, a framing that generates an investigation of the very meaning of legality since this ‘originary violence’ was, and remains, ‘neither legal or illegal’. In relation to this legal ambiguity, Derrida foregrounds Montaigne’s thesis, which highlights that these violent ambiguities are effaced through the self-generated, self-serving legal narrations of law that invest law with transcendent qualities. Specifically, Montaigne contends that, ‘laws keep up their good standing, not because they are just, but because they are laws: that is the mystical foundation of their authority, they have no other’ (1992: 13). If Australian law is founded upon ‘originary violence’ then the possibilities for a state founded on that law to offer hospitality are at once extremely limited as well as abundant. My suggestion here is that hospitality is a synonym for the exercising of sovereignty, in particular a colonial form of sovereignty.

In *Hostipitality*, Derrida repeats to dramatic effect the idea that ‘we

do not know what hospitality is' (2000:6). This, it would seem is partly because of the problematic relation between law and hospitality, since imposing a 'formalization of a law of hospitality ... violently imposes a contradiction on the very concept of hospitality in fixing a limit to it, in de-termining it' (Derrida, 2000:4). While the conceptual argument around the 'self-contradictory' and 'impossible (Derrida, 2000: 5) nature of hospitality is easy enough to accept, the problem of hospitality lies in its ongoing implication with law and sovereign power.

Those who are in need of receiving hospitality, or *asylum* are reliant on the law's prescriptions. Those prescriptions emanate from a place where the *host*, acts at home, acts Indigenous over land in order to set the limits of asylum. This enactment of hospitality is synonymous with sovereignty in that it functions, through law to maintain authority over the *home* while also maintaining the 'the truth of authority' (2000:4). As Stronks puts it 'the power of the host implies that he will select and filter the visitors and guests as he would otherwise lose the sovereignty of his home' (2012: 75). The exercising of hospitality is the exercise of sovereign will to maintain authority and privilege over a particular territory. There is at least a double violence here. If the concept of hospitality is violated by a limit set by law, then that violence is exacerbated when the law that sets that limit is also constitutively violent.

2 Inhospitable Precedent: Sovereignty is Non-Justiciable

The High Court in *Mabo* has been hailed as ground-breaking for its overturning of the doctrine of *terra nullius*. However, according to Ritter,

Despite the regularity with which '*terra nullius*' has been bandied about since *Mabo*, uncertainty exists about the precise meaning of the term. This confusion exists because the term has both narrow and expanded meanings; it is an international law doctrine, yet is often equated with its common law analogue (1996: 7).

This is a significant clarification on the origins of the term because in most analyses of *Mabo*, (and there have been many) little attention

has been paid to the way in which international law, that is the 'contemporary notions of justice and human rights' mentioned in the *Mabo* judgement, was the reasoning through which the High Court overturned *terra nullius*; itself a creature of international law. The question that this raises is whether international law could be used to justify colonial violence as it was at the time of initial colonisation. Ritter explains that

Uninhabited territory, was always uncontroversially classified as 'terra nullius'. However over time, various international law jurists expanded the categories of territory that were 'terra nullius' to include certain lands of inhabited territory. Whether or not inhabited land was included within such expanded visions of '*terra nullius*' depended 'on the degree of political development and other characteristics of the inhabitants' of the land in question ... but all expanded definitions of *terra nullius* shared the common feature of explicit ethnocentricity. That is, each expanded version of '*terra nullius*' expressed the right, under certain circumstances, of the European colonial powers to seize territory inhabited by indigenous people, on the basis that these people do not conform to European cultural norms (1996: 8).

This explanation, citing ethnocentricity as being at the core of all the various manifestations of *terra nullius* begs another question. Could the overturning of *terra nullius* also function to deny legal and political development of those being colonised and thus continue to enable ethnocentrism? Joseph Pugliese has tracked the way in which the category of the *human* and its various classifications has functioned as a colonial technology:

Prior to the establishment of the United Nations' protocols and conventions on human rights ... the west deployed the category of the pre-human or proto-human as a biopolitical technique of governance within its colonised territories, denying, in the process, the rights and privileges that accrue from being able to inhabit the category of 'the human' (2007: 82).

Does the establishment of the United Nations, with its reason for coming into being to protect the *human*, but without disturbing

the colonial relations firmly entrenched in the very locations where universalising declarations can function to efface unequal colonial relations, ensure that the categories such as 'pre-human' and 'proto-human' are still effectively in operation insofar as they are disguised in bodies, laws and practices that do not challenge colonial forms of organisation? Ritter has argued that the concept of *terra nullius* 'was doctrinally irrelevant to whether native title existed under Australian common law' (1996: 6) but it proved useful for it 'emotively connoted the historical reality of how Aboriginal people had been treated upon colonisation' (Ritter 1996: 7). From this position, the court could then overturn the doctrine in order to account for why 'traditional Aboriginal rights to land had never been recognised under Australian common law' (ibid). The court also 'resolved the crisis in Australian legal discourse, by reaffirming the apparent equity of Australian jurisprudence. *Terra nullius* was a stage edifice that was demolished so that the good name of the Australian legal system could be redeemed' (ibid).

By uniting Pugliese's argument of the categories of 'pre-human' being used as tools of colonial governance with Ritter's claim that the *rejection* of *terra nullius* was staged like a theatrical production, it can be argued that the categories that Pugliese writes of are still operating within the legal discourses that adopt international law conventions to pronounce *terra nullius* dead. If the 'pre-human' is the type of human that cannot be understood as legally regulated, then in the continued denial of Indigenous laws and sovereignties, this category must still be seen as operational in white law. If the doctrine that was once central to the establishment of the white nation has been found to be *fictitious* and yet the concept of nation, as Kerruish and Purdy (1998) have suggested, has remained unquestioned, then upon what new basis does colonialism continue? Watson (2002a: [4]) asks:

Now post-*Mabo* and the 'death' of *terra nullius*, questions lay at the feet of the Australian state. What legitimises your entry? Do you still require the consent of the natives? And if we give it to you now what meaning will you or I give to that agreement? For who will hold the colonising state and its growing globalised identity to honour and respect our laws, territories and right to life? No one has in the past.

What is the meaning of *lawful* in this country if the High Court, an institution founded on the basis of *terra nullius*, continues to have ultimate authority to decide upon the question of its own foundation? What is the meaning of the *lawful* if law can declare *terra nullius* to have been a fiction but for this admission to have had so little impact on the operations of law? Moreover, since the nature of the *Mabo* decision seems, *prima facie*, to be a critique of colonial law, how can that very judgement act to strengthen the institutions of the common law? It was disingenuous of the High Court to declare *terra nullius* retrospectively as having been a fiction when the fiction functioned to generate a colonial state whose foundation cannot be questioned. If *terra nullius* is understood as having worked successfully at removing Aboriginal peoples from their lands and laws and in re-marking this space then it can be argued that *terra nullius* was not in fact fictitious since dispossession continues. Or perhaps dispossession continues precisely because of the overturning of *terra nullius*. My claim here is that the alleged ‘overturning’ of one fiction brings into being another: that the terrain of white law is a place of *lawfulness* and equality free from racial discrimination.

Stewart Motha has argued, specifically with reference to *Mabo*, that the bringing about of a so-called ‘postcolonial’ law and society is based on a finite conception of sovereignty (2005: 110). He argues that this happens in three ways throughout the High Court decision. Firstly, the dispossession of Indigenous peoples is attributed to an imperial sovereign, thereby allowing the acts of dispossession to be relegated to ‘a now surpassed ‘colonial’ era’ (ibid). Secondly, the grounds for the reception of the common law of England to Australia, is a consequence of an imperial assertion of sovereignty over a territory deemed ‘vacant land’ (*terra nullius*) (ibid). In this act, a finite conception of sovereignty permits Australian law to ‘retain and depart from this racist ground of law’s reception in the territory’ (ibid). This monistic conceptualisation of sovereignty, Motha argues, allows the legal system, which was ‘previously concerned with the exigencies of Empire’ to ‘ripen into an “Australian law” no longer under the constraints of the courts in the hierarchy of Empire’ (ibid).

Thirdly, a finite conception of sovereignty that relegates genocidal acts of violence against Indigenous peoples in a time long 'past' 'enables the court to inaugurate and affirm a society which reflects "contemporary values based on universal human rights"' (ibid). The common sense meanings now being circulated by the High Court so that Australia is no longer 'frozen in an age of racial discrimination', are 'premised heavily on the possibility of a "finite" containable colonial sovereignty' (Motha 2005: 111). That is, in Australia's entrance into a postcolonial space, defined by intolerance for race discrimination and by the embracing of human rights, 'a limit would have to separate imperial sovereignty and nation's law now capable of recognising the citizenship rights (as proprietors) of indigenous people' (ibid).

The overturning of *terra nullius* in the High Court *Mabo* decision is by now well known. It may also be well known that the same case denied the existence of Indigenous sovereignty through the manoeuvre of finding that the question of sovereignty is non-justiciable. Justice could not be done to this question according to the logic of the court since to engage in this would be to 'fracture the skeleton of principle' of Australian law (Giannacopoulos 2007: 49). In addition to the overturning of *terra nullius*, the Court *recognised* a form of native title with the important qualification that

where the tide of history has washed away any real acknowledgement of traditional law and any real observance to traditional customs, the foundation of native title has disappeared [and] cannot be revived (Buchan: 2002).

Tony Birch has argued that this decision has been 'One of the key moments in this historical polemos of memory, that is the struggle for control of how Australia's past is reconstructed' (2006: 22). There is much at stake here since Birch argues that the denial of Indigenous sovereignty and land is inextricably linked to interpretations of the past. As he powerfully asserts: 'A sovereign right to land and the interpretation of the past in Australia are inextricably linked. Land belonging to Indigenous nations throughout Australia was and continues to be contested by white Australia through acts of violence...'

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(Birch 2007: 110).

Mabo is by now an old case, its main finding overly familiar but this is precisely why it continues to exert such power; it interprets the past in a way that further distances Aboriginal people further from their laws and lands. The High Court in *Mabo* has been complicit in sanitising the national memory. Even as the Court overturned the doctrine of *terra nullius*, ostensibly bringing the past into view, this overturning was used to sanitise and forget the bloody processes that founded white law and which continue so long as Indigenous sovereignty is denied. Whilst *terra nullius* was overturned, the bloody question that founds and enables white law's continued operations is excised from the national memory, as an effect of the ruling that the question of sovereignty is non-justiciable. The logic of the decision continues to function daily by affirming the *legitimacy* or *truth* of a violent authority.

3 Pacific Solution to Operation Sovereign Border: Offshore Hospitality

In 2001, the Howard Government deployed a distinct and simplified discourse on sovereignty along with military strategies to prevent the landing of 438 asylum seekers seeking entry and refuge in Australia (Giannacopoulos 2005: 29). The Federal Court legitimated this military turn, even if it was cloaked in law and order discourse, hiding the deeper more invisible violence that was occurring in this manoeuvre. While the *Tampa* case has been the impetus for much critical commentary, twelve years after the event it warrants re-examination given that it has acted as the precedent for contemporary asylum policies on both sides of politics.

When John Howard famously declared that 'Every nation has the right to effectively control its borders and to decide who comes here and under what circumstances' (Giannacopoulos 2005: 39), his position as sovereign was affirmed in law by Justice French of the Federal Court, a man who would later be appointed in 2008 as Chief Justice in the highest court of the land. In his judgement back in 2001 Justice French

rationalised the approach taken by the Howard regime by couching his decision in deference to executive power and the importance of this discretionary category to be used to maintain 'Australia's status as an independent, sovereign nation state' (Giannacopoulos 2005: 39). This move had significant parallels to the ruling made by the High Court in *Mabo*; the Court while deeply implicated in exercising power in favour of a particular form of sovereignty, insulated that very category from critique. In *Tampa* Justice French declared that, 'these powers may be exercised for good reasons or for bad. That debate however is not one for this court to enter' (2001: [192]). In *Mabo* the court declared the nature of sovereignty was non-justiciable and the outcome of *Tampa* demonstrates precisely what was at stake in that ruling. If the nature of colonial sovereignty had been questioned in 1992, this could not continue to operate as the legitimate basis for further enactments of sovereignty at the border. The continuing significance of these cases lies in the way that they narrate power and where and in whose interests it can be exercised *legitimately*.

In *Hostipitality*, Derrida engages with Kant's claim that hospitality is a 'human right', more specifically with the 'right of the stranger not to be treated with hostility when he arrives on someone else's territory' (2000: 4). But there are limits to Kant's vision of this human right since he argues that the stranger 'can indeed be turned away, but he must not be treated with hostility so long as he behaves in a peaceable manner in the place he happens to be' (qtd in Derrida 2000:5). Kant's position runs parallel to the policy that was formulated by the Howard Government during the *Tampa* events. I argue this because those seeking asylum were turned away and arguably were not treated with hostility since they were not sent back to their countries of origin. Instead, they were sent to third locations under the freshly engineered Pacific Solution. In *Tampa*, the denial of asylum was an executive act of state, criticised as inhumane and as contrary to both law and human rights. These criticisms, while valid, do not account for the way in which the exclusion of the refugees was in fact driven by discourses of human rights, specifically through the principle of *non-refoulement*. Not sending asylum seekers back to the frontier of

danger simultaneously became the way that a human rights principle was upheld, while using those seeking refuge as the vehicle for new policy initiatives. Following Kant's idea of right, it becomes possible to see Australian hospitality, as a limited human right, which reinforces a colonial sovereign imperative along with an imperialising vision. With the Pacific Solution began the policy now preferred by both major parties in Federal politics; hospitality to asylum seekers can only exist offshore.

While the law of the state comes to be central in whether asylum seekers are ultimately protected, states do not exercise their violent power by completely disregarding international law. International law is not the opposite of state law but rather its competent partner in maintaining colonial sovereignty at home and in enabling neo-liberalising missions abroad. Colin Harvey has argued that whilst in other epochs it may have been to theology that people looked to for a higher law above and outside of the state, in the context of *secular* societies this approach proves insufficient as it lacks rationality. In relation to this, he argues 'God may well be dead, but now we have international law. International law reflects an expansive vision of human rights that attach to the person and not solely the citizen' (2001: 95-96). Harvey identifies the way in which human rights, in the context of international law, are viewed as a superior source of protection for humans, who are not citizens, and therefore outside of the protection of law. By suggesting that international law becomes the replacement for God, Harvey alludes to the distance that may exist between the protection promised and the protection delivered by this contemporary *higher* source. Through the comparison to God, it becomes possible to argue that what is important for international law is the *perception and belief* in it, rather than its ability to deliver protection and justice to those most in need. International law, whilst often appearing as humane and as the cure for ills resulting from the state/citizen order, remains fundamentally tied to its own history. That is, in international law 'new normative concepts were developed that aimed to humanize the violence of war' (Bates 2007: 14).

During *Tampa* those who were forcibly held *outside* Australia, but *inside* its punishment zone, were not denied freedom in detention centres. In *Tampa*, 'the desert and the ocean alike become prisons. More than two hundred years after the convict ships the Pacific is again imagined as penal zone' (Perera 2002: 3). In this deceptively simple statement, Perera captures the logic of the camp, economically articulating the ever expanding geopolitical reach of prison Australia, whilst situating the ever narrowing and violent places offered to those in need of asylum in the context of Australia's colonising presence in the region. As Mitropoulos argues, the law 'as the installation of a sovereign and jurisdictional authority – does not secure human rights; it both grants and denies them at its discretion' (2003). This was dramatised in the first instance *Tampa* judgement (*Victorian Council for Civil Liberties v Minister for Immigration and Multicultural Affairs* (2001)) where Justice North decided to enable the refugees to land in mainland Australia legally, a judgement that never took effect since it was overturned at appeal. He said:

The situation of the 433 rescued by the MV *Tampa* has attracted considerable public attention and discussion. In these circumstances it is necessary to stress that the role of the Court is strictly confined. It has a duty to apply the law of Australia ... Judges of the Court take an oath on appointment to do justice 'according to law' ... Questions of policy concerning the way Australia should treat refugees are solely questions for the government (2001: [12]).

Here it is evident that Justice North does not simply make the substantive decision but takes the opportunity to narrate the role of the Court, that being to apply 'the law of Australia'. North provides information to decode the problem of the so-called conflict that arises between national and international law. He is obligated as a matter of law, to place not only law first, but to give law a meaning that excludes 'human rights law'. The law demands that he apply 'Australian' law and therefore in effect to push international law outside of the legal equation. However, Justice North's need to highlight this action shows that the logic of international law is already inside the operations of white law

and thus informing the logic of exclusion.

In the *Tampa* appeal judgement, Justice Beaumont is more explicit about this same idea. He stated that:

Finally, it should be added that this is a municipal, and not an international court. Even if it were, whilst customary international law imposes an obligation upon a coastal state to provide humanitarian assistance to vessels in distress, international law imposes no obligation upon the coastal state to resettle those rescued in the coastal state's territory. This accords with the principles of the Refugee Convention. By Art 33, a person who has established refugee status may not be expelled to a territory where his life and freedom would be threatened for a Convention reason (2001: [126]).

He names international law by saying that this court is not an international court and by the use of 'even if' he asserts the supremacy of the domestic court. This is because (according to Beaumont's logic) 'even if', hypothetically, this issue was to be decided in an international court, such a court would lack the power to compel Australia to 'resettle' those rescued at sea. He argues this in line with principles of international refugee law. In so doing, he also articulates very clearly the legal logic that underlies Australia's so-called 'Pacific Solution'. Here one could be forgiven for thinking that far from the court taking an impartial role in relation to this decision, the court is acting as legal adviser to the executive. I say this because the judgement of the court, on this aspect of human rights discourse, is reflected in alarmingly similar terms in the 'Pacific Solution' policy. Human rights discourse can thus be seen as simultaneously absent and present in white law as the very mode through which substantive rights are denied.

This 'advice', as well as the resultant 'Pacific Solution', was consistent with a tendency by states, identified by international law expert Goodwin-Gill, to attempt to circumvent refugees from finding the asylum they seek since

As a matter of *fact*, anyone presenting themselves at a frontier post ... will already be within state territory and jurisdiction; it is for this reason, and the better to retain sovereign control, that states have

devised fictions to keep even the physically present alien technically, legally unadmitted (1983: 75).

Justice French in *Tampa* held that:

The steps taken in relation to the MV *Tampa* which had the purpose and effect of preventing the rescues from entering the migration zone and arranging for their departure from Australian territorial waters were within the scope of executive power. The finding does not involve a judgement about any policy informing the exercise of that power. That is a matter which has been and continues to be debated in public and indeed international forums ... The task of the Court is to decide whether the power exists and whether what was done was within that power, not whether it was exercised wisely or well (2001: [204]).

Here, Justice French is enacting precisely that which he is denying; he is providing an ideological and legal justification, in advance, for the policy that was to become the 'Pacific Solution'. This imperialist policy, sanctioned and enabled at the level of law, is premised squarely on the *finding* that there was a valid exercise of executive power by the government. When such a power is validated, the force of white sovereignty is activated and affirmed, since executive power is precisely the location of white sovereignty. Justice French in the *Tampa* judgement goes so far as to posit the refugee laws in relation to the superior law of executive power. He reasons:

Australia has obligations under international law by virtue of treaties to which it is a party, including the Refugee Convention of 1951 and the 1967 Protocol. Treaties are entered into by the Executive on behalf of the nation. They do not, except to the extent provided by the statute, become part of the domestic law of Australia. The primary obligation which Australia has to refugees to whom the Convention applies is the obligation under Article 33 not to expel or return them to the frontiers or territories where their lives or freedoms would be threatened on account of their race, religion, nationality, or membership of a particular social group or their political opinions. The question whether all or any of the rescuees are refugees has not been determined ... In this case, in my opinion, the question is moot because nothing done by the executive on the face of it amounts to a

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breach of Australia's obligations in respect of *non-refoulement* under the Refugee Convention (2001: [203]).

Here Justice French follows on from the reasoning of Justice Beaumont, in the sense that he attempts to clarify why Australia does *not* need to offer asylum and still comply with international law. The executive, whilst it is the body that enters into humanitarian agreements, is also the body that is in effect denying refuge to the *Tampa* refugees by its finding that the Convention is important only insofar as it is reflected in subsequent statutory law. Justice French's finding effectively erases the category of refugee, let alone the question of asylum, by declaring the determination of refugee status to be a 'moot' question. His use of 'moot' here, invokes for me the law school where legally complex questions are generated and a courtroom situation simulated for legal training. However, this is no simulated legal drama. Here, Justice French generates legal realities and legal contests that require resolution. Who may be classified as human and who may not? Who receives assistance and hospitality, and who does not? At this threshold moment, Justice French transforms the fate of the *Tampa* refugees into legal hypothesis, a legal fiction. Like Justice Beaumont, his *finding* serves the government well, since he renders the question of refugee asylum 'moot'. This is because, even hypothetically, his finding is that the executive's responsibility towards the refugee was not breached since the extent of what is owed is reflected in Article 33 of the Refugee Convention, which disallows the return of the refugees to a place of danger. The conventional interpretation of this *finding* has been to suggest that neither *Tampa* judgement 'seriously contemplated Australia's obligations under the Refugee Convention' (Magner 2004: 55) and that instead, 'both considered the seizure of the *Tampa* and the detention of its passengers under domestic law' (*ibid*). However, this analysis misses the critical point that in order to defeat the spirit of the refugee convention and to assert to the primacy of domestic white law, the refugee convention was very 'seriously contemplated'. This serious contemplation of international refugee law formed the legal foundation for the 'Pacific Solution'. Magner reports that:

In the same brief period of time that the case and appeal were heard, the Australian government sought to negotiate arrangements with other nations, such as Papua New Guinea, Fiji, and Kiribati, to accept rescuees and process their asylum applications. Ultimately only Papua New Guinea and Nauru made arrangements with Australia. These were made in exchange for millions of dollars in aid and with the understanding that Australia would pay the full cost of housing the refugees and reviewing their claims ... Nauru is not a party to the Refugee Convention (2004: 56).

This was the *solution* that the Australian state followed, so that it could exclude the *Tampa* refugees from Australian territory. It used its position of superior economic power in the region to coerce countries into *buying* Australia's refugee problem. This bargain, unequal on multiple levels, transformed the *Tampa* refugees into human cargo precisely by failing to qualify them as human, thus making it possible and legal for human life to be bought and sold in a global economy.

Magner questions whether such behaviour was appropriate under international law standards (2004: 57). In a sense, this question is unproductive since it does not shift from the problematic assumption that international law conventions and protocols are essentially good and exist as to assist those at the mercy of the state. I have been arguing in this essay that Australian law uses discourses of International law to expand its jurisdiction of violence, since the artificial distinction between domestic and international law is one that works in favour of white law and sovereignty. Australia's domestic laws propelled by 'human rights' are international in their scope making them not only colonially constituted but imperial in their contemporary operations. So whilst the Pacific Solution was criticised as contrary to human rights, it must also be seen as an imperial manoeuvre enabled by human rights. This imperial manoeuvre can be exercised in and through the white law that guards white sovereignty as non-justiciable. If white colonial/sovereign power is guarded as non-justiciable then Australia is free to act as an imperial power, an imperial power that apparently without irony, argues and defends the idea of the primacy of the state and importance of domestic matters being free from international control.

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Under Prime Minister Abbott's *Operation Sovereign Borders* we see a more complete vision of that which was envisaged by the Howard regime in the wake of Tampa (Phillips 2013). The development of an offshore hospitality policy approach that seeks to undo the very category of the refugee, was assisted by the intervening Labor Government. In the lead up to the 2013 Federal election, former prime minister Kevin Rudd sought to out-do the Coalition in his policy package designed to refuse hospitality (Joseph 2013). To be more specific, Rudd refused to enable the type of hospitality that would require the Australian state to be *host*. Instead he engineered a policy that would install Papua New Guinea *as host* to those peoples that the Australian state re-directs and refuses. In return for taking the peoples unwanted to Australia, Papua New Guinea was to receive an aid package that would enable redevelopment of universities, a new hospital, upgrading roads, a new courts complex and the deployment of Australian police (Ritchie 2013:1). Rudd first visited Papua New Guinea in 2008 when signing the Port Moresby declaration which according to Ritchie 'represented a recasting of Australia's aid relationship with its former territory' (2013: 1). In Rudd's plan, the offering and refusal of hospitality was bound up in complex colonial relations of power. The power to refuse entry is premised on acting sovereign and at home on Aboriginal land. That this forms the basis of the power to compel another sovereign to exercise the will of its *former* imperial master attests to the ongoing imperial relations operating through development and aid programs. The Port Moresby declaration *recognised* the sovereignty of Papua New Guinea, even as the increased aid to be provided by Australia was connected to Papua New Guinea lifting 'its own contribution to improving governance, economic infrastructure and education' (Ritchie 2013: 2).

Operation Sovereign Hospitality

Where the Rudd and Gillard Labor Governments sought to couch their refusal of hospitality in humanitarian terms – their purpose in stopping the boats was to save lives – the policy of the Abbott Government ushers in an explicitly and unapologetically militarised

response to the question of asylum. Commander Angus Campbell heads Operation Sovereign Borders. The position on hospitality, and therefore asylum seekers appears clear:

More people are becoming aware of the reality that there are two choices. First, be sent to Papua New Guinea or Nauru for processing or, second, return home. Coming to Australia is not an option. Since the commencement of Operation Sovereign Borders, in increasing numbers, potential illegal immigrants are staying informed of Australia's migration policies through the media and in particular social media... For example, You Tube shows an increase by 55 per cent from the month of September to October... Since Operation Sovereign Borders began, there has been 77 people return home because they have realised they were sold a lie. People smugglers promised them a ticket to Australia knowing they would never reach that destination (Campbell 2013).

In writing about immigration detention centres, Joseph Pugliese has argued that 'Outside the Centres reside the human-citizen subjects; inside the Centres are carceral post-humans divested of the rights and privileges that accrue to their human counterparts' (2007: 69). Human rights *exist* for those who do not need them and who reside outside Australia's carceral zones, whose humanity and indeed whose privilege is protected by virtue of their citizen status. As if detention centres as places of punishment for asylum seekers were not problematic enough, the offshore locations, the third spaces where *non-refoulement* can be upheld, become the carceral zones of Australia's entitled claim not only to Aboriginal land but to what order *should be developed into being* on the land of those Pacific *partners* in the region.

I claimed at the outset of this essay that if Australian law is founded upon 'originary violence' then the possibilities for a state founded on that law to offer hospitality are at once extremely limited as well as abundant. The increasingly shrinking space for hospitality to be offered on Australian soil is well captured by the Commander led border initiative. But what is significant about this border protection is that as possibilities for hospitality are shut down in first world zones, those who dominate those zones can be seen to be imposing

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an imperative on their neighbours to offer that which they refuse. In doing this they impose an imperialising will that seeks to use excess populations as productive 'agents for development' in areas that are in need of being transformed to conform to neo-liberal imperatives (Betts 2009:5). Australia's militarily closed door generates a proliferation of hospitality in its neighbourhood. This is a form of hospitality that is consistent with sovereign prerogative, a colonial and imperialising sovereign prerogative.

At the time of *Tampa*, the time that I argue heralded the start of the undoing of right to seek asylum, Gungalidda Elder, Wadjularbinna powerfully stated:

If we as Aboriginal people are true to our culture and spiritual beliefs, we should be telling the government that what they are doing to refugees is wrong! Our Aboriginal cultures do not allow us to treat people in this way ... We have our own issues to deal with but the refugees are fleeing hunger, deprivation, persecution and war. And now they are caught up in a situation with the Australian Government in which they are powerless. The refugees were coming here, to OUR country, which we as Aboriginal people have a spiritual connection to. Our culture teaches us that we are all connected, to the land and to everybody else. Our Spirit Creator and our ancient law and culture would not stand for how these refugees are being treated. But no-one will listen to us ... Aboriginal Peoples have never been accepted in this land, even though it is OUR land. We have never been treated as equals. I will finish by reminding everyone that this is not John Howard's country, it has been stolen. It was taken over by the first fleet of illegal boat people (2001).

This statement makes it possible to imagine a non-violent response to those seeking refuge. In Perera's words Wadjularbinna 'rejects a circumscribing and closed Australia, an Australia of ever shrinking, heavily defended borders' (2002: 22). By drawing attention to Aboriginal ownership, Wadjularbinna provides a way to read the actions of former prime minister Howard and the Australian state as illegitimate, as based on theft and as having usurped the right of Aboriginal peoples to offer hospitality to refugees. Her critical

insights against state violence amount to a generosity towards refugees, which functions to reveal the multiple layers of white law and white sovereignty's violence. Wadjularbinna's statement is an enactment of Tony Birch's critical insight that Aboriginal people must

assert more moral authority and ownership of this country. Our legitimacy does not lie within the legal system and it is not dependent on state recognition. It lies within ourselves ... 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 (2001: 17-22).

Birch's statement here is powerful because it moves beyond the violent parameters established by white law to deny not only Aboriginal sovereignties but to deny the possibility of welcome being offered to those fleeing oppression and attempting to find refuge on Aboriginal lands. So long as colonial sovereignty remains non-justiciable in Australia, 'conditional hospitality' by 'invitation only' (Kelly 2006: 459) as well as the outsourcing of hospitality will remain legitimate acts of state.

References

- Bates D 2007 'Constitutional Violence' in *Journal of Law and Society* 34/1: 14-30
- Betts A 2009 'Development assistance and refugees: Towards a North-South grand bargain?' Refugee Studies Centre Oxford
- Birch T 2007 "'The Invisible Fire": Indigenous Sovereignty, History and Responsibility', in Moreton-Robinson 2007 105-117.
- 2006 "I Could Feel it in my Body": War on a history war' *Transforming Cultures E-Journal* 1/1 Available from <http://epress.lib.uts.edu.au/journals/index.php/TfC/article/viewArticle/188> Last accessed 22/11/13
- Buchan B 2002 'Withstanding the Tide of History: The *Yorta Yorta* Case and Indigenous Sovereignty' *Borderlands E-Journal* 1/2 Available from http://www.borderlands.net.au/vol1no2_2002/buchan_yorta.html Last Accessed 21/11/2013

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- Campbell A 2013 Transcript: Minister for Immigration and Border Protection and Commander of Operation Sovereign Borders Joint Agency Task Force Press Conference. Available from http://www.customs.gov.au/site/131018transcript_operation-sovereign-borders.asp Last accessed 22/11/13
- Cornell D, Rosenfeld M and Carlson DG Eds 1992 *Deconstruction and the Possibility of Justice* Routledge New York
- Derrida J 2000 'Hostipitality' *Angelaki: Journal of the Theoretical Humanities* 5/3: 3-18
- 1992 'Force of law: the 'mystical foundation of authority'' in Cornell et al 1992 YEAR 4-67
- Giannacopoulos M 2007 *Mabo, Tampa and the Non-Justiciability of Sovereignty*, in Suvendrini Perera, *Our Patch*, Network Books, Perth, pp. 45-60.
- 2005 'Tampa: Violence at the Border' *Social Semiotics* 15/1: 29-42
- Goodwin-Gill GS 1983 *The Refugee in International Law* Clarendon Press Oxford
- Harvey CJ 2001 'Refugees, Rights and Human Security' *Refuge* 19/4
- Joseph S 2013 'The PNG Solution: cruel to be ...cruel' *The Conversation* Available from <http://theconversation.com/the-png-solution-cruel-to-be-cruel-16389> Last accessed 22/11/13
- Kelly E 2006 'White Hospitality: a critique of Political Responsibility in the Context of Australia's Anti-asylum-seeker Laws' *Continuum: Journal of Media and Cultural Studies* 20/4: 457-469
- Kerruish V and Purdy J 1998 'He "Look" Honest – Big White Thief' *Law Text Culture* 4/1: 146-171
- Magner T 2004 'A Less than 'Pacific' Solution for Asylum Seekers in Australia' *International Journal of Refugee Law* 16/1: 53-60
- Mitropoulos A 2003 'The Barbed End of Human Rights' in *Borderlands E-Journal* 2/1 Available from http://www.borderlands.net.au/vol2no1_2003/mitropoulos_barbed.html Last accessed 21/11/13
- Motha S 2005 'The Failure of 'Postcolonial' Sovereignty in Australia' *The Australian Feminist Law Journal* 22: 107
- Moreton-Robinson A Ed 2007 *Sovereign Subjects: Indigenous Sovereignty Matters* Allen and Unwin Sydney

- Perera S 2002 'What is a camp...?' *Borderlands E-Journal* 1/1 Available from http://www.borderlandsE-Journal.adelaide.edu.au/vol1no1_2002/perera_camp.html Last accessed 21/11/13
- Perera S 2002 'A line in the Sea: The Tampa and Boat Stories and the Border' *Cultural Studies Review* 18/1: 11-27
- Phillips M 2013 'Tough guys: Operation Sovereign Borders vs the PNG Solution' *The Conversation* Available from <https://theconversation.com/tough-guys-operation-sovereign-borders-vs-the-png-solution-16443> Last accessed 22/11/13
- Pugliese J 2007 'The Event-trauma of the Carceral Post-Human' *Social Semiotics* 17/1: 63-86
- Ritchie J 2013 'Colonialism, sovereignty and aid: what refugees mean for PNG' *The Conversation* Available from <https://theconversation.com/colonialism-sovereignty-and-aid-what-refugees-mean-for-png-16318> last accessed 22/11/13
- Ritter D 1996 'The "Rejection of Terra Nullius" in Mabo: A Critical Analysis' *Syd L R* 18: 5
- Stronks MC 2012 'The question of Salah Sheekh: Derrida's hospitality and migration law' *International Journal of Law in Context* 8/1: 73-95
- Wadjularbinna 2001 'A Gungalidda grassroot's perspective on Refugees and the recent events in the US' Media Release September 25 Available from <http://www.mail-archive.com/recoznnettwo@green.net.au/msg01108.html> Last accessed 22/11/13
- Watson I 2002a 'Aboriginal Laws and the Sovereignty of Terra Nullius' *Borderlands E-Journal* 1/2 Available from http://www.borderlands.net.au/vol1no2_2002/watson_laws.html Last accessed 21/11/2013
- 2002b 'Buried Alive' *Law and Critique* 13: 253-269

Cases

- Mabo and others v Queensland (No 2)* (1992) 175 CLR 1 (High Court of Australia)
- Ruddock v Vadarlis* [2001] FCA 1329 (Full Court of the Federal Court of Australia)
- Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs & Ors* [2001] FCA 1297 (Federal Court of Australia)