

First Nations¹ and the Colonial Project

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Abstract

The colonial project has embodied a centuries-long, ongoing campaign to annihilate, define, subordinate and exclude the ‘native’, and an arsenal of tools has been applied to these ends. Mast-headed with the Christian mission to ‘civilise’, First Nations laws were deemed non-existent and, for more than 500 years, the colonialist construct of an absence of law in First Nations’ territories was supported by its idealised notions about the ‘savage’ and ‘backward native’. European constructs of backwardness and savagery continue to prevail in contemporary times, but First Nations continue to survive, live, practice and assert a law-full² way of being in the world, one which is different to the European way of being, but no less valid and perhaps more critical to the future of life on earth.

Many appeals made for recognition under international law by First Nations have failed because international law has been created by colonial nations and in the interests of colonialism itself. International law grew out of the distinctions made between civilized and non-civilized states, and those distinctions confirmed that international law applied only to a civilized ‘family of nations’. Anghie argues that colonialism was not an example of the application of sovereignty, but that sovereignty was constituted through colonialism. With the shaping of international law by colonialism, we are left to consider the question: is it possible to reconstruct international law so that it is liberated from its colonial origins? The subject is made more complex by the fact of the many First Nations confined to the ‘domestic paradigm’, immersed within an occupying settler state, and the state policies which aim at their complete annihilation. This paper will explore the possibility of freedom beyond the domestic paradigm and the absorption of First Nations into the universal ‘civilization’ of Europe.

Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin.³

French Translation

Le projet colonialiste représente une campagne de plusieurs siècles pour annihiler, définir, subordonner et exclure « l’autochtone », et un arsenal d’outils a été employé à ces fins. Percutées par la mission civilisatrice du Christianisme, les lois autochtones étaient considérées non-existantes, et pour plus de 500 ans, la construction colonialiste de l’absence de droit chez les autochtones a été nourrie par des notions idéalisées du « sauvage » et de « l’autochtone arriéré ». Les conceptions européennes du sous-développement et de la barbarie persistent dans l’époque contemporaine, mais les peuples autochtones continuent de survivre, vivre, pratiquer et revendiquer une manière légale d’exister, une qui est différente à la manière d’être européenne, sans être moins valide et en étant peut-être plus critique de l’avenir de la vie sur Terre.

Plusieurs revendications autochtones pour la reconnaissance sous le droit international ont échouées car le droit international a été créé par des états colonisateurs selon les intérêts du colonialisme. Le droit international s’est développé à partir des distinctions entre les États civilisés et les États non-civilisés, et toutes ces distinctions ont confirmé que le droit international s’applique seulement aux familles « des nations civilisées ». Anghie avance que le colonialisme n’était pas un exemple de l’application de la souveraineté, mais que la souveraineté s’est constituée à travers le colonialisme. Avec l’influence formatrice

¹ I use the term nations throughout this article in reference to First Nations Peoples, to assert a sovereign, relational, ‘we were here first’ standpoint. For example, the term refers to a way of being that is determined by First Nations and which is not limited by the colonial project - international law.

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² Law-full is used here to speak back to the idea of terra nullius, and First Nations being without law.

³ From nineteenth century writer Henry Wheaton, *Elements of International Law* (Boston: Little Brown and Co, 1866) at para 11, cited in Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004) at 54.

du colonialisme sur le droit international, nous devons nous demander : serait-il possible de reconstruire le droit international de façon à ce qu'il s'affranchisse de ses origines coloniales? Le sujet devient plus complexe par le fait que plusieurs populations autochtones sont enclavées dans le « paradigme domestique », immergées à l'intérieur d'un État-occupant, ainsi que dans des politiques qui visent leur annihilation. Cet article explorera la possibilité de la liberté au-delà du paradigme domestique et de l'absorption des peuples autochtones dans la « civilisation » universelle de l'Europe.

Y a-t-il un droit uniforme des nations? Il ne s'agit certainement pas du même pour toutes les nations et états de ce monde. Le droit public, à quelques exceptions près, a toujours été, et l'est encore, limité aux peuples civilisés et chrétiens de l'Europe ou ceux d'origine européenne. (De Henry Wheaton, écrivain du XIXe siècle, à 54. Notre traduction.)

Spanish Translation

El proyecto colonial ha encarnado por un siglo campañas de aniquilación, subordinación y exclusión “nativa”, y un arsenal de herramientas ha sido empleado para estos fines. Encabezado por la misión cristiana de “civilizar”, las leyes de las primeras naciones fueron consideradas inexistentes, y por más de 500 años, la explicación colonialista de la ausencia de la ley en dichos pueblos indígenas fue respaldada por esa idealizada noción del pueblo indígena como un pueblo “salvaje” y “atrasado”. Ideales Europeos de retraso y salvajismo permanecieron en la era contemporánea, pero los pueblos indígenas continúan sobreviviendo, practicando y afirmando una medio legal de pertenecer al mundo en una manera diferente al modo de ser Europeo, pero no menos válido y quizás más crítico con relación al futuro de la vida sobre la tierra.

Muchas demandas por el reconocimiento de las leyes internacionales realizadas por los pueblos indígenas han fallado, debido a que el derecho internacional ha sido creado por naciones colonizadoras con fines de colonialismo. El derecho internacional creció basado en la distinción de estados civilizados y no civilizados, y esas distinciones confirman que el derecho internacional ha sido creado para naciones civilizadas, o la “familia de naciones”. Anghie sostiene que el colonialismo no es un ejemplo de la aplicación de soberanía, sino que esa soberanía se construyó a través del colonialismo. Con la organización del derecho internacional resultando del colonialismo, dejamos en consideración la pregunta siguiente: es posible reconstruir el derecho internacional y liberarlo de sus orígenes coloniales? El asunto resulta más complejo por el hecho de que muchos pueblos indígenas se encierran en “paradigmas domésticos”, inmersos en un estado colonial y en políticas de estado, cuyo objetivo es la aniquilación completa de estos pueblos. Este artículo explorará las posibilidades de libertad más allá de paradigmas domésticos y la asimilación de los pueblos indígena dentro una dicha “civilización” universal europa.

Existe un derecho uniforme de naciones? Es cierto que no existe un mismo derecho para todas las naciones y los estados del mundo. El derecho público, con leves excepciones, siempre ha sido, y aún queda reservado a personas “civilizadas”, entendidas como Cristianos europeos o gente originaria de Europa. (Del autor del siglo XIX, Henry Wheaton, a 54. Nuestra traducción)

Introduction

This article is written from a critical Indigenous standpoint which centres an Aboriginal ontology while also examining the colonial project from a similar position which draws from First Nations laws and legal systems.

The Australian colonial project began in the eighteenth century and is ongoing. It continues to impact upon the lives of contemporary First Nations Peoples. Our critical voices provide an account of colonialism's ongoing nature,⁴ but even while doing so, those critical voices exist within the colonial matrix of power. This is because the modern state, even while styling itself liberal and multicultural, provides no real platform upon which it could recognise Indigenous autonomy or make space in which there could be

⁴ Chakravorty G Spivak, “Culture Alive” (1995) 5 Australian Feminist Law Journal 3 at 10. The author suggests the language of post-colonialism is akin to throwing words around; this is particularly so when the fact of Aboriginality is evidence of the failure of decolonisation. Spivak refers to the danger of the term post-colonialism as applied in the United States, where it claims a time after colonialism.

a challenge to its political economy.⁵ And this is in the face of the concerns of Indigenous Peoples living beyond the embrace of white privilege, and includes murder, cultural genocide, ecocide of our territories, incomprehensible incarceration rates and levels of poverty and poor health which vastly outscore those of non-Indigenous persons.

The colonial project is old, but not as old as the First Nations Peoples whose territories have come under the control of the colonising empires which have constructed and imposed their bodies of laws upon First Nations territories and jurisdictions. The colonial project is older than the story of Columbus and his 1492 journey of ‘discovery’ to ‘distant lands occupied by pagan tribes of savages.’⁶ It goes further back than 1770, when Captain James Cook claimed that the lands of New South Wales were the ‘solitary haunt of a few miserable savages, destitute of clothing.’⁷ Cook’s newly ‘discovered’ territories were deemed ‘terra nullius’ and the invader colonists who followed Cook positioned themselves as ‘white’ and ‘European’ while the Indigenous were deemed ‘voiceless’ by the invaders, as if the invaders alone had the ‘authority to name without being named in return.’⁸

But the lands of the so-called native savages were based upon ancient connections to land. First Nations Peoples maintained long relationships with those territories, but those relationships were (and largely remain today) incomprehensible to the invaders’ legal and political philosophies and knowledge of relationships to the natural world, especially as the British wanted the land themselves. British culture theorised land as property and as being the foundation of their society and culture but they had a limited capacity to understand collective Indigenous relationships to it. So many Indigenous Peoples continue to resist and work hopefully towards an opening which might provide for a resurgence of relational ways of living with and viewing the natural world.

However, the state has deployed an arsenal of tools against the possibility of an Indigenous resurgence and for continuing to contain Indigenous Peoples within the confines of its jurisdiction. And running with its long tried-and-tested methodology, the colonial project continues to define and construct the Aboriginality of First Nations; part of that has excluded the ‘native’ from having any legal subjectivity or personality in international law.

The colonial project in positing their laws created the lie of native lawlessness

Positivist jurisprudence positioned the ‘civilized’ European state as sovereign and the ‘uncivilized’ non-European as lacking in sovereignty; this constructed difference continues to be used by the ‘civilized’ European states to deny the uncivilized non-Europe any legal personality or sovereignty.⁹ Characterisation of the ‘savage’ and ‘native’ still prevails as First Nations continue to be considered as being without law and sovereignty. This enables the colonial state to intervene wherever the ‘native’ is deemed to act in a way which is considered to be against universal human rights or which is deemed by the state in any way repugnant. The underlying cause for state intervention is often laid at the feet of culture - that which is characterised by the state as ‘cultural difference’ is often used to justify its intervention in the form of police or military actions. This occurred in what is known as the Northern Territory Intervention and is discussed further below.¹⁰ Whether or not an act is repugnant is evaluated by neo-liberal universal human rights standards and the validity of Indigenous laws is assessed by these same standards – should they be tolerated and or rejected by the state? The United Nations *Declaration on the Rights of Indigenous Peoples* summed up the ongoing intent of colonial states to determine First Nations futures and thus colonisation. Article 46 of the *Declaration* denies the political and territorial integrity of First Nations by re-inscribing

⁵ Roger Merino Acuña, “Critical Human Rights and Liberal Legality: Struggling for ‘The Right to Have Communal Rights’” (2013) 3 *Philosophy Study* 246. See also Irene Watson, “Aboriginal Sovereignities: Past, Present and Future (Im)Possibilities” in Suvendrini Perera, ed, *Our Patch, Enacting Australian Sovereignty Post-2001* (Perth: Network Books, 2007) at 23-43 [Watson, “Aboriginal Sovereignities”], on the representation of the Indigenous voice while captive of the colonial project.

⁶ Robert Williams Jr, *Savage Anxieties: The Invention of Western Civilization* (New York: Palgrave Macmillan, 2012) at 179.

⁷ *Ibid* at 227.

⁸ Walter Mignolo, “Who Speaks for the ‘Human’” in ‘Human Rights’: Human Rights in Latin American and Iberian Cultures” (2009) 5 *Hispanic Issues* 7 at 8, cited in Acuña, *supra* note 4 at 257.

⁹ Anghie, *supra* note 2 at 4.

¹⁰ See Irene Watson, “In the Northern Territory Intervention, What is Saved or Rescued and at What Cost?” (2009) 15:2 *Cultural Studies Review* 45 [Watson, “Northern Territory Intervention”], for a discussion on state intervention in the name of human rights.

those powers to the state.¹¹ This same Article justifies the power of colonial states to reject Indigenous Laws, based on a test which subjects these laws to the ambiguity of universal standards such as ‘human rights’, ‘democracy’, ‘good governance’, and ‘good faith.’ These standards have been translated within a Euro-centric framework to re-inscribe the civilising mission and the colonial project of assimilation.

In 2007, the federal government of Australia authorised its military to enter First Nations territories across the Northern Territory (NT). The authorisation was based on the perception that First Nations communities were rife with violence and the sexual abuse of young children.¹² The NT intervention, officially the ‘Northern Territory Emergency Response’, deployed culture in a way which positioned the moral hegemony of the state and its non-Aboriginal citizens. But accompanying the moral indignation was a highly opportunistic land-management agenda in favour of the federal government - it had nothing to do with the safety of women and children.

It is moreover argued that the interpretation and translation of culture in relation to our bodies has been used and manipulated by colonising states - many times over - to uphold and support the colonial project. Spivak has argued that a particular reading or interpretation of culture could be set up in such a way that it allows the female person and her body “to be the theatre on which this strategic game is manipulated ...we should really think about, the extent of our folly as women.”¹³ The idea of a strategic game which can be manipulated is what has occurred in the Northern Territory intervention. The Australian state, empowered to position and subjugate Indigenous women, repositions itself, the agent of colonial violence, to that of the upholder of universal human rights and defender of the rights of women and children against the violence of Indigenous men. In this context the voices of Indigenous women are submerged within the state’s power to conceal the complexity and layers of truth. The image of an Indigenous woman lying dead by the roadside, in Tracey Moffatt’s 1989 work *Something More*, could be re-read as *Aboriginal women - colonial narrative road kill*. As the title *Something More* suggests, there is perhaps a multi-layered alternative to that of the one-truth which dominates the universality mission of the colonial project.¹⁴

In the case of the Northern Territory, state intervention is represented as the dominant truth, as a humanitarian emergency. But those events which are masked as humanitarian interventions on behalf of the colonial states are re-enactments of the initial colonizing event. They are acts which are being perpetrated for the purpose of justifying and maintaining the ongoing colonised position of Indigenous Peoples¹⁵ and are still based on the idea of native savagery - that Aboriginal women are in need of the colonial state to rescue them from savage native men.

The colonial project is ultimately about justifying the occupation and exploitation of Indigenous land and the maintenance of unequal relationships between non-native and native; it is of paramount importance that the colonised remain contained as objects of the colonial state. And for the Indigenous, the only trajectory is to become totally absorbed and assimilated into the state.

Tools of the colonial project

Carrying the banner of the Christian mission to ‘civilise’, the Europeans deemed First Nations laws non-existent. For more than 500 years, the colonialist construct of an absence of Indigenous laws was supported by notions of the ‘backward native’. European constructs of backwardness and savagery

¹¹ Charmaine Whiteface & Zumila Wobaga, *Indigenous Nations’ Rights in the Balance: An Analysis of the Declaration on the Rights of Indigenous Peoples* (Minnesota: Living Justice Press, 2013), provides an excellent blow-by-blow account on the limitations of the UN *Declaration on the Rights of Indigenous Peoples*. [Whiteface & Wobaga]

¹² In a report by Rex Wild and Pat Anderson, “AmpeAkelyernemaneMekeMekarle Little Children are Sacred’: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse” (30 June 2007), online <www.nt.gov.au/dcm/inquiriesaac/pdf/bipacsa_final_report.pdf>. The Commonwealth government used the findings of a report which recommended closer consultation and community development programs across Aboriginal communities within the Northern Territory; - instead the findings were used to legitimise the military intervention into Aboriginal communities.

¹³ Spivak, *supra* note 3 at 8.

¹⁴ Tracey Moffatt, “Something More #9”, (1989), *Roslyn Noxley9 Gallery*, online <www.roslynnoxley9.com.au/artists/26/Tracey_Moffatt/75/32690/>.

¹⁵ Watson, “Northern Territory Intervention” *supra* note 9.

continue to prevail in contemporary times. It is apparent in Australia's Northern Territory 'intervention'¹⁶ and in another recent example where the state of Queensland declared a 'state of emergency' in response to the Palm Island 'riot', and provided us with another indicator of the ongoing colonial ordering of Aboriginal spaces.¹⁷

State interventions occur routinely, but First Nations continue to survive, live, practice and assert a law-full way of being in the world, one which is different to the European or mainstream Australian way of being. For many Indigenous Peoples, their Aboriginal laws exist, not in ivory towers or the power houses of the Australian state, but in the lives, minds and memories of their Indigenous holders.¹⁸ However, while we are left to carry the onus of proof of our existence and the existence of our laws, very few ever consider asking the question: what laws existed before colonization or, what happened to those systems of law? Few ever ask the question: how did the colonial state obtain authority over Indigenous Peoples?¹⁹

The idea that the colonial project is a thing of the past is a falsehood; colonialism has not ceased, it is ongoing. This ongoing nature of colonialism is evidenced by states' statistical data kept on Indigenous Peoples. The position of Indigenous Peoples is in turn evidence of the states' colonial policies of control and containment. Within colonial containments, policies of disempowerment are routinely maintained. In Australia at present, we see Indigenous people being continually moved from state-controlled Aboriginal reserves in rural and remote areas (rich in minerals) to public housing in cities and towns, and this is occurring along with a steady flow of Indigenous people being incarcerated in Australian gaols and juvenile detention centers. The historic sites of containment have shifted from reserves established and controlled under the *Aborigines Acts*²⁰ to new sites of control, including the state's criminal justice system or its mental health institutions. The sites of colonial subjugation have shifted from the *Aborigines Acts* concentration camps to prisons, mental health institutions and juvenile detention centers. Far from seeing an end to colonialism, we perceive a prospect where there is no end in sight. Colonialism is alive in these contemporary institutions; but we call the character of our containment by another name. But whatever name is used to describe the subjugation of Indigenous Peoples, the acts of containment remain linked to the colonial history of Australia and that is one which may never be white-washed.²¹

The ongoing existence of colonialism is partly disguised by neo-liberal attempts to recognise Indigenous 'rights' and casting the illusion of recognition. These attempts have been well positioned - so well that the event of colonialism is now appearing as though it is a thing of the past, no longer an ongoing phenomenon, and as though de-colonisation was actually effected. Within the domestic jurisdiction of Australia, 'native title' jurisprudence has come to represent a return of stolen Aboriginal

¹⁶ The National Emergency Response comprised the following legislation: *Northern Territory National Emergency Response Act 2007* (Cth); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth); *Social Security and Other Legislation Amendment (Welfare Reform) Act 2007* (Cth). This legislation has affected the position of traditional owners with respect to the *Aboriginal Land Rights Act 1976* (Cth), and also not only effected the suspension of *The Racial Discrimination Act 1975* (Cth), but also has impacted on provisions of the *Northern Territory Self-Government Act 1978* (Cth).

¹⁷ On 26 November 2004, the Queensland government declared a State of Emergency similar to that of 1957 when Palm Islanders protested against slave-like working conditions. In 1957 Palm Islanders went on strike and in response the state sent in forces, which at gun point led chained protesters away to a life in exile from their Palm Island home. For further background see, Joanne Watson, "We Couldn't Tolerate Any More: The Palm Island Strike of 1957" (1995) 69 *Labour History* 149-70. Similarly, in 2004, the Queensland government sent in heavily-armed mainland riot police to land and arrest 43 Palm Islanders who had been protesting against the violent death of an Aboriginal man in custody. Those arrested were detained in mainland Townsville. Lex Wotten, who was among the arrested individuals, was gaoled for two years, see, Chloe Hooper, *The tall man: Death and life on Palm Island* (Camberwell (Vic): Random House, 2009). Following serving a two-year sentence, Wotten was released on parole with an imposed gag order. The order prevented him from speaking (without permission from his parole officer) to the media and public meetings, Alicia Wicks, "Due Process and Parole in Queensland: The Case of Lex Wotton" (2010) 7:20 *Indigenous Law Bulletin* 13.

¹⁸ Globally, Indigenous Peoples have asserted the validity of their laws, and questioned their displacement to the 'domestic jurisdiction' of colonising states. For further discussion, see Sharon Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights* (British Columbia: Theytus Books, 1998) at 135-65. For a discussion on Aboriginal Law and colonialism, see Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law*, (Abingdon: Routledge, 2015).

¹⁹ Moana Jackson, "Justice and political power: Reasserting Maori legal processes" in Kaylen Hazlehurst, ed, *Legal Pluralism and the Colonial Legacy: Indigenous Experiences of Justice in Canada, Australia and New Zealand* (Aldershot (UK): Avebury, 1995) at 243.

²⁰ See for example, the *Aborigines Act 1910* (Vic); *Aborigines Protection Act 1909* (NSW) *Aborigines Protection Act 1886* (WA); *Aborigines Act* (1969) (NSW); *An Act to amend an Act intituled "An Act to provide for the Protection and Management of the Aboriginal Natives of Victoria 1886* (Vic) (also known as *Half-Caste Act*); *Half-Caste Act 1886* (WA); *Aboriginal Protection and Restriction of the Sale of Opium Act 1887* (Qld).

²¹ In *Mabo v Queensland (No 2)* (1992) HCA 23; (1992) 175 CLR 1, [66] [*Mabo Case*]. Brennan J refers to the 'tide of history' that 'has washed away any real acknowledgement of traditional law and any real observance of traditional customs' and therefore 'the foundation of native title has disappeared'.

lands by the state and the recognition of Aboriginal relationships to them. Native title recognition, however, is a myth. The truth is that native title has an end point which ultimately results in state power to extinguish Aboriginal title. In the case *Mabo (No. 2)*, Justice Gerard Brennan stated:

Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared.²²

The colonial project is about ensuring that the Aboriginal relationships to all things Indigenous are inevitably extinguished, or reach a point where the Indigenous are absorbed into the ideological abyss of 'progress'. The end of Aboriginality is a form of genocide but the genocide argument has not been successful in Australian courts. (When tested, it was found that the crime of genocide was considered not to be a part of Australian law).²³ So the Australian state enables the cultural genocide of Aboriginal peoples and at the same time escapes the blow torch of scrutiny from the international community. Australia gets away with this in the same way that other powerful members of the United Nations do, partly because of the hegemonic position of the United States and its alliances and complicity with Canada, Australia, and New Zealand. These four states are not the only colonial regimes still working in the world, but they work to support each other on the question of Indigenous Peoples and in particular in the erasure of our rights to self-determination and our ancient territories. In all the colonial states, the 'domestic paradigm' prevails even though the United Nations *Declaration on the Rights of Indigenous Peoples*²⁴ appears to lead the way towards the protection of land rights and the acknowledgement of Indigenous Peoples' rights to self-determination. Essentially, Indigenous Peoples remain domestic captives without any international subjectivity. The colonial project has worked for centuries to domesticate the international subjectivity of the Aboriginal person and in doing this the colonial states have constructed their own accounts of Aboriginality. Murri²⁵ artist Richard Bell has famously painted 'Aboriginal Art is a White Thing'; I would add: the Australian state's construction of our Aboriginality is 'a white state thing'.

In recognition of a colonial foundation

Many appeals for international law recognition have been made by First Nations, but all have failed. This is largely because international law has been created by and in the interests of colonialism itself. International law grew out of the distinctions made between civilized and non-civilized peoples and those distinctions enabled and confirmed that international law applied only to a civilized 'family of nations'. Anghie has argued that colonialism was not an example of the application of sovereignty but that sovereignty was constituted through colonialism.²⁶ The sovereignty of First Nations was displaced and ignored, as though it had never existed prior to the colonial invasion, while the Indigenous person is measured by our humanity (or inhumanity) by those who know nothing of the Indigenous life.²⁷

But all the while First Nations Peoples have managed to survive within the colonial matrix. What has also survived are Aboriginal world views and Aboriginal knowledges and relationships to country. In the same space, the colonial settler society draws its survival from an illegitimate foundation upon Aboriginal lands. Relationships to the land held by the colonised and colonialist are different. Aboriginal relationships are founded in the view that people belong to land while non-Aboriginal relationships are of

²² *Ibid.*

²³ In the matter of an application for a writ of mandamus directed to *Re Thompson; Ex parte Nuyarimma and Others* (1998) 136 ACTR 9; *Nuyarimma v Thompson* [1999] FCA 1192, [1999] 96 FCR 153.

²⁴ For a critique of the Declaration, see Whiteface & Wobaga, *supra* note 10; Sharon Venne, "The Road to the United Nations and the Rights of Indigenous Peoples" (2011) 20:3 Griffith L Rev 557; Irene Watson, "The 2007 Declaration on the Rights of Indigenous Peoples Indigenous Survival – Where to from Here?" (2011) 20:3 Griffith L Rev 507.

²⁵ It means 'Aboriginal person', a term that is used extensively across Queensland.

²⁶ Anghie, *supra* note 2.

²⁷ For a discussion on who names the human-inhuman, see Judith Butler, *Undoing Gender* (New York: Routledge, 2004) at 2.

land belonging to people. The Aboriginal relationship to land goes unrecognized in Australian law - apart from a token recognition in native title rights.²⁸ In Australia, the native title processes do provide an entry point of neo-liberalist recognition into western property legal frameworks for Aboriginal Peoples, but native title is limited to a beneficial usage and excludes the full range of ownership options which are a part of Anglo-Australian property law. The 'native title' holder is excluded from benefits gained by non-native property ownership and the right to exclusive possession. Aboriginal traditional owners thus possess the most marginal form of property title. This is while title to Aboriginal lands can be extinguished by executive government policy or statutory laws. So the end point of Aboriginal relationships to land is still managed by the state, in these latter days measured by 'native title' principles.

Those principles measure the lives of Aboriginal peoples who, following the colonial holocaust, have been able not only to remain standing but also able to provide evidence of an ancient connection to land which has continued unbroken throughout the violence of colonial history. But if Indigenous Peoples end up being deemed unable to prove they have a continuing connection to country, the alternate native title finding is of extinguishment. This means that any relationship to country, land, law, culture, and Aboriginal life is deemed extinguished. This may be determined where the courts establish a lack of continuity between law, land and peoples and such a determination is usually based on the evidence of non-Aboriginal experts: connection to country cannot be proven. In a court reaching a final determination on the continuity of an Aboriginal relationship to country, oral Aboriginal evidence has been displaced by the account of a white male historian.²⁹ Under its native-title devices, the colonial legal system determines our Aboriginal capacity to stay in a belonging relationship to land. It determines our connection to country and its endings. The colonising disconnection of Aboriginal relationships to country goes on all the while, while the 'real' land relationships - of colonial ownership and control - are deemed legitimate, maintained and sustained by Australian law. But as with most things in the Australia-Indigenous relationship, these different relationships to land cause the unsettling of both. The colonial state's agenda for two centuries has been a resolution of Aboriginality, a process for bringing it to an end. Civilization brings progress and closure to old worlds, to Aboriginal worlds and to those worlds in which peoples belong to ruwe³⁰ rather than owning and controlling the land.

However, looking at things within an Aboriginal horizon, the idea of Aboriginal law being extinguished is an alien one. This is because the law is alive. It lives and it cannot be extinguished, for the law lives in this land. It's a fact, a belief, a way of knowing the world which is still alive and waiting for that 'impossible' moment of recognition and activation.

To state that Aboriginal law cannot be extinguished is to resist and to question the power and authority of Australian laws, which inscribe and position themselves over Aboriginal sovereign possibilities and enact and construct themselves so as to erase and extinguish Aboriginal law. But in these acts of erasure, what is the state doing? Can Australian laws really erase an Aboriginal way of knowing the law, a way which sits outside Australian law? How can you erase and extinguish that which you have denied even exists? Colonial power allows for the act of erasure, but is it law-full? And if its acts are unlawful and Australian law then attempts to affirm its own unlawfulness, what kind of laws does it make? Are they laws which move us from genocide to juriscide?³¹ Where does justice live in acts which are deemed to be in the name of the law; can you have justice in that place where one law purports to extinguish the law of the other?

How can Australian law erase Aboriginal law when Aboriginal law sits outside of the proclaimed colonial legal foundation? The High Court of Australia in the *Mabo* decision refused to recognise the existence of Aboriginal laws since to give recognition to them would fracture the state's skeletal foundation.³² From where does the one law driving to extinguish the laws of the other draw its legitimacy?

²⁸ For an extensive critique of the limitations of native title rights in respect of Aboriginal land rights, see Irene Watson, "Sovereign Spaces, Caring for Country and, the Homeless Position of Aboriginal Peoples" (2009) 108:1 South Atlantic Quarterly 27.

²⁹ *Yorta Yorta Aboriginal Community v Victoria and Others* (2002) 194 ALR 538.

³⁰ It means 'land' in the language of the Tangane-kald.

³¹ This term was first suggested to me by Valerie Kerruish; it has no 'authoritative' definition. I understand it to mean the killing of one law by another. A further reference to the term was found in the work by Mary Linda Pearson, *From Genocide to Juriscide, the last Five Hundred Years: A History of the Genocide of North American Indian Peoples* [unpublished manuscript].

³² *Mabo* Case, *supra* note 22 at 29-30, 43, 45.

Is it simply because it can, because it has the military power to do so? The High Court in *Mabo (No 2)* answered this question: it affirmed that Australia was lawfully settled as an act of state, but at the same time rejected an enlarged view of 'terra nullius' as the foundational principle of Australian law.³³ In the High Court's rejection of terra nullius, many thought that there would appear an opening for an Aboriginal presence, but it became recognition of the limits of Australian law. In a measuring of the 'natives' remaining connection to land in a contemporary colonial context, the court decided it would not give recognition to an Aboriginal presence if it held any possibility of breaking the skeletal framework of the body of the imposed colonial law. The fiction of settlement under international law prevailed in the *Mabo (No 2)* decision. The skeleton of Australian law remained intact and the question of its legitimacy did not arise as the court avoided addressing the question of its own legitimacy. But meanwhile the body of Aboriginal law continues to reside in the land, bodies, minds and spirits of its peoples, even as the skeleton of Australian law lays itself out across them.

In the colonial context, the notion of civilisation has always been part of a process involving the harvesting of the planet's Aboriginal being - its peoples, lands, fauna, and flora. But it is a harvest which is more like mining; inevitably it becomes a contradiction to a sustainable future - and therefore unsustainable. In this process of the mining of Indigenous spaces and places, there is very little sense of future generations or future well-being. What exists predominately is the importance of the now. And it is Indigenous Peoples' lands which are being harvested or mined of their resources, as their peoples are removed from the land. This removal goes on as if there is no future and or relationship between peoples and land. Indigenous Peoples are still being displaced, refugees from Indigenous homelands, and positioned socially, economically, and culturally inferior to any other persons.

A future international?

The relationship between international law and colonialism is a co-dependant one. If colonialism is a great fault, we should then examine the possibility of a reconstructed international law - one which is liberated from its colonialist origins. In real time, many First Nations are confined to the 'domestic paradigm' of the settler states occupying their lands and are looking down the barrel of settler-state policies which are about their annihilation.

Roger Acuña suggests that human rights instruments could be used by Indigenous Peoples if there were first a critical appraisal of their association with neo-liberalism.³⁴ Similarly, Anghie recommends that we better understand the relationship between international law and colonialism in order to transform the inequities and imbalances which have resulted from the colonial confrontation with First Peoples.³⁵ However, in coming to do this work we also need to understand that colonialism institutionalises, legitimises, conceals and enshrines violent power relations. As China Miéville makes clear, we live in a world in which violence is often sanctioned by the rule of law. On this assessment, it is the rule of law which requires an unfolding.³⁶

The work of Charmaine Whiteface provides a critical analysis of the *Declaration on the Rights of Indigenous Peoples*, illustrating how the *Declaration*, like other human rights instruments, can be used as a tool for empire. In concluding comments regarding the long process of drafting the *Declaration*, Whiteface asks the question: will the human rights of Indigenous Peoples ever be upheld? She replies thus:

When a system such as the one that dominates the globe today is allowed to run rampant over human beings, over natural resources, and over virtually every piece of matter on the Earth, then that system is destined to fail and eventually will fall. The time left for this current system, which includes the United Nations, is very, very short. Cause and effect is the Natural Law that will prevail.³⁷

³³ *Ibid.*

³⁴ Acuña, *supra* note 4 at 246.

³⁵ Anghie, *supra* note 2 at 38-39.

³⁶ China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Chicago: Haymarket Books, 2006) at 319.

³⁷ Whiteface & Wobaga *supra* note 10 at 108.

Indigenous Peoples have for more than 500 years survived colonial violence otherwise authorised, legitimised and called the ‘rule of law’. This testament to survival is not a recommendation for more of the same, or to further test the resilience of Indigenous peoples, but is a reflection upon the current predicament of both Indigenous lives and natural world environments and the critical need to alter the trajectory we are currently on.

Perhaps the possibility of shifting away from the current trajectory is seen as impossible. Derrida suggests such moments – moments of *aporia* – are what are needed to make a decision in order that all life forms have a future.³⁸

The colonial matrix has assumed construction of the idea that the rule of law is what holds the world together and it is true that it is that which holds the colonised form together. But alternatively, how might we unfold or disentangle this rule of law, and embrace a different vision, one which is sustainable and which values the thriving survival of future generations? What might we be or where might we end up if we were to unfold from the rule of law which has come to hold the colonial world together? Would we be at the edge of where it had all began, the edge of that which the colonial world had constructed as ‘barbarian’? It would be a world of my ancestors, a world in which the ancestors called up their own ancient laws as the legal system responsible for holding the native and the natural world together. The colonial world unfolding, letting go of itself and instead embracing all that it has worked on to annihilate for centuries may be inconceivable, an impossibility, but that is ‘exactly where one starts thinking.’³⁹ It is in thinking through how to engage with First Nations laws that colonial societies become stuck - but that is also where the ‘ground of impossibility’ lies, and that is the ground where our thinking should begin.⁴⁰ The taking up of that impossible moment of engagement with First Nations laws is also the moment in which colonial societies engage the opportunity to ‘take responsibility in order to have a future.’⁴¹ In shifting the current trajectory, the possibility of creating an opening to a future which had not previously existed is revealed.

If the current trajectory of power is not shifted and the steps to embrace the world of the ‘barbarian’ are not taken, the question is left begging: what will become of us if this opportunity is turned away from? Thought is rarely paid to this question for it is assumed that First Nations Laws are a relic of the past, and that outside state powers there are no other ways or legal traditions that can hold our world together.

Is it possible to begin again, for us to find another way of holding the world together?⁴² Upon Captain Cook’s arrival in Australia, the denial of the recognition and acknowledgement of the First Nations of Indigenous Australia first arose and all flowed from that moment: the injustices of invasion and colonization; the denial of our Aboriginal presence, our laws, our culture, and our ways of knowing the world. This point – at which recognition or activation is deemed inconceivable – is where we should begin again.

The ‘madness’ of the idea creeps in when we dwell too long at the site of the hard, core, concrete realities of power and how power manifests and is held. But then, First Nations law stories teach us how to deal with those forces. The law story of the frog teaches that through laughter we come to find an alternative to power and violence.⁴³ Violence was not the way of our past,⁴⁴ but do the old ways still work? To become our reality once again, a shift needs to occur.

³⁸ Jacques Derrida, “Time & Memory, Messianicity, the Name of God” in Paul Patton & Terry Smith, eds, *Deconstruction Engaged: The Sydney Seminars* (Sydney: Power Publications, 2001) at 63.

³⁹ *Ibid* at 64-65.

⁴⁰ See Watson, “Aboriginal Sovereignties”, *supra* note 4.

⁴¹ Derrida, *supra* note 39.

⁴² An idea raised by Kevin Buzzacott when speaking at a pre-Australia day protest meeting held at La Perouse, NSW, on 25 January 1988.

⁴³ For a discussion of the story of the frog relative to the power of state sovereignty, see Irene Watson, “Buried Alive” (2002) 13 *Law and Critique* 253 at 269.

⁴⁴ Anthropologist Peter Sutton has argued that the endemic contemporary violence which exists in some Aboriginal communities is culturally inherent. For a critical analysis of those views and a discussion on the impact of colonialism, see Irene Watson, “Illusionists and Hunters: Being Aboriginal in this Occupied Space” (2005) 22:1 *Australian Feminist Law Journal* 15.

I see First Nations laws as holding the potential for the future growing up of humanity. While this view might be considered marginal (and a position marginalized largely due to Indigenous Peoples being undermined by the colonial project for more than five centuries) it is nevertheless a view which makes sense when all else has failed.⁴⁵ This is particularly so when we know that our ancient laws held and still hold our ancient worlds together. These are worlds which continue to survive in the face of modernity and in the face of the very denial that we are still here and that we have survived. From my humble position, I see no reason for First Nations laws not to work – but then again, there are many more who consider that it would be impossible. In their comparatively recent existence, the states have denied the existence of our ancient legal systems, because the places and spaces that Indigenous Peoples occupied are the same places and spaces upon which the states built their violent and colonial foundations. To realize and value First Nations would be to annihilate the state. At another point in the spectrum of ‘knowing’, First Nations can be no longer; there are critical commentators who see the ongoing existence of First Nations laws as impossible, because they have deemed them to no longer exist (if they ever did).

We know the West has sought to dominate all things, that it dominates the west, the east, the south, and the north, and that it feeds its own expansion stealing from the Indigenous and the earth, an expansion that determines its own ending. It is clear also that:

It is not that the contribution of non-Western polities to international law has been *obscured* by colonialism, nor that (Western) international law’s spread across the world is the *result* of colonialism: it is that international law *is* colonialism.⁴⁶

But the thing is, ‘international law’ has not dominated the way we see and know the world. The West has the power to be in the places of our ancient ways but it has no power to kill our law, for the law is the law. It is a song sung and is a song which will continue; there are no endings in this song.

But in re-imagining how we might begin as the First Nations Peoples, I repeat one of our modern day Aboriginal songs: *always was, always will be*, Aboriginal law/land. Lawful peoples. Peoples full of law. Knowers of laws’ relations to the natural world, a world full of law. A way of knowing which is for continuing cycles of life, as Charmaine Whiteface reassures, our natural world will continue to prevail. These are ideas which stand apart from the certainty of the progress trajectory and its own proclaimed conclusion in the end of history.

If we turn away from the possibility of a future First Nations’ survival and our relationship with the natural world, we shall miss the opportunity of living lawfully.

⁴⁵ Climate change is a good place to start when looking for the failings of modernity, along with the critical environmental degradation occurring across the earth.

⁴⁶ Miéville, *supra* note 37 at 169.