Expanding terra nullius

In an essay challenging characterisations of Pacific nations as 'small' and 'isolated', Epeli Hau'ofa describes pre-colonial Oceania as 'a large world in which peoples and cultures moved and mingled, unhindered by boundaries of the kind erected much later by imperial powers' (1994: 154). Describing an oceanic world in which the seas connected rather than separated people and cultures, movement was integral to life, and boundaries were negotiated points of entry rather than imaginary dividing lines, Hau'ofa writes that 'the sea was open to anyone who could navigate a way through' (1994: 155). Hau'ofa's essay puts forward a worldview radically different from the one which Anglo-European colonialism violently imposed upon it. Colonialism brought to Oceania ideas of territorial sovereignty, possessive individualism and white supremacy. It was only through these ideological lenses that Oceania was seen not as a vast region of interconnected and vibrant cultures, but rather as an isolated group of essentially empty islands suitable for use as prisons.

In this essay I consider the Australian regime of imprisoning maritime refugees in 'offshore' detention centres on Manus Island, Papua New Guinea and Nauru as part of the ongoing imperial project of establishing white supremacy in Oceania. Though arguably this project began with the arrival of European explorers in the 17th century, it solidified into its contemporary form in 1770, when British naval Lieutenant James Cook landed on the east coast of the island continent now known as Australia and claimed possession of it on behalf of King George III. As, firstly, a British colony and secondly an empire-building project of its own, 'Australia' has always relied upon and reproduced two racist fictions: *terra nullius* ('empty land') and lawless sea. While *terra nullius* has rightly received significant academic attention, below I consider how this racist legal fiction has always operated beyond the bounds of the land it treats as empty, expanding out into the sea. Specifically, *terra nullius* is connected to Australia's hyper-defensive policies against non-white maritime migration, and to its historical and ongoing exploitation of Manus and Nauru. To explore this I draw on Renisa Mawani's work highlighting how some modern European thought assumed that juridico-political order is rooted in 'firm land' while the 'free sea' is a lawless void to be mastered in the service of territorial empire building (2018: 51-55).

'Offshore' refugee detention

Australia's current 'offshore' refugee detention regime was initiated in September 2001 in response to what is now known as "the Tampa affair". The MV Tampa, a Norwegian container ship making its way to Singapore, had rescued 438 people from an overcrowded fishing boat which had been attempting the voyage from Indonesia to Australia. Almost all the passengers were Hazara Afghani refugees. Although Australia was the closest port, the Australian government refused to allow the Tampa to land. As the situation on board deteriorated and the Tampa captain feared some of the refugees were near death, he defied Australian orders and entered its territorial waters. Australia responded by sending armed military officers to forcefully board the Tampa and prevent it from sailing further. As human rights lawyers in Melbourne filed emergency applications seeking orders that the refugees be brought to Australia, the Australian Prime Minister John Howard announced that he had reached an agreement with Papua New Guinea and Nauru, for the refugees to

be processed there. Thanking all governments involved, Howard declared "this is a truly Pacific solution".[1] Still at sea, the refugees were transported onto Australian navy troopship HMS Manoora, which began the 16-day voyage across the northern coast of the Australian continent, from the Indian Ocean, through the Timor Sea and to its ultimate destination of Nauru, an 8-square mile island nation in the central Pacific.

From its inception, the purpose of detaining refugees in locations that are off Australian shores has been to 'stop the boats', a slogan which has become a rallying cry on both sides of Australian electoral politics. Detention on Manus and Nauru is used as a spectacle of cruelty that will warn others not to attempt a maritime voyage to Australia. Punishment, containment and deterrence of maritime refugees has been deemed appropriate in Australian political discourse because 'boat people' are 'queue jumpers': lawless and slippery racialised figures who have participated in the criminal activity of people smuggling (see Gelber 2003). As Australian migration law has become increasingly securitised, refugees, many of whom are Muslim, are also legally constructed as potential terrorists.[2] Maritime refugees are categorised under Australia's *Migration Act 1958* as 'unauthorised maritime arrivals' (previously 'offshore entry persons'), meaning they become legally ineligible to apply for a visa (s46A). This post-2001 legislative scheme enables Australia to treat maritime refugees as if they never reached Australian territory despite the reality that they did (Motha 2018: 54). Transported offshore, the legislation renders maritime refugees permanently 'at sea' and formally outside of Australian jurisdiction. The spatiality on which the regime relies is one in which Manus and Nauru are understood as harsh and isolated landmasses, separated from Australia and its superior legal system and society by a formidable expanse of treacherous, murky ocean.

The Australian government signed an agreement with Nauru while the Tampa was still at sea, and with Papua New Guinea soon after that (Taylor 2005: 7). As has been noted, these agreements are exploitative of the unequal power relationship which Australia has with many Pacific island countries, which are dependent on it for imports, aid and investment (ibid 18-19; Opeskin and Ghezelbash 2016). Eighteen years later,[3] Nauru and Papua New Guinea remain financially dependent on Australia. Meanwhile, the operation of the detention centres has caused tensions within the local communities (ibid). Manus and Nauru have become synonymous, in much political discourse, with Australia's offshore regime and its gross human rights violations. The regime has been roundly condemned by human rights organisations and found by the UN to be in breach of Australia's obligations under the Convention Against Torture (Mendez 2015), and at least twelve refugees have died on Manus and Nauru, including one by self-immolation. While the abhorrent conditions for the refugees, the exploitative nature of the agreements and the negative impact it has had on contemporary Manus and Nauru are beyond doubt, it is worth exploring the deeper political roots of the regime.

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1 Quoted in Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multicultural Affairs [2001] FCA 1297 at [40].

[2] See for example s 198E Home Affairs Legislative Amendment (Miscellaneous Measures) Act 2019, which suggests offshore detainees in need of urgent medical treatment in Australia may pose national security risks. It is notable that the September 11 terrorist attacks occurred during the Manoora's voyage to Nauru, leading to a hardening of political rhetoric against Muslim migration.

[3] Note the regime had a brief hiatus between 2008 and 2011.

Empty land, lawless sea

Though the concept of *terra nullius* has taken hold in Australian legal and political discourse, it was never formally declared by early colonists. From Cook's first sighting of the continent, it was clear that the land was not "empty". Rather, the British treated the land as unowned and ungoverned because on the justificatory premise that Aboriginal people were racially inferior and thus incapable of ownership and self-government (Ritter 1996; Fitzmaurice 2016). Racialised thinking then becomes the foundation of legal reasoning and conclusion (Anghie 2018). British common law developed the analogous concept of colonial acquisition by "settlement". As explained by the Privy Council in 1863, "Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State" (*Advocate-General of Bengal v. Ranee Surnomoye Dossee* (48)). "Barbarous" countries were thus seen as legally equivalent to uninhabited ones, meaning British sovereignty could be asserted without the need for any agreement with "barbarous" indigenous populations. While the case of *Mabo v Queensland (no 2)* HCA (1992) acknowledged for the first time in Australian common law that the land was not *terra nullius* when the British arrived, it upheld the legal fiction that Australian sovereignty was obtained through "settlement". Racism thus remains a foundational structure of Australian law.

As mentioned above, the concept of *terra nullius* and the ways it has been used to legally justify the violent theft of Aboriginal land has rightly received extensive academic attention (Kerruish and Purdy 1998; Watson 2002; Wolfe 2006; Dorsett 2007). Less attention has been paid to how Australian settler colonialism also relied on a European imperial conceptualisation not just of land, but also of the ocean. Arguing for an oceanic method in the study of colonial history, Renisa Mawani highlights the legal interdependence of land and sea (2016: 117). Mawani traces how Hugo Grotius' argument that there was an elemental difference between land and sea became foundational to European thought and international law (Mawani 2018: 44). This distinction was selectively taken up, when it was in the interests of European imperial expansion, to construct the sea as a lawless void (48-49). During the 18th and 19th centuries, British law came to treat the ship as a legal person, one who could transport British law with it through the high seas (78-88). Britain's oceanic legal regime was always racialised: while ships were legal persons, the enslaved Africans they carried across the Atlantic were not.

Building on Mawani's reading of the importance of the land/sea distinction in European imperial thought and international law, I suggest here that alongside 'empty land', a conceptualisation of 'lawless seas' has always been crucial to Australian settler colonialism. An understanding of the ocean as a dangerous and ultimately lawless abyss separating land-based legal orders, only capable of regulation through the passage of ships, was a concept correlating to and supporting *terra nullius.* The land could only be 'empty' if not only the continent but also its surrounding ocean, and the preceding maritime movement of people and goods in the region, was also void of civilisation. The establishment of New South Wales as a penal colony 18 years after Cook's landing relied not only on Australia being constructed as 'empty' but also as isolated. The voyage from England to Australia took three months in the late 1700s and was notoriously treacherous, the ocean being operationalised by colonial authorities as a dangerous void which would separate convicts from civilisation

(Maxwell-Stewart 2010: 1228). The idea that Australia was isolated, with civilisation only arriving with British ships, entailed a Eurocentric and racist assumptions that Oceania as a region lacked law and culture, and that all other maritime movements were uncivilised and lawless.

Expanding *terra nullius*: Australia's colonisation of Manus Island and Nauru

The foundational ideas of empty land and lawless sea have long been extended beyond Australia's borders and to the surrounding Oceania area. In 1883, Queensland raised its flag in Port Moresby, attempting to annex New Guinea on the assumption that Papuans, like Aboriginal people in Queensland, had no rights to land or government of their own (Overlack 1979; Anghie 2018: 21). Following Germany's defeat in World War 1, the newly federated Australian government saw the negotiations at Versailles as an opportunity to claim control of the Pacific islands previously under German colonial control (Storr 2018: 355; Anghie 2018). Australian Prime Minister Billy Hughes fought hard to annex the former German colonies of Nauru and north-eastern New Guinea, resulting in the creation of the "C class mandate" in the system instituted by the new League of Nations to administer the occupied German and Ottoman territories (Storr 2018: 349; Anghie 2018). Using rhetoric similar to that used by colonial authorities about Aboriginal people in Australia, part of Hughes' campaign for the C class mandate of the former German controlled Pacific islands and their need for 'tutelage' by Australia was the assertion that their indigenous populations were at the 'primitive stage of civilisation' and thus not capable of self-governance (Storr 2018: 361).

Nauru was a particularly lucrative possession for Australia because of its rich phosphate resources. Before the League of Nations mandate had even been formally conferred, Britain, Australia and New Zealand drafted the Nauru Island Agreement (NIA) 1919 which set up the British Phosphate Commissioners (BPC). The NIA established that the BPC was to consist of one commissioner for each of the three states, and that title to all Nauruan phosphate was vested in the BPC. Between 1919 and 1968, when Nauru became independent, the BPC mined 34 million tonnes of phosphate from the island (Gowdy and McDaniel 1999). Throughout this period the BPC paid the Nauruans a low royalty which the BPC set based on what they deemed adequate to meet Nauruan needs (Islam 1992). The racist attitude affecting this assessment is reflected in the 1923-24 British Year Book of International Law: 'the remuneration is small, perhaps, in the eyes of a civilised man in view of the immense value of the product in the Commonwealth, but it is not small to a child of nature who lives on cocoa-nuts and fish and sunshine'" (quoted in Anghie 2018: 11).

The BPC's devastating exploitation of Nauruan land for the direct benefit of the predominantly white populations of Australia, New Zealand and Britain mirrors the racist logic applied on the Australian continent. Today, 90% of Nauruan land is mined out and the island is dependent on food imports. In 1989 Nauru launched an action against Australia in the International Court of Justice, the first ever case by a former dependent territory against its colonial authority for abuse of power (Anghie 1993: 446). The case settled in 1993 with Australia agreeing to pay Nauru $Aus107 million to be paid in yearly instalments ending in

2013.[4] While the settlement represents a legal victory for Nauru, it continued the island's economic dependence on Australia, while its land remains unrehabilitated. When, in 2001, Australia approached several Pacific island states to host refugee detention centres, Nauru was the first to agree.[5]

While Nauru was seen as lucrative to Australia first for its phosphate and second for its location far from its neighbouring islands and even further from Australia, Papua New Guinea, and Manus in particular, has always been utilised by Australia primarily for its strategic location. Part of the former German New Guinea which became a class C mandate after Versailles, Manus was used as a military base by Australia during World War II, when it was bombed and briefly taken over by Japanese forces. When the war ended, some Australian parliamentarians wanted Manus to be taken under direct Australian and US control and developed into a military facility which would serve as a bastion between Australia and its enemies. Speaking against what they saw as too much international oversight of its activities on the island, conservative parliamentarians revealed their perception of Manus as an empty island in a lawless sea. One described Manus as "that worthless base, that barren island to the north of New Guinea",[6] while another described it as "like a shag on a rock, right, out on its own" which had no other use than as a military base for Australia.[7]

When the Dutch East Indies came to a close, the western part of New Guinea which had been under its administration became subject to a military occupation by Indonesia in 1962, involving mass violence against indigenous West Papuans, some of whom crossed the border into Australian-controlled Papua New Guinea. Not wanting to disturb its diplomatic relationship with Indonesia, Australia sent these refugees to Manus Island where they would be far from media attention or potential political support (Neumann 2015: 196-197). When Australia opened its refugee detention centre at the Manus Island Lombrum Naval Patrol Boat Base on 11 October 2001, it was thus continuing its use of Manus as both an island on which to isolate refugees, and a defensive base against those considered a threat to national security.

In 2016 a Papua New Guinean Supreme Court decision found that the detention of refugees at the Lombrum centre on Manus was contrary to the right to personal liberty guaranteed in the Papua New Guinean constitution and ordered it be shut down (*Namah v Pato* [2016] PGSC 13). Despite this decision, the centre remained in operation until November 2017, when the detainees were forcibly removed to another site on the island, where they are guarded and subject to curfews (Davidson 2019). It appears that the Australian imperative to keep the refugees on Manus has been prioritised over the Papua New Guinean judicial

[4] Australian Treaty Series 1993 No 26, Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning Certain Phosphate Lands in Nauru (Nauru, 10 August 1993) http://www3.austlii.edu.au/au/other/dfat/treaties/1993/26.html

[5] Parliament of Australia, Senate Select Committee Report on a Certain Maritime Incident (2002) Chapter 10: Pacific Solution Negotiation and Agreements

[6] 'Question: International Affairs', House Hansard Tuesday 15 February 1949 https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22hansard80%2Fhansardr80%2F1949-02-15%2F0125%22.

[7] These descriptions were made as part of arguments relation to the Papua and New Guinea Act 1949's amendments to the New Guinea Act 1920.

directive that they be released. The 2018 announcement that the Manus Lombrum site is to be developed into a joint Australian-US naval base (Murphy 2018) is the fulfilment of the desires of 1950s Australian conservative MPs, its life as a refugee detention centre having served as a stop-gap during which Australian and Papua New Guinean jurisdiction on the island became increasingly blurred. Australia's long-held imperial ambitions being met as the region is shaped according to its racist priorities.

Conclusion

Behrouz Boochani, a writer and maritime refugee detained on Manus Island since 2013, recalls that prior to their transportation to Manus, Australian officials told the refugees that Manusians are cannibals (Boochani 2018: 83). The story, intended to frighten the refugees into returning to their countries of origin, is indicative of Australia's continued construction of Papua New Guinean and Nauruan people as racially inferior, their isolated island homes only useful as prisons. Though Australia's 'offshore' regime formally places refugees outside of Australian law, it effectively expands Australian jurisdiction beyond its territorial borders to encompass Nauru and Manus Island. Like the original arrival of British law in Australia, this Oceanic expansion of Australian law is reliant on the notion that indigenous people of Oceania are inferior, that the seas that connect them are lawless, and that their lands are harsh hellish places of isolation, best used as prisons. The structural racism of *terra nullius* on which Australia rests, does not end at its territorial bounds, but extends out into the oceans and islands in its surrounds, imposing a white supremacist landscape of confinement not only maritime refugees, but also the indigenous people of Oceania.

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