The Cairo Accord provides under Article IV for the Authority, which is designated as 'one body of 24 members' that will be 'responsible for all the legislative and executive powers and responsibilities transferred to it' (Article IV (1)). The composition of the Authority will be decided by the PLO and it will inform the Government of Israel of the initial personnel and any subsequent changes. The Authority is thus conceived as a body that is subordinate to the PLO although distinct from it. Article V provides for the jurisdiction of the Authority which is described as 'territorial, functional and personal' (Article V (1)). These types of jurisdiction are explained as:

(a) The territorial jurisdiction covers the Gaza Strip and the Jericho area territory, as defined in article I, except for the settlements and the Military Installation Area. Territorial jurisdiction shall include land, subsoil and territorial waters, in accordance with the provisions of this agreement.
(b) The functional jurisdiction encompasses all powers and responsibilities as specified in this agreement. This jurisdiction does not include foreign relations, internal security and public order of Settlements and the Military Installation Area and Israelis, and external security.
(c) The personal jurisdiction extends to all persons within the territorial jurisdiction referred to above, except for Israelis, unless otherwise provided in this agreement.

These provisions are thus highly conditional. Not only does jurisdiction only extend to tiny areas of land in Gaza and the Jericho Area (carefully defined in maps that form an annex of the agreement) but it is also severely limited in scope (for a critical review of the agreements, see Said, 1995, 2000). Most of the description of jurisdiction is exclusory to prevent the Authority from exercising power over any of the Israeli security needs, its military installations or the settlements, and to ban international relations. In addition, and significant, is the removal of any Israeli from the provenance of the Authority. The scope of Israel's powers in respect of 'internal security and public order of Settlements and the Military Installation Area and Israelis, and external security' is not detailed. This has been interpreted by the Sharon Government (elected in 2001) very widely as meaning that the Israeli Defence Force is able to carry out major military operations, incursions and targeted assassinations on the basis of securing the settlements or in the interests of general Israeli security. This appears to fatally undermine Palestinian control over its territory and people (see Kimmerling, 2003).

The ban on external relations is curiously expressed when it is further elaborated in Article VI of the agreement. The sphere of foreign relations is specified as 'the establishment of abroad of embassies, consulates or other type of foreign missions and posts, or permitting their establishment in the Gaza Strip or the Jericho Area, and the appointment of or admission of diplomatic and

consular staff, and the exercise of diplomatic functions' (Article VI (2) (a)). However, the next clause demonstrates the neat division of labour between the Authority and the PLO as it outlines that:

> Notwithstanding the provisions of this paragraph, the PLO may conduct negotiations and sign agreement with states or international organizations for the benefit of the Palestinian Authority in the following cases only:
>
> (1) economic agreements . . .
> (2) agreements with donor countries for the purposes of implementing arrangements for the provision of assistance to the Palestinian Authority;
> (3) agreements for the purpose of implementing the regional development plans detailed in . . . the Declaration of Principles or in agreements entered into in the framework of the multilateral negotiations; and
> (4) cultural, scientific and educational agreements.

The agreement thus carefully redefines activities that would normally fall within international relations as being consistent with the prohibition on such relations providing the PLO acts on behalf of the Authority. It is interesting that the text is silent on the precise manner in which the Authority and the PLO relate to each other in order to effect these relations. In practice, the personnel have been much the same, Yasser Arafat was the head of both the Authority and the PLO as is his successor, Mahmoud Abbas. However, it is significant that, in the negotiations of the agreement, both Israel and the Palestinians found it useful to keep the PLO distinct from the Palestinian Authority. It permits the Palestinians to use the international legal personality of the PLO to carry out international relations while, for the Israelis, the Palestinian Authority in the occupied territories is deprived of a decisive power associated with statehood.

In 1995, the Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip transformed the Authority from one body into a series of institutions. The institutions took on a state-like character, with an elected 'Ra'ees' as the head of the Executive Authority, the 20 appointed members of this executive and an elected Palestinian Council of 88 members. The use of the term Ra'ees is instructive of the studied ambiguities that stalk all the documents of the Oslo process. It is the Arabic term for the 'head' of an organisation and can be variously translated as 'head', 'chairperson' or 'president'. This allows the Israelis to talk of the chairperson of the Authority while Ra'ees retains the flavour of a president for the Palestinians. When these sections of the agreement were implemented by the Palestinians, there were many terminological shifts: not only was the Ra'ees very definitely the president but the executive also became the cabinet and the Council assumed the title of Palestinian Legislative Council (for a discussion of these developments in the early period, see Mahler, 1996 and generally Brown, 2003). These internal changes took place through executive

decisions and then appeared in the many drafts of the Basic Law for the Authority, the final version of which was promulgated by 'President Arafat' and published in the *Gazette* in July 2002.

The text provides for the creation of institutions intended to be of a transitional nature for both sides. However, whereas the Israelis attempted to limit their powers to internal self-government, the Palestinians sought to use them as a basis for laying the foundations of an independent state. The shift in nomenclature is symbolic of a struggle for self-determination carried on by institutional means.

The question of the territorial jurisdiction of the Authority also underwent significant changes as the result of the Interim Agreement which, while leaving the arrangements in Gaza unchanged, assigned three different categories to territory in the West Bank. Area 'A' was to be under exclusive Palestinian control, whereas area 'B' would be a joint responsibility of Israelis and Palestinians, although the Authority would be responsible for civil administration. Area 'C' was to be under Israeli control. These area designations became central in the allocation of jurisdiction. The complexity of the arrangements was increased due to the transitional character of the agreement, and as 'jurisdiction will extend gradually to cover West Bank and Gaza Strip territory . . . through a series of redeployments of the Israeli military forces' (Article XVII (2) (8)). It should be noted that ambiguity continues in this section, as there is no specification of what territory will be redeployed from, with the absence of the definite article before 'West Bank and Gaza Strip territory'. The extent of territorial jurisdiction is far from clear. Although the redeployments will take place in the West Bank, the text obfuscates whether or not the intention is to redeploy from all of 'the' West Bank in three manoeuvres. This is only an apparent imprecision as this formula carefully transfers to Israel the active voice of the text. It continues: 'Further redeployments of Israeli military forces to specified military locations will commence immediately upon the inauguration of the Council and will be effected in three phases' (Article XVII (2) (8)). It appears from this and similar formulations that it will be Israeli authorities alone who will determine the scope of the redeployments. Palestinian territorial jurisdiction is dependent on Israeli military considerations and is not a result of any independent conception of rights – linked, for example, to the doctrine of self-determination.

This conditional character of jurisdiction is compounded by the difference between the Cairo Agreement, which refers to Israeli 'withdrawal' from the Gaza Strip and the Jericho Area, and the Interim Agreement, which refers only to 'redeployment'. This implies a less permanent state of affairs than withdrawal does. As Raja Shehadeh (1997) points out, Article XIII (2) affirms that 'Israel shall retain overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism.' This reinforcement of similar provisions of the Cairo Agreement is made absolutely clear in Annex I, which deals with the details of redeployment: 'nothing in this article shall derogate from Israel's security power and responsibilities in accordance with this agreement' (Article 1.7). Shehadeh (1997: 63) is correct when he says 'the security arrangements agreed upon substantially limit the jurisdiction of the Palestinian

Council in all respects including in area A where it is agreed that that the Palestinian Council can exercise territorial jurisdiction'.

The consequence of these agreements was to create the Palestinian Authority and to endow it with a degree of jurisdiction limited to internal affairs while territorially limited to tiny tracks of land. When the elections for the Ra'ees and the Legislative Council took place (in January 1996), area A, over which the Palestinians exercised exclusive control, amounted to only 3 per cent of the West Bank. Area B, where the Palestinians ran education, social services, health and cultural affairs, was about 20 per cent of the area. By the time of the failed Camp David talks in the autumn of 2000, area A amounted to 22 per cent and area B to about 18 per cent. While 90 per cent of the Palestinian population fell under the civil administration of the Palestinian Authority, they were far from empowered. The designation of categories A, B and C was portrayed as temporary zones to effect the redeployments. However, it should be borne in mind that area C contained all Israeli settlements with a population of about 130,000 in 1995. In addition, the areas under Palestinian administration were not contiguous but scattered areas that could only be reached by passing through areas of Israeli control. During the period of the negotiations, the population of the Israeli settlements grew dramatically, reaching 240,000 in 2003. In addition, Israel had acquired significant amounts of occupied land to construct a system of highways linking the settlements to each other and to Israel. As a result of these developments, the designated areas A, B and C began to gain a degree of permanence. This gave rise to the occupation culture of the checkpoints, established along the lines demarcating the zones. These military installations which are sometimes permanent and sometimes episodic, dominate the everyday life of the population. At times, there have been as many as 200 for a population of little more than two million. Permission to move from one area to another within the West Bank, to occupied East Jerusalem, to work in Israel or to Ben Gurion International Airport is regulated through an intricate series of passes reminiscent of apartheid South Africa. The hope of empowerment rapidly gave way to the reality of imprisonment.

Since its establishment, the Palestinian Authority has increasingly come to resemble a state. The amendments to the Basic Law in 2003[10] demonstrate how the language about the institutions has changed since the Cairo and Interim Agreements. The use of the terms 'Council of Ministers' and 'cabinet' are significant, as is the designation of the post of prime minister. Reading the amendments gives an impression of the emergence of a mature constitutional order. This is further reinforced by the presence in the cabinet of a Minister of Foreign Affairs. Yet this apparent widening and deepening of the jurisdiction of the Authority has been accompanied by the effective reoccupation of the West

10 I am working from the Draft Amendment moved by the Council of Ministers to the Palestine Legislative Council on 8 March 2003 (Draft Bill No. 111/2003/M), contained in 'Draft Amendment to the Basic Law for the Palestinian National Authority' Jerusalem: Jerusalem Media and Communications Centre, Occasional Document Series No 10, July 2003.

Bank by Israel and regular incursions into Gaza since the beginning of the second intifada in the fall of 2000.

The Authority exercises no effective control over any of 'its' territory, and its jurisdiction appears ephemeral. This situation is the result of a change in Israeli policy on the creation of the Palestinian state (see Pape, 2004: 232–68; Rubinstein, 2000: 111–272). The opposition to a Palestinian state was common to both major political parties, Labor and Likud, until the mid-1990s. At the 1996 election, the Labor Party changed its policy to support the creation of a state as one of the possibilities for resolving the conflict. Likud appeared to oppose this and went on to win the elections. However, little noticed at the time was the subtle shift in tone from one of the Likud leaders, Ariel Sharon, who argued that in reality the Palestinian state had come into existence with the establishment of the Palestinian Authority (Strawson, 1998). While he was opposed to that development, he saw the advantage that the Authority was weak and confined to relatively little territory. If this weak entity could be called a state, then perhaps there would be fewer objections to it. By the date when the 'permanent status' talks were to have been completed (4 May 1999), there was great speculation that Yasser Arafat would unilaterally declare a state in the absence of a signed agreement. Many in Israel hoped that he would, thus confining Palestine to its existing territory – towns and villages surrounded by Israeli settlements and the rest of area C. The Sharon faction in Likud thought this would be a green light to annex the rest of the West Bank to Israel. It was highly significant that when Sharon assumed the premiership in February 2001, he pursued a military policy rather than a negotiations strategy. The aim of the then newly announced policy was of unilateral disengagement from Gaza – including dismantling the settlements – and from some areas of the West Bank. That offered the Palestinians the poisoned chalice of a society devastated by Israeli attacks, fenced in by the wall yet in need of administration. In this sense, Ariel Sharon becomes the father of the Palestinian state – small, weak, territorially discontinuous, and at the mercy of Israel's economic and military policies.

This walk through the texts of the Oslo Agreements is, however, treading an older path constructed by the British Mandate for Palestine. The trajectory of marginalising the Palestinians began at that time, through legal instruments approved by the League of Nations (Strawson, 2002).

The British Mandate

Reading the Mandate at a distance of 80 years, one is struck by the overwhelming weight given to the Balfour Declaration and its implications. The preamble and the first part of the actual provisions are taken up with this objective (Articles 2, 4, 6, 7 and 11). The Palestinian population is referred to, variously, as the 'existing non-Jewish communities', 'other sections of the community' and 'natives' but remains with an identity undisclosed. These references are *inter alia* in provisions covering issues such as the principle of non-discrimination, the Arabic language and religious freedom.

In his intriguing article on the impact of British Mandate law on Israel, Assaf Likhovski (1995) argues for the development of a relational historical narrative for Israelis and Palestinians. Despite the success of the article in plotting critical aspects in the history of the cultural–legal form of the Mandate – and neatly exposing the racism and cultural superiority of the judiciary to both Jews and Palestinians (Likhovski, 1995)[11] – no relational narrative emerges. Rather, we are confronted with a British legal policy that secretes itself into two societies which are themselves being radically constructed or reconstructed. Rather than a relational narrative, the history of contemporary Israelis and Palestinians has been negotiated through an existential conflict in which space – land – has been at the core. The centrality of the 'Jewish National Home' and the marginality of the unnamed plural 'existing non-Jewish communities' results in the jurisprudential privilege of the former over the latter. The construction of the proto-Israeli legal personality as central is striking, as the people who gain such identity are largely absent. The tiny Jewish population of Palestine is thus not the only intended beneficiary, but rather takes its place within a wider category: the Jews. With the Palestinians, the opposite process takes places as their new legal personality – the result of the general provisions of the Mandate system – is systematically undermined by the terms of the particular Mandatory instrument.

The text of the Mandate does not merely reinscribe the terms of the Balfour Declaration in its preamble, but fleshes out the objective and institutional means of establishing a Jewish National Home in the body of the document. Article 2 places the obligation on the Mandatory to 'be responsible for placing the country under such political, administrative and economic conditions as will secure' its establishment. Almost as a second thought, it adds: 'the development of self-governing institutions, and for safeguarding the civil and religious rights of all the inhabitants of Palestine irrespective of race and religion'. There are the outlines of the legal agenda of the Mandate which, first, create the condition for a Jewish National Home; second, develop self-governing institutions and third, safeguard the rights of all the inhabitants. This drafting of provisions that appear to grant rights, yet are subject to an overriding norm that entirely changes their content, is a familiar technique in the Israeli–Palestinian conflict's legal discourse. It should be added that it is a common feature of international law in general.

In Article 4 of the Mandate, we see the grant of international legitimacy to the legal privileging of the Jewish National Home. It provides:

> An appropriate Jewish agency shall be recognized as a public body for the purpose of advising and co-operating with the Administration of Palestine in such economic, social and other matters that may affect the establishment of the Jewish national home and the interests of the Jewish population in Palestine and subject always the Administration, so assist and take part in the development of the country.

11 See the discussion of the book: Mustard and Cress, *Palestine Parodies: Being the Holy Land in Verse and Worse* (privately published, 1938).

> The Zionist organization, so long as its organization and constitution are in the opinion of the Mandatory appropriate shall be recognized as such agency. It shall take steps in consultation with His Britannic Majesty's Government to secure the cooperation of all Jews who are willing to assist in the establishment of the Jewish national home.

This article is significant in several respects. First, it creates a state-like administrative body out of a civil society organisation – the Zionist organisation becomes the Jewish agency. Second, that organisation will be the key element on 'advising and cooperating' with the Mandatory authority on the creation of the conditions necessary for the creation of the Jewish National Home. Third, the Zionist organisation/Jewish agency will not only operate within the jurisdiction of the Mandate but will also have an obligation to 'secure the cooperation of all Jews' willing to engage in the project. In this way, the Jewish agency becomes the institutional link with the absent population. Interestingly, the implication is that the Mandate confers on Jews outside Palestine 'willing to cooperate' an elementary *locus standii* in Palestine itself.

In the 1920s and 1930s, Palestinian Arab lawyers began to argue that the Mandate was itself illegal. Wissam Boustany made the case in his book published in 1936:

> The Palestine Mandate is invalid in the presence of Article 16 of the Treaty of Lausanne, and Article 20, and the fourth paragraph of Article 22 of the Covenant of the League of Nations. It is not formulated as an 'A' Mandate. Great Britain as a party to the Covenant should have procured her release from the Balfour Declaration.
>
> (Boustany, 1936)

This argument essentially rests on interpretations of the Covenant of the League of Nations. Article 20 has some similarities with Article 103 of the UN Charter in that it wants to create the legal regime of the League as superior to all other sources of international law. Reflecting the character of the times, Article 20 is somewhat more discrete about sovereignty as it requires members to act to invalidate any previous obligations that are inconsistent with the League. Article 20 reads:

1. The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.
2. In the case of any Member of the League shall, before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of this covenant, it shall be the duty of the Member to take such immediate steps to procure its release from such obligations.

Boustany, in his argument, links this article with Article 22 (para 4) which deals with the Mandate system. This reads:

> Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by the Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

In his account, these two provisions mean that their effect:

> . . . by no means constitute a justification or a legalization of an infringement and a violation so long as the provisions of the fourth paragraph of Article 22 and those of Article 20 of the Covenant are not abolished or amended to exclude Palestine or to make the special exception of a policy in favour of 12–16 million Jews in the presence of hundreds of millions of Moslems and Christians.
>
> (Boustany, 1936: 32–33)

In his opinion, therefore, the inclusion of the terms of the Balfour Declaration in the Mandate is:

> . . . ultra vires and entirely foreign to the principles laid down in Article 22 of the Covenant of the League cannot supply any justification of any departures from those principles, namely: (a) the well-being of the community and development of the people of the mandated area, and (b) the recognition of the community of the territory of an 'A' mandate as an 'independent nation'.
>
> (Boustany, 1936: 18)

This interpretation of Articles 20 and 22 of the Covenant is problematic, as Boustany has overlooked the elliptical and rather indeterminate drafting of the provisions. Article 22, para 4 (on the Mandate system) does not refer to all the 'communities formerly belonging to the Turkish Empire' but more enigmatically to 'certain communities formerly belonging to the Turkish Empire'. This implies that some 'communities' may not be treated in the same manner. Nor is it the case that there is an emphatic recognition that such communities are to be recognised as independent nations. Article 22 is ringed around with caveats on this point. It suggests that 'certain communities' that have reached a certain 'stage of development' 'can be provisionally recognized' as such. Article 22 therefore leaves open entirely which communities are being referred to. Nor does it define what is meant by the 'stage of development'. Finally, the article merely says that such entities can be recognised clearly, meaning that equally they might not be. In any event, the recognition is provisional and further subject to the terms of 'advice and assistance' of the Mandatory. The latter must refer to the exact terms of each individual mandate. Boustany also makes much of the wishes of the relevant

community in the selection of the Mandatory power. However, again the article is more carefully written than Boustany assumes. While appearing as an example of democratic consultation – if that can be used to describe the right of a people to select their own colonial power – it is less than it appears. The wishes of the people are only '*a* principal consideration' and not '*the* principal consideration' (italics added). This implies that there are other 'principal considerations' that would be weighed up in making the selection – these conveniently remain unspecified.

The creation of the League of Nations Covenant, mainly by the then great powers, reflected a world fundamentally divided into imperial and colonial states. The flexibility contained in Article 22 necessarily benefited the imperial powers. It was they who dominated the Council of the League, especially after their victory in the First World War, and thus it is they who were the active element in interpreting and applying the Covenant. All the elliptical phrases offered them the power to decide how to draft the mandates and what their exact terms would be. In addition, the provisions of Article 20 would be used to reinforce their legality.

The 1929 Hague Academy of International Law lectures were delivered by Norman Bentwich, then the Attorney General of Palestine. His topic was the Mandate system. In the preface to the subsequent publication, Bentwich was described by his editor Angus McNair as 'one of the few international lawyers to whose lot it has fallen to be intimately responsible for the actual working of a Mandate' (Bentwich, 1930: v). McNair also cogently sums up the purpose of the Mandate system as:

> introducing a new code of mixed law and morality into the dealings of colonising Powers with the peoples inhabiting their dependent possessions. It has also introduced into the colonial administration a defined objective, namely, the gradual preparation of the dependent peoples for the independent management of their own affairs and for the ultimate growth into statehood.
>
> (Bentwich, 1930: v–vi)

McNair is right to point out that the Mandate system is a new form of colonial policy, and he quite accurately identifies the colonising powers as those who will hold the mandates and that the peoples they govern will be 'inhabiting their dependent territories'. Imperial powers and their surrogates alone, it is assumed, will be given the mandates.[12] In his lectures, Bentwich explains the novel features of the system as introducing into political science and international law two principles:

> 1 A System of national responsibility for the government of a country under the control of an international body
> 2 A system of guardianship of peoples, similar the guardianship by individuals of minor persons.
>
> (Bentwich, 1930: 17)

12 Britain and France are the main beneficiaries. The Union of South Africa, created on the basis of a racist constitution in 1910 (according to the terms of the *British Union of South Africa Act* 1909), was awarded the Mandate for the former German colony of South West Africa, now Namibia. This decision indicates quite clearly how the 'welfare' of the peoples of these territories was viewed.

Whether the idea of 'guardianship' is a new concept in the context of the colonial world of the 1930s could be disputed, but the formal international regulation of the system through the Permanent Mandates Commission certainly is a new concept. Bentwich deals head on with the particular character of the Palestine Mandate, as he discusses the features of class A mandates:

> Class A is limited to territories detached from Turkey which are populated by civilized peoples and it was thought, were unable for a time to stand on by themselves. There the function of the Mandatory is to render Administrative advice and assistance, tough as we shall see, this position in Palestine does not conform to this character. There were special features of the Mandate over that country which put it in a class by itself, as the government of Palestine has been frequently of old. The wishes of the peoples were to be considered in the choices of the Mandatory: but this proved to be a *pious voex* than a practical counsel, because the Arab peoples concerned were opposed to the basic idea of the Mandate and desired complete independence.
>
> (Bentwich, 1930: 12–13)

Bentwich exhibits a great deal of candour in explaining the reason for this situation:

> Of the Palestine Mandate it may be said that, if the Mandate system had not been evolved for other purposes, it would have had to be created for the government of this little land . . . For Palestine, by its history, its geography, its population and its destiny is an international country, and its well being and development form, in the nature of things, a sacred trust of civilization.
>
> (Bentwich, 1930: 21)

This was a striking admission of the particular role that the Mandate system was to play in Palestine. The use of the term 'international country' indicates a reified existence that requires special governance, the specific features of which will be the Balfour Declaration. The function of the Mandate in transforming this policy into law is quite explicit in Bentwich's account:

> The Palestine Mandate recognizes the historical connection of Jewish people with the territory as giving national rights to which the Mandatory in the first place, and the League of Nations ultimately, has pledged itself to give effect. It is the application in law of the idea that 'memory also gives a right'.
>
> (Bentwich, 1930: 23)

It is ironic to find this early evocation of a now much discussed issue in the context of law and postcolonialism: the problem of restitution for past wrongs committed in the colonial period. It is much discussed, for example, in relation to land (see Fischbach, 2003; Hussein and McKay, 2003). The role of memory is often seen as a vital part of the possibility of legal recovery. It is all the

more ironic in the context of Palestine and the dispossession of Palestinian land, which is a contemporary rather than merely historical issue (see Holme, 2003). Bentwich is quite frank about the implications of this legal situation for Palestine:

> The principle of self-determination had to be modified because of the two national selves existing in Palestine: and the majority Arab population could not be allowed to prevent the fulfilment of the Mandate in relationship to the minority Jewish population.
>
> (Bentwich, 1930: 27)

British policy deploys international law through the application of the Mandate. The Palestine Order in Council which creates the legal basis for British rule includes the Balfour Declaration in its preamble. The order thus created affords the Jewish National Home and its institutions a further degree of legal personality. In Bentwich's terms, 'it signifies a territory in which a people, without receiving rights of political sovereignty, has nevertheless, a recognized legal position and the opportunity of developing its moral, social and intellectual ideas' (Bentwich, 1930: 24).

Boustany's argument that the Mandate is legally defective thus appears entirely problematic. The characters of the Covenant and the Mandates themselves seem doctrinally part of the then existing international law. The proof of this is also demonstrated not so much in the power of Bentwich's arguments but in the prestigious forum in which he delivers them – The Hague Academy of International Law. These summer lectures were, and remain, a seminal event in the life of international legal discourse.

Conclusion

Reading legal texts rarely offers the pleasure of uncovering a kernel of emancipation or of justice. Rather, they encode the power relations in sometimes elegantly composed technical prose. In the case of the Palestinians, international law appears as a chimera offering the dignity of self-determination in a sovereign state. Yet international law's origin in colonial conquest reasserts itself in a particularly aggressive manner in the texts of the Israeli–Palestinian conflict. This is done not in some general way but takes the form of specific documents and discourses that are devoted to legal arguments for the marginalisation and dispossession of the Palestinians. Colonialism and the postcolonial collude to create a legal lineage that reaches Israel through the British experience. Palestinian rights are often referred in this discourse, but are always conditional on a more central obligation: the creation of the Jewish National Home or Israeli security interests. A decade of the jurisdiction of the Palestinian Authority has poignantly evidenced this. For many years the

president of the Authority operated from a building surrounded by rubble[13] after a sustained Israeli siege, all Palestinian police stations were destroyed – mostly bombed by F16's – while the Israeli authorities increased control over the civilian population particularly through the checkpoints.

Palestine, however, is not unique. The great tragedy of the situation is that we have seen this all before – albeit before the television age. Colonial conquest and international law have been aggressive allies in the making of the contemporary world built on 350 years of European colonialism and the attendant ethnic cleansings, genocide, slavery, theft of territory and subjugation of peoples. Colonialism reassigned identities and created boundaries, then international law 'granted' rights to the peoples left within this dispensation and dignified them with the doctrine of self-determination. Palestine should remind the international conscience of this history – indeed, perhaps it is because it represents such a history that its significance is repressed.

As the wall is built in the West Bank, the scene is set for the next manoeuvre of marginalisation of Palestine. Israel rejected the International Court's advisory opinion that the wall is illegal. However, even this opinion is a two-edged one for the Palestinians, as it provides legal recognition for the first time of Israel's conquest of territory allocated for the Arab State in Palestine by the United Nations in the 1948 war. Israel can undoubtedly draw comfort from this, believing that persisting with settlements in the West Bank might in the long run win legal recognition too. The April 2004 Bush–Sharon plan for Israeli disengagement from Gaza provides the precise contours of Israeli hopes.[14] Disengagement from Gaza with the removal of settlements and Israeli military installations means permanent control of much of the West Bank as Israeli settlements become, in President George W Bush's new parlance, 'existing major Israeli population centers'. The election of the Kadima-led government in March 2006 indicated that despite the furore around the Gaza disengagement, there is a major consensus in Israel on the plan. Gaza is already fenced in, and the West Bank wall will complete the process of creating a society that is literally captive in a cage. It is this entity, no doubt, that Israeli Governments will wish to present to the world as a Palestinian state and the realisation of the right to self-determination. Given the current plans for the wall, this would mean that the Palestinians would gain 15 per cent of British Mandate territory. This small area, combined with five million refugees living outside the country, would effectively mean not only an unviable state but also one which would be unable to address this pressing problem. The Balfour Declaration has produced a persistent legal inheritance, and international law, despite the mantra of self-determination, might sanctify another jurisdiction of dispossession.

13 The Mukata became a symbol of the actual situation of the Palestinian National Authority: at once legally significant and politically enfeebled. After the election President Mahmoud Abbas in 2005, the rubble was removed and the buildings restored. Perhaps his sense of irony was less pronounced than his predecessor.

14 The plan was published on 18 April 2004 after Ariel Sharon had returned from securing agreement to the plan from Washington. For the text, see 'The Disengagement Plan', at www.mfa.gov.il

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6 Jurisdiction and nation-building

Tall tales in nineteenth-century Aotearoa/New Zealand

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Introduction: jurisdiction and nation-building

Questions of jurisdiction involve the determination of the boundaries of the law. Notions of modern territorial jurisdiction emerged with the development of the modern nation-state as the bounded territory in which a particular set of laws applied. These modern notions of both nation-state and jurisdiction facilitated colonisation by determining the territorial boundaries in which colonial law applied, by opposing the national space to other nations, and by producing difference within national and jurisdictional boundaries. The production of internal difference, the creation of differences between distinct groupings through the law's jurisdictional speech, is arguably the most important work that jurisdiction performs (Ford, 1999: 908).

Jurisdiction determines the boundaries of legal space in at least three ways: through territorial boundaries; by defining what is law and what is non-law; and by subject-matter (Dorsett, 2000: 34; Rush, 1997: 150). Subject-matter jurisdiction is the determination of what is included in the law of property, or contract. Territorial jurisdiction contributes to the construction of political subjectivity by tying individuals to the fixed boundaries of the modern nation-state (Ford, 1999: 905). Power is consolidated within the nation-state in part through a centralised jurisdiction that represses and excludes difference through homogenisation and assimilation (Dorsett, 2000: 35).

As part of the process of New Zealand's colonisation, jurisdiction operated as a tool of the state, one that consolidated and centralised power, and participated in nation-building, producing ideas about the identity of the emerging modern nation. Nations are ideas – stories that are told about the collective past and current cohesion of groups of people (Renan, 1990: 19). In the nineteenth century, the prevailing stories of nations revolved around a fiction of unity

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through kinship and culture (1990: 19), as summarised by New Zealand's famous jurist, John Salmond:

> A nation is a society of men united by common blood and descent . . . speech, religion and manners. A state . . . is a society of men united under one government.
>
> (Salmond, 1907: 103)

Salmond went on to suggest that in every nation there is an impulse to develop into a state. In his fictional story, states grew out of nations. Where a state encompassed cultural differences, it tended to become a nation:

> The unity of political organization eliminates in course of time the national diversities within its borders, infusing throughout all its population a new and common nationality, to the exclusion of all remembered relationship with those beyond the limits of the state.
>
> (Salmond, 1907: 103)

Salmond's language provides a tie between nineteenth-century notions of jurisdiction and nation-building. Modern nation-states are territorially bounded, as opposed to 'primitive' notions of states as ruling over a group of people (Salmond, 1907: 102). As part of the process of colonisation, jurisdiction contributes to nation-building by extending a centralised power system for the homogenisation of individual and political identity within contested territorial boundaries (Ford, 1999: 906–08). This centralisation facilitates the erasure, violent elimination and assimilation of jurisdictional and legal diversity within national boundaries while it simultaneously determines those boundaries.

Salmond's reference to the exclusion of remembered relationships, and Benedict Anderson's more recent work on nations as imagined communities (Anderson, 1991: 6), provide tools for analysing jurisdiction's nation-building work. Anderson argues that nations are imagined political communities. A nation is *imagined* because no member can ever know all of those who make up the nation, and therefore each carries a fictional image of the nation. It is an imaged *community* in the sense that all members of the nation are imaged as part of a fraternity. This part of the fiction typically masks various forms of exclusion, inequality and exploitation. As imagined communities, nations are the stories that are told about collective identities. Cases and legislation participate in nation-building by presenting stories of imagined communities that remember some relationships and exclude others (Harris, 1996: 214). In these stories, the nation is defined in part through its limits and in opposition to its others:

> Because the nation is constitutively finite, it is through the articulation of its limits that nation defines itself. But in a seemingly contradictory

> maneuver, the nation is constructed as the universal in opposition to what appears other to it, an other that is defined in terms of particularity.
>
> (Stychin, 1998: 4)

A nation is defined by its boundaries, or limits, at the same time that the excluded 'other' resides within it. Defining the nation in opposition to external and internal foes, both real and imagined, is integral to the production of national identity (Ford, 1999: 908). In the context of colonisation, the emerging modern nation-state is often defined in universals in opposition to primitive particularities.

This chapter traces the ways in which jurisdiction, the law's speech, participates in telling stories of inclusion in and exclusion from the boundaries of the nation-state, producing difference within the nation, and internal foes to the nation. Throughout the nineteenth-century colonisation of New Zealand, the jurisdiction of the colonial courts over the indigenous Maori people and their land was contested. Stories of the jurisdiction of the colonial courts, in cases, legislation and other historical materials, reveal its role in the contested process of nation-building, or colonial attempts to produce, in nineteenth-century terms, 'one people' who were a 'better Britain'. Maori were excluded from and produced as internal foes within an emerging nation that was also in the process of defining itself in relation to Imperial Britain.

This chapter traces these contested attempts to centralise jurisdictional power in the colonial courts through the exclusion and erasure of Maori laws and customs. Integral to this process was the production of difference within the emerging nation. The creation of a sub-jurisdiction in the Native Land Courts provides an example of jurisdiction's production of difference. As colonisation continued throughout the nineteenth century, the 'remembered relationships', in Salmond's (1907) terms, between colonial laws and Maori laws and customs were violently erased. The resulting tall tale that Maori laws and customs had never existed in New Zealand facilitated both stories of Maori assimilation to a nation increasingly defining itself as a 'better' and 'purer' (whiter) Britain and the production of Maori as internal foes of the emerging nation. This tale was buttressed by stories of Maori as descendants of the same 'Aryan' ancestors as the Anglo-Saxons, creating a common blood descent line for all New Zealand, and one imagined community, or nation.

However, the elaborately constructed story of the progress of colonisation in producing one nation in New Zealand – in part through the extension of jurisdiction – was a fiction. Throughout the nineteenth century, many Maori continued to live under their own laws and customs, sometimes selectively incorporating ideas from Britain, sometimes not. The colonial story of the production of one nation is a story of anxiety and insecurity on the part of the British and the settlers. This chapter reveals the ways in which ideas about jurisdiction, and the creation and application of jurisdictional boundaries, contributed to the myth of nation-building in New Zealand.

Clashing jurisdictions

In New Zealand's dominant founding story, the indigenous Maori people freely agreed in the Treaty of Waitangi (the 'Treaty'), signed on 6 February 1840, to cede their sovereignty to the British Crown in return for its protection, for a guarantee of 'full exclusive and undisturbed possession of their Lands . . . ', and for the rights of British citizenship. This story is constructed using the official English version of the Treaty. Consistent with this story, upon the signing of the Treaty at Waitangi, Governor Hobson declared 'We are one nation' (see Frame, 1995: 109), making New Zealanders all British subjects, and all one community.[1]

This dominant story coalesced at the turn of the century, facilitating the emergence of a modern nation while repressing and excluding Maori understandings of these events (Binney, 1981: 16). The Maori versions of the Treaty, signed by most Maori leaders, who never saw the English version, did not cede sovereignty to the British (Ross, 1972: 136). Rather, Maori retained their traditional control over their land and people, explicitly recognised in the guarantee in the Maori versions of the Treaty of *te tino rangatiratanga* (Williams, 1989: 79), and in oral guarantees of Maori laws and customs (see Colenso, 1890: 32; Durie, 1996: 460–61; Frame, 1981: 106; Law Commission, 2001; Williams, 1999: 116–19). In this story, Maori simply agreed to allow the 'lawless' British to establish a government to govern themselves.[2] Maori laws and customs would continue to apply to Maori through their established practices. The dominant story of the fusion of Maori and settlers into one nation contrasts with the guarantee of protection of Maori sovereignty, laws and customs, and the parallel legal jurisdictions envisioned by the Maori versions of the Treaty (Frame, 1995: 109).

The story of power-sharing through parallel jurisdictions is buttressed by the early denial by the British Colonial Office of any intention of ruling over Maori (see Normanby, 1968: 38, disclaiming any intention of seizing New Zealand without the consent of Maori; and Gipps, 1968: 200, stating that the British Government 'interferes' in New Zealand against its will). The British were reluctant to colonise New Zealand right up until 1840 (Hight, 1940: 46, 90–92). The proclamation of British sovereignty over Maori may have been

1 For the extent to which this dominant story still prevails, see Moon (2002: 10): 'I assumed – like most other people – that there were certain facts about the Treaty that were beyond the reach of challenge even by the most incorrigible historian or analyst . . . One fact in particular stood out clearly . . . that the purpose of the Treaty was for the British Crown to assert sovereignty over Maori. Yet the more I considered this assertion in the light of evidence I was uncovering, the less it seemed to stand up to close scrutiny.'

2 Moon (2002: 10): 'The central argument of this book . . . is that the British Crown never intended to rule, preside over, or govern Maori . . . the evidence suggests that the Treaty was intended by the colonial office to allow Crown rule to apply solely to British settlers in the fledgling colony'; Adams (1977: 156): 'Hobson was not definitely instructed to seek cession of the whole country . . . Hobson was told to try and acquire sovereignty of the lands where British subjects were already located first, but to accept the whole lot if the Maoris wished to cede it.'

more the result of British officials and missionaries in New Zealand acting in their own self-interests than the result of official policy (Seuffert, 1998: 73–77):

> It was only after the Treaty was signed, and Hobson's dubious Proclamations of Sovereignty had arrived at London, that the possibility of British sovereignty applying to Maori emerged as a serious consideration.
>
> (Moon, 2002: 185)

This 'dubious' status of the British in New Zealand subsequent to the Treaty is reflected in early British policy. Much of this early policy recognised that Maori retained their right to govern themselves, and that Maori law and custom would continue to apply at least to Maori (Adams, 1977: 210–37; Frame, 1981: 105–09). For some colonial actors, this policy was consistent with continued Maori self-governance and parallel legal systems. For others, it was a temporary measure in the assimilation of Maori to British laws and customs – or, in Salmond's terms, the fusion of two cultures into one nation. In any case, lack of money and resources meant that in the early years the British could at most pretend to govern Maori, a position that induced contempt in Maori who did have contact with the British (Adams, 1977: 236–37; Boast, 1993: 136–39). During these years, the simple fact was that most Maori continued to be governed by their own laws and customs, applied by their own people through established procedures, and were outside the jurisdiction of the colonial courts. British laws and customs simply did not extend to many Maori (Adams, 1977: 225–37).

An 1842 editorial in the *Bay of Islands Observer* provides a contemporaneous statement reflecting the two governing and legal systems operating with parallel jurisdictions:

> *The Maoris (sic) are not and cannot be governed by the Crown* [emphasis in original]. Those who signed it [the Treaty] and those who didn't alike disregard it, as far as the Government is concerned . . . The sovereignty over them on the part of Great Britain is entirely nominal . . . Thus, there are really two distinct communities in this country, living and more or less mingling with each other, governed on different principles, and by different laws and customs, and acknowledging a totally different authority.
>
> (Quaife, in Moon, 2002: 149–50)

This quote records the position of many Maori – the idea that they had ceded the power to apply their laws and customs was simply incomprehensible (Walker, 1989: 266; see also Swainson, 1859) and, initially at least, the Treaty signing had little or no impact on their lives or actions. According to Salmond's nineteenth-century notions of nation, fusing the two cultures in New Zealand into one nation would require eliminating diversities and creating a common nationality by excluding relationships to those beyond the limits, or boundaries, of the dominant nation.

Early British policy recognising continued Maori self-governance was implemented through colonial laws excepting or exempting Maori from their

application and through laws declaring the recognition of Maori laws and customs (Adams, 1977: 230). Both of these approaches participated in defining the nation. Exempting Maori from the application of colonial laws defined the limits of the colonial jurisdiction, and positioned Maori outside the jurisdictional boundaries determining the emerging modern nation. Soon after his arrival in New Zealand in 1843, Governor Fitzroy, in a speech to 200 Maori leaders, assured them that he did not want to interfere with customs that affected only Maori (Adams, 1977: 223). He secured the passage of the Native Exemption Ordinance 1844, which provided for European interference with, or responses to, crimes between Maori only upon Maori request (Pratt, 1992: 42). This approach positioned Maori outside, but in parallel to, the emerging colonial nation, implicitly recognising the existence of two legal systems and two nations. The Ordinance was critiqued on the basis that it allowed Maori to maintain 'their nationality' (Adams, 1977: 223).

Statutory recognition of Maori laws and customs brought them within the subject-matter jurisdiction of the colonial courts, and provided the courts with the power to define and reshape those laws and customs.[3] This dynamic produced difference within the subject-matter jurisdiction of the courts and within the nation. The *New Zealand Government Act 1846* provided for Maori laws, customs and usages to be observed within certain districts in New Zealand. The Royal Instructions accompanying the *Act* provided for the setting aside of such districts, and for the application of Maori laws to both Maori and non-Maori inside the districts and between Maori outside the districts (Frame, 1981: 106–07).[4] With respect to jurisdiction, the 1846 proposal provided:

> The jurisdiction of the Courts and magistrates . . . shall extend over the said aboriginal districts, subject only to the duty . . . of taking notice of and giving effect to the laws, customs, and usages of aboriginal inhabitants.
>
> (Frame, 1981: 106–07, citing Chapter. 14 in 'Draft Instructions')

The creation of local districts, or sub-territorial units of difference, is one of the ways that jurisdiction may operate to produce difference within the nation. In the colonial context in New Zealand, where British governance was dubious, this proposal simultaneously extended jurisdiction, providing for the fusion of Maori into the emerging modern nation, and provided for the determination of difference within that jurisdiction by giving effect to Maori laws. This *1846 Act* was suspended, and the districts were never set aside.

The *New Zealand Constitution Act 1852* made New Zealand a self-governing colony with a General Assembly (the Crown, through a Governor, maintained imperial control over Maori affairs until 1861). The *1852 Act* remained in force

3 Hohepa and Williams (1996: 46): 'Whilst it is true that Maori custom is supposed to have been the basis for decisions of the Maori Land Court from 1865 to 1967 and 1974 to the present day, it has to be said that the "Maori custom" applied in that Court derives from rules laid down by Land Court judges which often bear but a remote resemblance to tikanga Maori.'

4 *Rira Peti v Ngaraihi Te Paku* (1888) 7 NZLR 235 at 239; s 6 was repealed by Royal Instructions of 1848.

until 1986, and also provided for districts to be set apart in which Maori laws, customs and usages would apply between Maori:

> It may be expedient that the laws, customs, and usages of the aboriginal or [Maori] inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government of themselves, in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs, or usages should so be observed.
>
> (s 71)

The language here is couched in the qualifiers 'may', 'expedient' and 'for the present'. This type of recognition of indigenous laws and customs was often part of the process of the creation and containment of difference in constructing a colonial nation:

> Custom . . . was 'recognised' solely in subordination to the law of the colonist and denied such recognition where it was 'repugnant to natural justice, equity, and good conscience', or 'contrary to the general principles of humanity' to take two standard and revealing formulations.
>
> (Fitzpatrick, 2001: 180)

'Recognition' of Maori laws that are not 'repugnant' to 'general principles of humanity' aligns the emerging modern nation with universalist notions of civilisation and subordinates Maori laws as particularist, producing difference within that nation (Fitzpatrick, 2001: 120–25). This language creates a site for the determination of which Maori laws would be recognised and applied, and which would be declared 'repugnant' to humanity, or civilisation, marking the boundary of inclusion within the jurisdiction of the colonial courts, and the nation. However, no districts were ever set aside; instead, Maori were to be violently assimilated to the centralised jurisdiction.

Boundary anxieties

By the 1860s, the form and boundaries of the nation were still debated. Debates regarding the meaning and effect of the Treaty still raged, with Maori, the Crown and the colonial governments still holding views ranging from power-sharing with Maori self-governance and parallel legal systems to absolute sovereignty of the British and complete control by the colonial administration.[5] Continued Maori demands for autonomy and self-governance, based on the Treaty, were reflected in developments such as the King Movement, in which substantial sectors of

5 See Orange (1987: 159–75) – for example, at p 168, quoting Sewell (1864: 5, 9, 40–41). Sewell, a member of the Legislative Council, perceived New Zealand as at a crossroads, with the essential question to be resolved 'what are the respective rights and obligations of two races placed in political relation to each other'.

North Island Maori came together in an effort to retain Maori self-governance, restrict sales of Maori land and reassert Maori values and culture (Firth, 1890: 32–51; Orange, 1987: 142; *Te Kingitanga*, 1996). In response to these types of co-ordinated Maori resistance to selling land and demands for parallel governing systems (Belich, 1986: 303), the British and colonial governments, in attempts to fix the boundaries of the nation-state, waged wars of sovereignty on Maori (Orange, 1987: 137–78). Although it is often assumed that Maori lost the wars, the wars were not successful in abolishing the King Movement, Maori demands for self-governance or centres of Maori autonomy (Belich, 1986: 305–10; *Maori History*, 1995: 555; *Te Kingitanga*, 1996: 50). James Belich writes that, even as late as 1884, the King Country encompassed 7,000 square miles:

> In the late nineteenth century an independent Maori state nearly two-thirds the size of Belgium existed in the middle of the North Island. Not all historians have noticed it.
>
> (1986: 306)

The King Movement and King Country represented an ongoing challenge to the centralised jurisdiction of the colonial courts and the determination of fixed national boundaries. In 1865, the King issued his own war honours (Orange, 1987: 173). The King Country both harboured fugitives from the colonial courts and killed Europeans who entered the area without permission, indicating the failure to extend colonial jurisdiction over it.

In light of the continued existence of centres of Maori autonomy it is not surprising that by 1865, it was still unclear, even to the colonial legislators, whether the general jurisdiction of the colonial courts extended to Maori. The *Native Rights Act 1865* expressed this anxiety explicitly in its preamble, which stated:

> An *Act* in response to doubts about whether the colonial courts have jurisdiction in all cases touching the persons and property of the Maori people.

This *Act* anxiously declared that the colonial courts had jurisdiction over Maori in an attempt to amalgamate Maori into colonial governing structures (Orange, 1987: 177–80). It simultaneously recognised jurisdiction over the determination of interests in land where native title had not been extinguished according to 'the ancient custom and usage of the Maori people' in the newly established Native Land Courts. The split in jurisdiction between the two court systems reflected ongoing anxiety about jurisdictional and national boundaries.

This boundary anxiety was revealed in a case in which the Supreme Court was required to determine whether all of the owners of a piece of land held under Maori title were capable of entering into a contract with respect to that land. The Court stated that it was 'quite at sea upon such questions – at sea without chart or compass…helpless to do anything but refer'[6] to the Native Land Court.

6 *Horomona & Others v Drowner* (1878) Vol IV NS 104, Supreme Court, at 107.

The requirement to refer a question of Maori law and custom to the Native Land Court results in the Court's acute anxiety; the language provides a dramatic image of the Court's discomfort with a limit to its ability to speak the law for the entire territory bounded by the sea. This lack of power leaves the Court at sea, outside the bounded territory, suggesting that Maori law and custom occupy the territory. The split in jurisdiction alone provides a challenge to the fiction of the emerging colonial nation.

In the context of the wars of sovereignty and ongoing Maori demands for autonomy, the establishment of Native Land Court jurisdiction performed two aspects of nation-building. It consolidated power in the colonial jurisdiction, buttressing the fiction of one nation. It also performed some of jurisdiction's most important work: the production of local difference within the territory of that jurisdiction 'by dividing society into distinctive local units that are imposed on individuals and groups' (Ford, 1999: 908), which also produced 'others' within the nation.

The function of the *Native Lands Act 1865* was to identify the 'ownership' of land held according to Maori proprietary customs, 'to encourage the extinction of such proprietary customs', replacing those customs with ownership of land in Crown-derived titles, and to regulate the succession of land with Crown titles (Preamble, s 23). The process was designed to enable potential buyers of land to identify the owners and to provide purchasers with certain title to land. The *Act* was intended to enable the British to more easily colonise the North Island by facilitating the sale of land, and to bring an end to 'tribal' Maori practices by destroying communal ownership, which was seen as part of a type of communism (Parsonson, 1998: 190–91). The Native Land Court jurisdiction therefore assimilated Maori to a centralised colonial jurisdiction by requiring its use for confirmation of their land ownership. It assimilated Maori to the nation by converting Maori laws and practices in relation to property into common law ownership.

The Native Land Court jurisdiction also produced Maori as different within the centralised colonial jurisdiction by creating a body of 'Maori law and custom' that often bore little relationship to the rules and practices used by Maori. The extent to which the courts shaped and created Maori law and custom in the process of applying it was recognised in 1910:

> A body of law has been recognized and created in that Court which represents the sense of justice of its judges in dealing with people in the course of transition from a state of tribal communism to a state in which property may be owned in severalty, or in the shape approaching severalty represented by tenancy in common.
>
> (*Willougby v Waihopi* at 149)[7]

As the quote suggests, the judges of the Court were much more interested in eliminating Maori customary tenure than in determining ownership according to Maori law (Williams, 1999: 165). This jurisdiction subordinated Maori law and

7 *Willougby v Waihopi* (1910) 29 NZLR 1123 at 149.

custom to the colonial courts while simultaneously reproducing it as inferior within that jurisdiction, with the goal of destroying it.

For example, the *Native Lands Act 1865* provided in s 23 for the court to issue certificates of title specifying the names of the persons or the tribe who, 'according to native custom', own or are interested in land, and provided that no certificates be issued to more than ten owners.[8] The provision for tribal title was under-utilised because applicants tended to name representative owners of the land rather than asking for tribal title. Despite the representative status of these people, the court frequently made grants to the named people as individual owners of undivided one-tenth shares in a whole block of land, insisting that the ten-person rule under s 23 was part of Maori custom, which clearly could not be the case (Williams, 1999: 162–64). In addition, the *Act* provided that any one of a number (sometimes hundreds) of communal owners of a block of land, regardless of their status as decision-makers in the *iwi* or *hapu* (people, 'tribe', 'subtribe') could bring the block in front of the court for a determination of title, forcing the rest of the *iwi* or *hapu* to participate. The jurisdiction thus facilitated land hungry settlers and speculators in persuading individual Maori into forcing the rapid individuation of title to Maori land, and the contemporaneous or subsequent alienation of the land, at great cost to Maori.

A 'bewildering succession' of *Acts* applying to the Native Land Court were passed in a manner that made it extremely difficult to ascertain the applicable law. The 'ridiculous' number of *Acts*, which were sometimes contradictory, may have resulted from attempts to deal with Maori land as though it were English land 'owned in severalty under a title of freehold'. The resulting system was 'expensive, complicated, slow and inefficient; nor did it even produce certainty of title' (Parsonson, 1998: 192). The system resulted in many Maori spending months away from home at locations where the court sat, often with disastrous affects on their health, funding the exorbitantly expensive court process with loans that ate into the proceeds of subsequent sales – transactions which were not in the interests of the *iwi* or *hapu* and against the wishes of many of the participants (Banner, 2000: 82–88). The Native Land Court jurisdiction's 'recognition' of Maori law and custom operated both to amalgamate Maori to a centralised system and to ensure their subordination within that system. The Chief Judge of the Native Land Court at the time stated: 'It is beyond the power of man to transfer the entire land of a country from one race to another without suffering to the weaker race' (Banner, 2000: 71, quoting Fenton, 1871). Indeed, the purpose of the court was to respond to colonial anxiety by attempting to create or produce Maori as a weaker, inferior race. Participation in the Court facilitated this by identifying Maori as a distinctive and particular local group within the centralised colonial jurisdiction.

The views of colonial officials and judges also reflect the fact that the Native Land Court and Maori were treated as 'different' from, and inferior to,

8 Section 23 allowed the court to issue certificates in the name of a tribe only with respect to pieces of land in excess of 5,000 acres.

the colonial norm. In *Wi Parata v The Bishop of Wellington*, discussed below, the Court characterised the Native Land Court jurisdiction as 'new and peculiar' (at 80). The Native Land Courts were said to be required to determine the ancient custom of the Maori people 'by methods known only to itself', positioning the jurisdiction, as well as Maori law and custom, as particular and peculiar in opposition to the universal principals of the common law. One early judge labelled Maori 'damned Cannibals', lamenting his entire tenure on the court. Other judges, who increasingly as time went on knew nothing about Maori language or culture, developed a dislike for Maori in general. Many officials were not interested in achieving justice through the court, and carelessness and the desire to facilitate land sales often prevailed over attempts to ascertain the true owners of Maori land. Maori were well aware of this dynamic. By 1868, the Native Land Court was already labelled the 'land taking court' by Maori; it has also been called an engine of destruction and a government 'weapon' of land confiscation (Banner, 2000: 71–82).

In the face of the ongoing claims to self-government represented in the King Movement, the combination of the *Native Rights Act* and the *Native Land Court Acts* anxiously extended the jurisdiction of colonial courts over Maori and Maori land, attempting to assert control. The land tenure revolution effected through the jurisdiction of the Native Land Court assimilated the ownership of Maori land to colonial title, while the *Native Rights Act* asserted jurisdiction over land after it passed through the Native Land Courts, and over the persons of all Maori. The two pieces of legislation operated as major mechanisms of centralisation of power in the colonial courts, consistently feeding more power through those courts. Maori in some areas, such as the King Country, resisted use of the Land Courts, and managed to maintain autonomy. Other Maori, attempting to work with the government, were more likely to end up in the Land Courts with a resulting further loss of autonomy (Belich, 1986: 308). By breaking *iwi* and *hapu* control and authority over land, the Land Court 'revolution' was an integral part of the war on sovereignty, interfering with Maori leadership and decision-making. Simultaneously, the jurisdiction of the Native Land Courts divided society into two groups: those whose land was dealt with in these Courts and those whose land was dealt with in the mainstream colonial courts. It was ownership of land with Maori title, or Maori ownership of land, which landed one in the Native Land Courts, where particular rules – and not those of Maori law or custom – applied. This process facilitated the production of Maori as different and of 'Maori law and custom' as particular and inferior to the 'general' common law that was defined as encompassing universal principals of humanity.

Tales of jurisdiction and nation

The establishment and operation of the Native Land Court reflected a tidal change in colonial policy regarding jurisdiction away from even sporadic recognition of any meaningful self-governance for Maori. While it nominally recognised the

existence of Maori law and custom, it shaped that recognition in the interests of colonisation, assimilating Maori to a centralised jurisdiction that participated in producing them as assimilated political subjects of Britain. In 1877, in *Wi Parata v The Bishop of Wellington*,[9] Chief Justice Prendergast was to tell a story of New Zealand as a nation that violently ended any remaining uncertainty of the courts with respect to the recognition of Maori laws and customs, and the jurisdictional boundaries of the courts.

The context in which the case was decided is important to an understanding of its implications for nation-building. During the first decades after the signing of the Treaty, Maori people gifted many pieces of land to churches in trust for the purpose of building schools for the local *iwi*. Few schools were built. The government wanted control over these lands. Gaining control required wresting control from the churches, and eliminating any reversionary rights to the land in the original Maori donors (Hackshaw, 1989: 109). Further, the land gifted to church-held charities was only one piece of a bigger puzzle. By the early 1870s, it was clear to Maori that the British were using any means possible, including war and the jurisdiction of the Native Land Court, to prise land from their hold. In response to their dissatisfaction, Maori were encouraged to use the courts. This suggestion was vigorously followed throughout the 1870s, and by the 1880s more than 1,000 Maori petitions were presented, with the Treaty figuring prominently in many of them (Orange, 1987: 186).

Wi Parata was a leader of Ngati Toa who claimed original ownership of one of the pieces of land; this piece had been given to Bishop Selwyn in 1848 for the purposes of educating the Ngati Toa children (*Wi Parata v The Bishop of Wellington* at 72). In 1850, a Crown grant of the land was made to Bishop Selwyn. Wi Parata applied to the Supreme Court for a declaration that the Crown grant of the land was void, and that the land should revert to Ngati Toa as it had not been used for the purposes for which it had been given (at 73–74). It was argued that the Crown grant was void, as the only way the Crown could obtain land from Maori was through purchase (at 74). The implications of Wi Parata's claim were therefore far-reaching: if he succeeded, a precedent for return of other land would be set, and a precedent for other claims based on the Treaty's guarantee of undisturbed possession of Maori land might also be created – a possibility of which the government was fully aware (Orange, 1987: 186). Chief Justice Prendergast concluded that, in New Zealand, the Court had no jurisdiction to avoid a Crown grant on the basis that it did not conform with the intention of the original owners (at 76–77), and therefore the land could not revert back to Ngati Toa.

In the course of its decision, the Court rewrote the story of New Zealand as a colony and emerging nation, violently erasing the power-sharing agreement in the Treaty and in Maori laws and customs (Fitzpatrick, 2001: 178), and unequivocally excluding those laws and customs from the boundaries of jurisdiction, and from the nation. The Court categorised Maori as uncivilised barbarians, and the land

9 *Wi Parata v The Bishop of Wellington* (1877) 3 NZJR (NS) 72.

they inhabited as 'thinly peopled by barbarians without any form of law or civil government' (at 77). Any guarantees to exclusive and undisturbed possession of land in the English version of the Treaty were irrelevant to the outcome of the case since the Treaty was a 'simple nullity … [because] No body politic existed capable of making cession of sovereignty' (at 78). According to Justice Prendergast, Maori people were uncivilised, primitive barbarians, and therefore could not constitute an independent political society with a sovereign capable of ceding sovereignty.

The Court relied on this characterisation to ignore and erase early colonial policy recognising Maori law and custom:

> Had any body of law or custom capable of being understood and administered by the Courts of a civilized country, been known to exist, the British Government would surely have provided for its recognition, since nothing could exceed the anxiety displayed to infringe no just right of the aborigines. (at 73)

Yet, as discussed above, a number of statutes *had* explicitly recognised Maori law and custom. The explicit recognition by the *Native Rights Act 1865* of the 'ancient custom and usage of the Maori people' was dismissed: 'As if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being' (at 79).

In response to the 'doubts about whether the colonial courts have jurisdiction' over Maori in the preamble to the *Native Rights Act 1865*, the Court asserted that 'we do not understand what could be the doubt' (at 79). The Court adamantly – and incorrectly[10] – concluded that the British Government had never recognised Maori law and custom because it did not exist. It also erased 38 years of the continued application of those laws and customs to Maori outside of the colonial court system.

The Court's tall tale of early colonial policy violently erased Maori law and custom, and simultaneously created a fantasy of an emerging modern nation. Maori are positioned as uncivilised, dispersed barbarians without law, in opposition to the civilised unified nations of the world. Where there is a 'cession of territory by one civilised power to another', the laws of the ceding country are administered by the Courts of the new sovereign (at 78); the Court found however that Maori were not a civilised power, and therefore could not cede sovereignty and had no laws for the courts to apply.

The court also defined what is meant by civilisation in opposition to the slippery and ill-defined words 'barbarian' and 'savage'. Peter Fitzpatrick has argued that terms such as 'savage' operated in the colonial period in opposition to modernity as 'cohering, "quilting" point[s], bringing together the disparate dimensions of modern

10 Frame (1981: 109) – see discussion of *Nireah Tamaki v Baker* (1901) NZPCC 371; Hackshaw (1989: 93): '[I]nstead of reflecting established law, *[Wi Parata]* reflected untested positivist-inspired legal theories…'; Brookfield (1989: 10): 'the work done recently by academic writers…appears to leave no doubt that since the late 1870s successive New Zealand judges have misunderstood the law…on the whole they did indeed get it wrong'.

identity' (Fitzpatrick, 2001: 18, 65). In order to operate in this manner, these concepts had to be both apart from modern identity and yet recognisably related to it, and had to provide opposites to the aspects of modern identity that they were to 'quilt' together. Aspects of modernity might be 'quilted' in opposition to a degenerate or 'savage and barbaric' past, which modernity must guard against (Stychin, 1998: 4).

The Court's use of the term 'primitive barbarians' (at 78) illustrates this quilting effect well. 'Primitive' invokes the pre-modern past, and 'barbarians' connotes inferiority, 'lack of refinement, sensitivity, learning or artistic or literary culture; uncivilised' (Longman, 1984). The emerging nation-state is defined in opposition to its own pre-modern past, providing the crucial link necessary to quilt modern identity. Opposition to 'barbarian' positions this modern national identity as an intricate quilt of refinement, sensitivity, artistry, culture and civilisation. The Court's reference to a past where New Zealand was 'thinly peopled', at a time when there was an influx of settlers to New Zealand, also positions high-density population, and colonisation, as aspects of civilisation. Defining Maori as without law or civil government allows the existence of those institutions alone, regardless of their processes or capacity to achieve justice, to count as civilised. In this context, the Court's refusal of jurisdiction to avoid the Crown grant protects the Court from tainting by its pre-modern, or uncivilised, past.

In Salmond's (1907) terms, the decision in *Wi Parata* operates to eliminate diversities within the nation's borders by excluding 'all remembered relationship with those beyond the limits of the state'. Justice Prendergast's decision literally remembers the nation by telling a tall tale erasing or cutting off not only any recognition of Maori laws and practices in colonial law but also any existence at all of those laws and practices. Prendergast's decision, by disclaiming jurisdiction to hear Treaty claims and Maori property rights, and by erasing the entire body of Maori law and custom, violently assimilates Maori to the subject-matter jurisdiction of the colonial courts, the colonial laws and the emerging modern nation-state of New Zealand.

In practical and political terms, Justice Prendergast's conclusion that, in New Zealand, a Crown grant extinguished native title and therefore the land could not revert back to Ngati Toa legitimated the Crown in extinguishing Maori title to land without purchasing it. The case also emphasises that Maori will have no recourse to the courts, the proclaimed arbiters and protectors of justice within the imposed system, for Treaty breaches. The decision in *Wi Parata* facilitated the ongoing confiscation of Maori land, legitimating over 100 pieces of legislation to 'legalise' Maori dispossession from Maori land. It has been argued that all of these pieces of legislation were enacted in breach of the Treaty (Jackson, 1993: 77).

Internal foes within the nation

The extension of criminal jurisdiction over Maori was an integral part of the use of jurisdiction as a tool of nation-building. I have noted that early colonial policy, such as the Native Exemption Ordinance 1844, provided for colonial interference in crimes between Maori only at Maori request. Until at least the early 1860s,

specific attempts to extend criminal jurisdiction over Maori were often ignored or subverted (Hill, 1986: 856–64; Pratt, 1992: 43–58). Prendergast's 1878 *Wi Parata* fantasy, in which the jurisdiction of the colonial courts extended unequivocally to all Maori, both facilitated and buttressed the progressive extension of criminal jurisdiction over Maori, increasingly positioning them as internal foes within the nation.

It is argued that, by the mid-1860s, the sovereignty war, combined with the extension of civil administration such as roads and health systems, broke down some resistance to colonial penal jurisdiction over Maori (Pratt, 1986: 56). This extension of jurisdiction meant that some Maori customs and practices integral to Maori law would be punished as criminal acts, criminalising Maori and branding their practices as different within the emerging modern nation. However, in many areas Maori laws and customs still prevailed, and the extension of jurisdiction often came only with Maori acquiescence (Pratt, 1986: 56–58).

In 1863, in the midst of the sovereignty war, a raft of legislation targeted at criminalising the behaviour of Maori, both extending the courts' jurisdiction over Maori and positioning them as internal foes within the nation, was passed. It included the *New Zealand Settlements Act 1863*, which authorised the confiscation of whole districts of land where 'any considerable number' of Maori were believed to be in 'rebellion' – effectively meaning those who were acting consistent with the Treaty guarantees of autonomy (Miller, 1966: 109–10; Orange, 1987: 167). This measure was directed in part at the King Movement but could apply in any district of the country. The *Suppression of Rebellion Act 1863* authorised the arrest and detention without trial of anyone suspected of complicity in the 'rebellion' (Orange, 1987: 169–70).

As resistance to the attacks on Maori sovereignty through land confiscation, and in particular the *New Zealand Settlements Act*, continued through the 1870s and 1880s, other pieces of legislation were also passed. For example, in the 1870s, at the same time that *Wi Parata* was being decided, Maori disputed the confiscation of land in Taranaki and the failure to create reserves promised as part of land sales. They peacefully ploughed and fenced the 'confiscated' land in protest, putting up no resistance to arrest. If charged with trespass, the protestors would be likely to receive little if any gaol term. The *Confiscated Lands Inquiry and Maori Prisoners' Trials Act 1879*, rushed through with all three readings in one day, allowed Maori to be held in gaol without bail until the Governor in Council fixed a date for their trial (s 6). The *Maori Prisoners Act 1880* provided that all of those awaiting trial or held in custody were deemed to have been lawfully arrested and in lawful custody until the Governor ordered their release (s 3), indicating that 'large numbers' of Maori were detained under these measures.[11] *TheMaori Prisoners Detention Act 1880* again extended the length of time that the Maori protestors could be held without trial. The *West Coast Settlement*

11 *Confiscated Lands Inquiry and Maori Prisoners Trial Act 1879* (NZ), parenthetical from long title of Act; Sinclair (2000: 152).

(North Island) Act 1880 allowed the arrest without a warrant of anyone who might be suspected of being about to commit an offence such as unlawfully ploughing or fencing, or interfering with a survey. The possible punishment included 2 years of imprisonment with hard labour (Parsonson, 1998: 188–89). The government's own inquiry promised by the *1879 Act* found that promises to set aside reserves for Maori had been repeatedly broken (AJHR, 1881: G-1), suggesting that the protests were justified. The *Acts* therefore criminalised the activities of Maori who were generally simply living consistent with the terms of the Treaty or attempting to peacefully focus attention on to grievous Treaty breaches. The only justification for imprisonment without trial was the perception that the release of these Maori 'would endanger the peace of the colony, and might lead to insurrection'[12] – they were treated quite literally as internal foes of the nation.

Producing a 'better Britain'

Prendergast's *Wi Parata* fantasy of the unequivocal supremacy of the Crown in New Zealand, and of a superior British civilisation in opposition to a primitive and savage indigenous people, was consistent with the emerging national identity of New Zealand – an identity focused on racial purity and embracing British culture as the peak civilisation. Aspirations to racial purity were facilitated by the erasure of Maori laws and customs, allowing the assimilation of 'good' Maori into a fiction of a unified nation, while Maori who insisted on recognition of the Treaty agreements were positioned as internal foes to the nation. In the late nineteenth century, fantasies of Maori as an Aryan race, descended from the same people as the Britons (although not as advanced as the Britons) emerged. These fictions positioned Maori as suitable candidates for quick amalgamation into the idea of a better Britain aspired to by many colonials who were coming to think of themselves as 'New Zealanders'.

By the end of the century, New Zealand was in the process of emerging from residual British control as a Dominion. However, it considered itself the English colony that remained most faithful to the mother country, and many New Zealanders were proud to identify as British, both culturally and racially (Gibbons, 1998: 309, 314). New Zealand was seen as a laboratory for the production of a 'better Britain'. This experiment was founded on the idea of the careful selection by the 'systematic' colonisers in the 1840s and 1850s of the 'pick' of British stock to colonise New Zealand (Reeves, 1899: 404). The history of selection on the basis of quality was opposed to Australia's convict immigration. Immigration was strictly limited by an unwritten 'whiter than white' policy that maintained a largely homogenous British population: 'New Zealand was viewed by successive governments as a utopia for a few, preferably white, Protestant Britons' (Brooking, 1995: 23).

12 *Maori Prisoners Act 1880*, preamble.

The image of New Zealanders as having a 'special destiny as the vanguard of British civilisation', the finest of all civilisations, resulting in New Zealand being dubbed 'God's own country', was strong. The ranking of civilisations was explicitly racial, and the subjugation of non-Europeans by the British was imagined as inevitable (Gibbons, 1998: 309–16; Stocking, 1987: 133–37). New Zealand's national identity was promoted as separate from imperial identity while deriving its coherence and stability from its flexible incorporation of Imperialist ideologies – 'primarily racism and cultural superiority' (O'Neill, 1993: 24). These sentiments are captured in this turn of the century passage:

> 'Home' means that we have transplanted to these alien lands and seas the national ideals of the North, the racial vigour and aspirations of our sires. It means that we have tried and are trying to be true to type, to keep our blood clean and pure, to preserve our past traditions, to be worthy of our great history, to progress undeviatingly and steadily along the lines instinctively taken by the heroes and leaders of our ancestral people. In a word, we seek to make of New Zealand a Better Britain.
>
> (Sinclair, 1986: 79, quoting *New Zealand Herald*, 26 March 1910)

The emphasis was on the purity of racial descent and the fiction of New Zealand as originally British – and potentially even more British than Britain itself. Aspirations to a 'better Britain' incorporate the recognition that British civilisation is at the top, as high as one can go in the hierarchy of civilisations that was so prevalent in the late nineteenth century; it was an idea that served the purposes of colonisation and imperialism well (Stocking, 1987).

Maori were incorporated into aspirations to a better Britain with flimsy arguments (Hanson, 1989: 892) that they were descended from the same common stock as the Anglo-Saxon (Gibbons, 1998: 313; Reeves, 1899: 417). The classic text for this viewpoint was Edward Tregear's *The Aryan Maori* (1885), which argued that Maori were descendants of the same Aryan people from whom the settlers came. As great explorers and migrants of the Pacific, the Maori were 'ennobled' in European eyes (O'Neill, 1993: 231). Maori were also positioned as the 'Vikings of the Sunrise' (Wanhalla, 2002: 18). It was argued in 1889 that 'the Maories [sic] are a branch of the Aryan race, and in their language, customs, characteristics, and traditions, possibly present better glimpses of our Aryan ancestors than any nation now in existence' (Firth, 1890: v). This quote positions Maori as providing, in the present, 'better' glimpses of British ancestors than any other nation. Maori were therefore 'pure' examples of settlers' pre-modern ancestors, without the progress to modernity that the great civilisation of Britain had provided.

These texts of 'hyperbolic admiration' (O'Neill, 1993: 232) both justified the inclusion of Maori in the story told about New Zealand as a better Britain, and simultaneously positioned Maori as pre-modern, and therefore as inferior to the settlers. Maori were therefore perceived as potential, and deserving, beneficiaries of the higher British civilisation. Maori were positioned as outside of the *modern* nation, but clearly recognisable to it, and capable of being incorporated into it as 'long lost Aryan siblings' (Ballantyne, 2002: 76–77). At a time when Maori were

again clarifying demands for self-governance based on the Treaty, these stories supported policies of amalgamation into one nation in opposition to recognition of the right to self-governance.

The idea of New Zealand as a laboratory for the development of a 'better Britain' involved quilting that identity, partly in opposition to a number of strands of ideas regarding Maori. The idea of Maori as sharing pre-modern but superior origins with the British was just one of these. Another was the myth that Maori were, in any case, a 'dying race', superseded by the superior British who, while they may have had shared origins, had progressed far beyond the Maori (Belich, 1986: 299; Firth, 1890: v; Reeves, 1899: 398; Stenhouse, 1999: 81–86). This popular nineteenth-century brand of Darwinism was 'a basic axiom of nineteenth-century racial thought . . . Europeans in contact with lesser races would inevitably exterminate, absorb, or, at the very least, subordinate them' (Belich, 1986: 323). The inevitability of these ideas helped to contain the threat that Maori posed as other to the emerging modern nation. As a dying race, with falling numbers, Maori would lose any political power and any ability to threaten the cohesion of one pure nation or demand fulfilment of the Treaty and be forced to assimilate. In fact, from 1896 the Maori population in New Zealand was increasing rather than decreasing, highlighting the mythical aspect of these ideas (King, 1998: 286).

In contrast to fantasies of a unified 'better Britain', many Maori were still demanding that the government honour the Treaty and give effect to its vision of power-sharing. The King Country was still operating largely independently. It was exercising its own jurisdiction, collecting taxes, administering justice and discouraging land sales through the 1890s (Belich, 1986: 307). In the 1870s and 1880s, great *hui* (gatherings) were held to formulate strategies for seeking government recognition of Maori grievances. Major chiefs throughout the North Island pledged themselves to union and setting up a Maori government under the Treaty, known as the *Kotahitanga* parliaments, which began to meet in 1892. The chiefs also sought the grant of a constitution for Maori, which would allow them to pass laws governing themselves and their lands, consistent with the Treaty. They sought equal rights for Maori with British settlers, who became known as *Pakeha* (Parsonson, 1998: 197). The reality was that, by the late 1890s, it had become clear that Maori 'had resisted the first great push of the British to assimilate them' (O'Malley, 1998: 241; Parsonson, 1998: 197).

Conclusion

Jurisdictional boundaries, like ideas of nation and national boundaries, are contested. In the process of colonisation in New Zealand, tall tales and fantasies were told about both jurisdictional and national boundaries. These tales were told in legislation and cases, highlighting the operation of jurisdiction as a tool for the creation of a myth of colonial progress in which Maori were subordinated to the colonial courts. This fantasy required ignoring and erasing ongoing Maori authority and self-governance. In fact, many Maori successfully resisted colonial assimilation throughout the nineteenth century. This analysis suggests close

scrutiny of the extent to which current dominant assumptions of 'one nation' continue to erase Maori autonomy and self-governance.

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7 The suppression of state interests in international litigation

Mary Keyes

Introduction

This chapter considers the role state interests play in the resolution of international jurisdictional disputes. Judicial jurisdiction, in Australian law, is composed of two inquiries. First, does the court regard itself as competent to hear and determine the dispute? I refer to this as the 'existence' of jurisdiction. Second, assuming the first requirement to be satisfied, will the court in the exercise of its discretion decline to hear the dispute? I refer to this as the 'exercise' of jurisdiction. It is difficult to refute the proposition that jurisdiction, which determines the extent of state authority and when it ought to be exercised in the context of international litigation, fundamentally involves problems of state interest. Remarkably, in international litigation it is rare to find an express acknowledgement of this fact. It is more likely – although still rare – to find judges expressly disavowing the relevance of state interests.

In *Lubbe v Cape*, the House of Lords had to determine whether it ought to exercise its jurisdiction. This was a group action in which a very large number of plaintiffs, almost all resident in and citizens of South Africa, sought damages in the English courts for personal injuries against an English corporation, essentially for its responsibility over its South African subsidiary companies. Lord Hope wrote that the relevant principles for determining this issue 'leave no room for considerations of public interest or public policy which cannot be related to the private interests of any of the parties or the ends of justice' in the particular cases.[1] Other members of the House of Lords agreed.

While this may not seem particularly noteworthy in a normal instance of international commercial litigation, this case clearly implicated state interests. The South African Government made submissions to the House of Lords, arguing that this dispute ought to be heard in the English courts and that for public policy reasons the defendant ought not be permitted to manipulate the forum (Muchlinski, 2001: 18). The South African Government argued that its own substantive laws on workplace negligence applicable at the time of the alleged

1 *Lubbe v Cape plc* [2000] 1 WLR 1545 at 1566.

torts were unconscionable as they were racially discriminatory and therefore that they should not be applied to resolve the dispute (Muchlinski, 2001: 21). One might have thought that these submissions, especially when expressed by the government of a foreign state, were quite a clear indication that issues of state interest were live in this dispute.

State interests, both of the legal system providing a forum and of foreign legal systems, are relevant and often influential in determining whether jurisdiction exists and whether it ought to be exercised. Both foreign and state interests are usually suppressed, although for different reasons. This suppression is unnecessary and makes the law uncertain and confusing. It would be preferable for the courts explicitly to acknowledge the role that state interests play (Fawcett, 1989: 226–27), which would permit a consideration of the legitimacy of those interests.

This chapter is presented in three sections. The first identifies how state interests may impact on jurisdictional principles and practices, giving some examples of the state interests which may be discerned from the relevant principles and the courts' practices. In my discussion of the courts' practices, I refer to empirical research I undertook which analysed all published decisions of the Australian superior courts between January 1991 and September 2001 in which the courts decided whether to exercise their jurisdiction (Keyes, 2005). The second section of the chapter suggests why state interests are suppressed, while the third section argues that they ought *not* to be suppressed.

State interests in jurisdiction

State interests are evident – although seldom articulated in those terms – in many aspects of jurisdictional law and the practices of the courts in resolving international disputes. The state interests may be those of the state in which the dispute is being heard (the forum), or those of other states. If the court perceives that the forum state's internal interests are at stake in the litigation, it may take the view that it is bound to uphold these interests. If the court perceives that a foreign state has some interest in the resolution of the dispute – which is inevitable to a greater or lesser degree in international litigation – it is likely not to give weight to that interest except in extreme cases. If the court perceives that the forum state and the foreign state both have interests in the resolution of the dispute, it will in most cases prefer the interests of the forum state. But, almost invariably, these questions are suppressed under the seemingly neutral language of international litigation.

The forum state's interests

When the forum court apprehends that there is an issue of state interest at stake in the litigation and that the court is obliged to ensure that interest is protected, this may influence and sometimes determine the outcome of a dispute.

The clearest example of such a case is where the litigation concerns the application of substantive mandatory forum legislation. If the legislation appears to apply to the dispute, the court may hold that it is constitutionally obliged, under the doctrine of parliamentary sovereignty, to apply the legislation,[2] irrespective of the usual jurisdictional principles. In *Akai v The People's Insurance Co*, a bare majority of the High Court took this view. On their interpretation of the *Insurance Contracts Act 1984* (Cth), this legislation was applicable to the dispute, although the parties had expressly negotiated a choice of English courts and English law, and the legislation said nothing about its intended effect in a jurisdictional dispute. The majority thought the court was constitutionally obliged to ensure the application of this legislation.[3] Because the defendant had not proven that the English courts would apply the Australian legislation (an impossible task), the court retained its jurisdiction (for criticism, see Whincop and Keyes, 1998).

The courts seldom explicitly take this approach. In my study of the Australian courts' practices in exercising jurisdiction referred to in the introduction to this chapter, I did not find any case in the five years following the decision in *Akai* in which the court applied the same analysis. But the potential application of 'mandatory' forum legislation appears to influence decisions. Section 52 of the *Trade Practices Act 1974* (Cth) prohibits misleading and deceptive conduct, and has mandatory effect in domestic Australian litigation. It is silent as to its intended effect in international litigation. In my study I found that, in every case not involving a contractual submission to jurisdiction in which the plaintiff claimed for breach of s 52, the court retained jurisdiction (Keyes, 2005: 170). In disputes in which there was no claim for breach of s 52, the court retained jurisdiction in 74.2 per cent of cases (Keyes, 2005: 170). While the courts do not state that they are retaining jurisdiction because of their constitutional responsibility to ensure application of this legislation, its potential application appears to assert a decisive influence.

Other kinds of local state interests are evident in the rules on establishing jurisdiction. Consistently with the division of authority between states in public international law, the forum state is taken to have authority to regulate local persons, property and activities, and these are common bases of determining the existence of jurisdiction. However, public international law imposes a requirement that any territorial connection be substantial in order to warrant the assertion of authority (Mann, 1984: 29). Some of the rules on the existence of jurisdiction based on territorial connections do not satisfy this criterion and do not otherwise identify the state interest in claiming jurisdiction on which they are based. One infamous basis of jurisdiction in international disputes permits the court to hear cases where a plaintiff has suffered a tort anywhere in the world, as long as some damage is felt in the forum.[4] While this basis of jurisdiction can be used in cases in which the state has a legitimate interest in providing a forum – such

2 *Compagnie des Messageries Maritimes v Wilson* (1954) 94 CLR 577 at 585.

3 *Akai v The People's Insurance Co Inc* (1996) 188 CLR 418 at 447.

4 *Federal Court Rules 1979* (Cth), O8 r 2 item 5; *Uniform Civil Procedure Rules 1999* (Qld), r 124(1)(l).

as where a dangerous product has been intentionally exported to Australia by a foreign manufacturer – it would be preferable if the rules articulated such interests more clearly.

Other types of interest motivate jurisdiction, but are much more obscure. For example, the rules on establishing jurisdiction and the courts' practices in exercising jurisdiction demonstrate a particular concern to protect personal injuries plaintiffs. The rule of establishing jurisdiction commonly relied on in such cases require the plaintiff only to show that they have suffered some damage within the jurisdiction, a condition which is easily satisfied. In my study of the courts' practices in exercising jurisdiction, the court retained jurisdiction in 100 per cent of personal injuries cases, whereas it retained jurisdiction in only 71.4 per cent of non-personal injury cases (Keyes, 2005: 173). It is very unusual to find any explicit acknowledgement that this factor is relevant, let alone decisive. Indeed, Kirby J recently stated that 'natural sympathy' for the predicament of the plaintiff who had become a paraplegic in an accident that occurred abroad was 'legally illegitimate'.[5] The majority in that case did not say whether they were sympathetic or not, but the plaintiff succeeded. There are acceptable justifications for the special treatment of such plaintiffs, including a concern for their financial and physical abilities to participate in foreign litigation, particularly when this is relative to the abilities of large foreign or multinational corporations to participate in litigation in Australia.

The courts have occasionally held that some types of forum state interests cannot be taken into account in determining whether the court should exercise jurisdiction because the courts lack the resources and the ability to determine what influence they should have. In *Oceanic Sun Line Special Shipping v Fay*, Deane J held that the court could not take into account questions of public interest convenience, such as the costs associated with and delays created by entertaining international disputes, in deciding whether to exercise jurisdiction.[6] This was so even though he thought these factors were cogent. Deane J wrote that: 'The costs of the administration of justice are high and judicial resources are limited. In this country . . . court lists in many jurisdictions are congested, most judges are overworked and justice is far too often delayed.'[7] These factors were excluded from consideration because His Honour thought that judges should not determine how they should be reflected in the principles. Deane J suggested that if they are to be taken into account, this should be undertaken by parliament,[8] a sentiment later endorsed by members of the New South Wales Court of Appeal in *James Hardie v Grigor*.[9]

5 *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 550–51.

6 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 255. Lord Hope agreed in *Lubbe v Cape plc* [2000] 1 WLR 1545 at 1567.

7 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 253.

8 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 255.

9 *James Hardie Industries Pty Ltd v Grigor* (1998) 45 NSWLR 20 at 41 and 43.

Foreign state interests

In most cases, the courts are even more wary of avoiding an indication that they are denying or giving effect to the interests of foreign states. The nature of international litigation is such that a foreign state is always likely to have an interest of some kind in the resolution of the litigation. In very rare cases, that interest is so patent that the court must acknowledge it. Having acknowledged the foreign state's interest, the blunt response of the common law is to refuse to entertain the dispute, on the basis that it is beyond the court's competence to make decisions which may affect international political relations.

In a case known as *Spycatcher*, named after the book which was the subject of the dispute, the Attorney General for the United Kingdom applied for an injunction to restrain publication of this book which was a memoir written by a former officer of the British Security Service. The High Court of Australia held that the Australian courts did not have jurisdiction to deal with the claim, on the ground that the relief sought would require the courts to enforce the governmental interests of a foreign state.[10] The reason was that 'the very subject matter of the claims and the issues which they are likely to generate present a risk of embarrassment to the court and of prejudice to the relationship between its sovereign and the foreign sovereign'.[11]

The issue of the existence of jurisdiction is generally concerned with the court's personal jurisdiction over the defendant. There are relatively fewer rules which establish subject-matter jurisdiction, which refers to the court's competence to deal with a dispute by reference to its subject matter. The foreign governmental interest exception established in *Spycatcher* is an example. The courts also lack subject-matter jurisdiction to deal with disputes essentially concerning title to and possession of foreign land and other 'immovable' property under the *Moçambique* rule.[12] Lord Wilberforce thought this rule clearly must involve 'possible conflict with foreign jurisdictions' and 'political questions of some delicacy'.[13] For this reason, he opposed judicial reform of the rule.

The *Moçambique* rule is consistent with the general allocation of authority between states according to public international law, which is based on the relationship between physical territory and political power. Generally speaking, in public international law, extraterritorial assertions of authority are impermissible. Opinions are divided on the relevance of public international law to the law of jurisdiction in private international disputes. Mann has argued that the extent of legitimate judicial authority is prescribed by public international law (1984: 32, 67–77)[14] but others disagree (see Bowett, 1983: 3–4; Yntema, 1957: 733).

10 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.

11 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 44.

12 *Companhia de Moçambique v British South Africa Co* [1893] AC 602; *Potter v BHP Co Ltd* (1906) 3 CLR 479. In Australia, this rule applies to some forms of intellectual property, such as patents and trademarks.

13 *Hesperides Hotels v Muftizade* [1979] AC 508 at 537.

14 Kirby J takes the same view: *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 528.

According to Akehurst (1974), it is irrelevant as jurisdiction is frequently asserted on the basis of very weak connections between the state and the litigation, and this very seldom led to international political repercussions.

Whether the forum is obliged to recognise the foreign state's interest, perhaps the court might recognise as a matter of comity the forum state's interest in preserving harmonious relations with other states. This should lead to recognition of the foreign state's interests in some cases. As noted above, the court treats itself as jurisdictionally competent in some cases where the connection between the forum and the dispute is trivial so this consideration seems not to have influenced the rules on the existence of jurisdiction. One might expect that comity would certainly be a relevant consideration in the exercise of jurisdiction. According to the High Court, 'considerations of comity and restraint, to which reference has so often been made in cases concerning [the existence of] jurisdiction, will perhaps be of the greatest relevance in considering questions of forum non conveniens'.[15] This is a fine sentiment, but in fact the Australian principle of *forum non conveniens* which was endorsed in that case is extremely chauvinistic, conducive to ignoring the valid concerns of other states and provides no incentive to restraint in the exercise of jurisdiction. The principle requires a defendant to persuade the forum that it is 'clearly inappropriate' for the resolution of the dispute – a task which is not surprisingly difficult to discharge. In my study of the Australian courts' practices in the exercise of jurisdiction, in the cases in which there was no enforceable jurisdictional agreement between the parties, the Australian courts held that they were clearly inappropriate in only 22.5 per cent of decisions (Keyes, 2005: 168).

Balancing forum and foreign state interests

Most international disputes implicate the interests of both the forum and at least one other state. In such cases, the courts generally give priority to local state interests. This problem most clearly arises when the court has to decide whether it will exercise its jurisdiction. The principle of *forum non conveniens* which is applied to resolve this question requires the court to consider the availability and relative virtues of litigation in alternative forums. In England, the defendant must establish clearly and distinctly that there is another available court which is more appropriate to hear and determine the dispute than the courts of the forum.[16] In Australia, the defendant must show that the local court is clearly inappropriate. The Australian test gives substantially less weight to the possible interests of foreign courts than to the interests of the local court. There is no compelling justification for this discrimination. The English test is more accommodating of foreign forums, although it does not expressly admit the relevance of foreign state interests.

The rules as to existence of jurisdiction permit the assertion of jurisdiction on the basis of limited connections between the forum and the dispute (e.g., on the

15 *Agar v Hyde* (2000) 201 CLR 552 at 571.
16 *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460.

basis that the subject-matter of the dispute is a contract which was 'made' within the jurisdiction). This shows that the rules give more weight to local interests than to foreign interests. The principles demonstrate no sensible justification for doing so.

Why are state interests suppressed?

The main reason that the courts avoid an overt responsibility for discussing, weighing and applying state interests is because of perceived constitutional restraints on the courts' functions. International litigation, like its domestic counterpart, is treated as a highly practical subject and therefore is under-theorised. This is so particularly in England and Australia. The assumptions about the role of the courts in an adversarial system also influence the court's view about the propriety of acknowledging the existence of any state interests which might influence the court's responsibility in resolving in international jurisdictional disputes.

Constitutional restraints

The doctrine of the separation of powers prohibits the courts from exercising 'political' functions, which are the concern of the political arms of government. The courts are therefore likely to attempt to avoid the perception that their decisions are motivated by a consideration of state interests. This is particularly manifest in the court's lack of subject-matter jurisdiction to enforce foreign governmental interests, as expressed in *Spycatcher*. This approach closely resembles the government interest analysis approach to choice of law first proposed by Brainerd Currie (1963). Currie wrote that 'assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order' which 'should not be committed to the courts in a democracy' (1963: 182). This is almost identical to the reasoning of the High Court in *Spycatcher*. The majority held that to enforce the foreign government's interest in that case may 'require an Australian court to resolve an issue which it could not appropriately entertain or competently determine, namely what was, on balance, in the public interest of the foreign State'.[17]

The majority of the High Court in *Voth v Manildra Flour Mills*, which established the modern Australian principle of *forum non conveniens*, specifically relied on the court's incompetence to address matters of foreign governmental interest as a justification for the chauvinism of the Australian principle. They wrote that the same kind of 'powerful policy considerations' as those which prevent the courts from adjudicating disputes involving the enforcement of foreign governmental interests precluded the Australian courts from determining

17 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 45.

whether a foreign court should hear a dispute.[18] The Australian courts invariably do conduct a comparative evaluation of the merits of litigation in the local as well as available foreign forums (Keyes, 2005: 138–40). The courts therefore do assume the responsibility of determining the suitability of foreign litigation relative to local litigation – it is just that they give foreign interests little weight.

Judges have occasionally stated that judicial reform of jurisdictional principles is inappropriate where questions of state interest are concerned and that legislative reform is required. This is seen both in Deane J's refusal in *Oceanic* to consider questions of public interest convenience from the Australian court's perspective and in Lord Wilberforce's remarks concerning political impediments to judicial reform of the *Moçambique* rule. In Australia, such reforms have not been forthcoming.[19] Responsibility for developing the jurisdictional rules is left entirely to the courts.

The doctrine of parliamentary sovereignty also leads the courts to suppress the valid interests of other states. In some recent Australian cases, the courts have explicitly relied on this doctrine in resolving international jurisdictional disputes. In refusing to enforce a contractual agreement to submit to the exclusive jurisdiction of the English courts, because to do so would mean that Australian legislation would not be applied, Kirby P stated that 'it is the duty of this Court to give effect to the *Act*'.[20] The usual conflict of laws principles, which are designed to determine which of two competing legal systems ought to provide the forum and the applicable law for international disputes in which both forums can claim that they ought to hear the case and that their law ought to be applied, can thus be out-manoeuvred by a combination of clever pleading by the plaintiff and a zealous court. This may do offence to the interests of other states, not to mention the position of the defendant.

Pragmatic formalism

In the English conflict of laws, which has heavily influenced the Australian doctrine, pragmatism is dominant. Theoretical analysis is eschewed in a subject which is widely considered to be fundamentally practical and procedural. A leading English text asserts that 'the most striking feature of the English common law rules relating to competence in actions in personam is their purely procedural character' (North and Fawcett, 1999: 285). According to this approach, the resolution of each international dispute is a practical matter which does not require a theoretical framework. In *Adams v Cape Industries*, the English Court of Appeal stated that the existence of jurisdiction is determined as 'a question of

18 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 559.

19 The only exceptions are enactment of legislation in New South Wales and the Australian Capital Territory reforming the *Moçambique* rule: *Jurisdiction of Courts (Foreign Land) Act 1989* (NSW), *Civil Law (Wrongs) Act 2002* (ACT) s 220.

20 *Akai v The People's Insurance Co Inc* (1995) 8 ANZ Ins Cas 61–254 at 75,389.

fact' and not 'by reference to questions of justice'.[21] The rules of jurisdiction 'have developed on an ad hoc basis, dependent on the exigencies of procedure, and the common law has failed to create a consistent theory of jurisdiction' (Sykes and Pryles, 1991: 20). Most analysis of jurisdiction is descriptive rather than critical or theoretical.

The doctrine of the separation of powers is linked to formalism, a school of jurisprudence which holds that judges do not or should not, for lack of qualification, concern themselves with issues of politics. Formalism has been particularly influential in the English and Australian conflict of laws. Jurisdictional rules are generally regarded as being policy neutral. In 1972, Pryles wrote that 'the courts evinced no general conception of the whole area of adjudicatory competence', and this remains true today (1972: 79–80).

The impact of the adversarial system

It is certainly no surprise that an explicit recognition of state interests is hard to find in international litigation, given the general attitude to this issue in the adversarial system of dispute resolution. In the adversarial system, according to Jacob (1987: 8):

> . . . the basic assumptions are that civil disputes are a matter of private concern of the parties involved . . . though their determination by the courts may have wider, more far-reaching, even public repercussions, and that the parties are themselves the best judges of how to pursue and serve their own interests in the conduct and control of their respective cases, free from the directions of or interventions by the court.

According to this model, the state lacks any substantive interest in litigation which arises independently of the interests of the parties. Its role is merely facilitatory. Recent reforms to the rules of civil procedure in England and Australia have not had a substantial effect on the parties' control over litigation or on the general perceptions about the relative roles of the parties and the courts. They seem in particular to have had a negligible impact in international litigation (Collins, 2000: xvi).

With several important exceptions, international litigation is not differentiated from domestic litigation. Assumptions of the adversarial system of litigation have presumably unintended consequences in international litigation. For example, the principle of party autonomy, which applies in domestic litigation, is generally unchecked in international litigation. This means that a plaintiff can unilaterally invoke the application of mandatory forum legislation, which may well lead the court to decide that the court must exercise its jurisdiction.

21 *Adams v Cape Industries Plc* [1990] 1 Ch 433 at 519.

Why state interests ought not to be suppressed

I suggested in the introduction to this chapter that failure to acknowledge the role that state interests play in influencing the relevant legal principles and their application makes the law unnecessarily complicated, and impedes analysis of and debate about the legitimacy of those interests. This in turn undermines the legitimacy of the principles and of decisions made in this area, and adds to private and public costs of international litigation. It also undermines other local state interests, including the need to ensure certainty and predictability in the application of the law and to accommodate the valid interests of other states.

Failure to expressly acknowledge the role that state interests play in international litigation is likely to do the most damage to foreign state interests. Von Mehren and Trautman observed that 'conduct that is overly self-regarding with respect to the taking and exercise of jurisdiction can disturb the international order and produce political, legal and economic reprisals' (1966: 1127). It is undesirable that private international law should flout the requirement of public international law that a state should only exercise its jurisdiction over cases which have a reasonably close connection to it. Whether public international law imposes an enforceable limitation on the courts' jurisdiction is beside the point. Excessive claims of jurisdiction lead to unnecessary and wasteful overlaps, so that more than one state may well provide a forum for the same dispute which obviously creates needless costs and may result in inconsistent judgements from those different forums. The consequence is likely to be that the dispute is not satisfactorily resolved.

Neither the doctrine of separation of powers nor the doctrine of parliamentary sovereignty were designed with the specific features of international private litigation in mind. It is questionable whether either doctrine is particularly relevant to this area of law. These are domestic constitutional doctrines designed to regulate arrangements between the arms of government, to safeguard the internal superiority of the parliament, and to guard the courts against interference by the political arms of government. While it may be accepted that there are some extraordinary cases in which a dispute necessarily involves international political ramifications for which it is desirable that the political arms of government should take responsibility, this exceptional situation should not be exaggerated. This should certainly not be tolerated as a justification for the unacceptably parochial principle of *forum non conveniens* applied in Australia.

The recent judicial tendency to rely on the doctrine of parliamentary sovereignty in order to justify the retention of jurisdiction because the plaintiff has relied on local mandatory law fails to appreciate the whole purpose of the conflict of laws. It is basic to this area of law that more than one legal system may provide a forum and the substantive law to resolve a dispute. The jurisdictional principles and choice of law rules are intended to resolve the competing claims of the respective legal systems to do these things. The fact that some judges are avoiding the conflict of laws' rules by relying on the mandatory nature of forum law indicates that perhaps it is time for a revision of the jurisdictional principles

and choice of law rules specifically to account for the modern awareness of the mandatory nature of some laws. While the enthusiasm of some judges to do their duty according to local law is impressive, it is essential to bear in mind that one legal system cannot isolate itself and its mandatory rules from the rest of the world.

Conclusion

Jurisdiction is an important area of law, whose importance is only likely to increase with the explosion of global and internet-mediated trade, commerce and communication (Bell, 2003: 3–5). Muchlinski, commenting on *Lubbe v Cape*, doubted whether 'the English courts can indefinitely refuse to address public interest issues, and hide behind the apparently apolitical doctrine of forum non conveniens, while at the same time coming to decisions that are doubtless informed by such considerations' (2001: 24). The same is true of Australian courts in relation to jurisdiction in international litigation. It is facile to maintain that state interests have no relevance to this area of law, and insulting to the courts for them to have to continue to pretend that these factors play no part in their decisions. It is high-time commentators, parliaments and courts set about articulating those state interests, explaining how they should be taken into account and resolved in the case of inconsistency.

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Part IV

Technologies

8 Mapping territories

Shaunnagh Dorsett

> . . . it is . . . the map that precedes the territory . . . that engenders the territory.
>
> (Baudrillard, 1994: 1)

> [He's] got a thing about em, says Menzies. Just trouble, maps. You can't really blame him. Like they suck everythin' up. Can't blame a blackfella not likin' a map . . . Go on the country, says the boy . . . not on the map.
>
> (Winton, 2001: 312)

Introduction

Picture two images, both of a native title claim area. The first is a map of the claim area, demarcated by latitude and longitude. The areas that cannot be claimed are marked with hatching. There are Crown reservation numbers, and a scale in kilometres – in fact, all the things we expect in a tenure map.[1] The other image is a painting on canvas, in a form that westerners have labelled 'dot painting'. Yet both address similar concerns, albeit expressed through different cultural lenses: in Western legal terms, jurisdiction, territory and ownership; for the Pila Nguru – the creators of the painting – the Tjukurrpa.[2]

In 1995, the Spinifex people lodged a native title claim with the Native Title Tribunal. As part of the native title process, an art project was established to

1 The visual representation of the map is supported by the following written outline of the claim area: 'Commencing at the westernmost north western corner of Yowalga Location 7 as shown on Land Administration plan 20992 and extending east along the northernmost northern boundary of that location and east and south easterly along boundaries of Milyuga Location 20 to the Western Australian–South Australian Border; Then southerly along that border to latitude 29.500000 South; Then west to the south eastern corner of Delisser Location 9; Then west and north along boundaries of that location and north along the western boundary of Delisser Location 8 to the south western corner of Yowalga Location 7 and then generally northerly along boundaries of that location to the commencement point': *Mark Anderson on Behalf of the Spinifex People v State of Western Australia* [2000] FCA 1717 (28 November 2000).

2 For Westerners, it is impossible to precisely define the term 'tjukurrpa'. It encompasses both spiritual and other aspects, including notions of law, ownership, etc.: see Cane (2002: 16).