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The Myall Creek Massacre as Part of a Broader War: War and the Common Law of the Nineteenth Century

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ABSTRACT

This paper considers whether the Myall Creek Massacre of 1838 was a part of a wider war according to the common law as it applied at the time. It also addresses the question of what the significance of this might be. It draws on research into martial law in the British Empire in the nineteenth century and applies it to what is known of the violence between Aboriginal people and Australian colonists in New South Wales. It was not necessary for there to be recognition of Aboriginal sovereignty for a war to exist. At the time and still today, the Crown can wage war against its own subjects when they are in open revolt. The characterisation of Aboriginal people as subjects rather than foreign soldiers meant that the same rules of war did not apply, but not that there was no war. The significance of this is that we can consider the Myall Creek Massacre as being a war crime within a broader war, and not an isolated criminal action. This would suggest that Australia was taken by conquest, rather than cession or settlement, which would have implications for ongoing Aboriginal sovereignty and continuation of Aboriginal law.

Introduction

The Myall Creek Massacre occurred on June 10th 1838 at Myall Creek Station, about an hour's drive North West from Armidale, New South Wales. The purpose of this paper is to make a legal argument for the Myall Creek Massacre being part of a broader war in the New England region during the nineteenth century. As well summarised by the National Museum of Australia on its website, the Myall Creek Massacre followed an earlier massacre of 40 to 50 Gamilaraay men at Waterloo Creek in January of that year. This occurred after a series of deadly clashes between them and police and settlers over many months. It was at the hands of a NSW Mounted Police Expedition led by Major Nunn, who named the site in reference to Napoleon's last stand. A group of Gamiliraay people had then sheltered on Henry Dangar's Myall Creek Station, receiving protection in exchange for working on the station. They enjoyed warm friendship with the station hands, some of them convicts. The massacre occurred when a group of convict and free

[1] With many thanks to Marcelle Burns, Indigenous Pre-Doctoral Fellow, School of Law, UNE for her generous provision of ideas and research. This paper was originally presented as a conference paper at the 'Myall Creek Massacre 180th Anniversary Symposium' Oorala Centre, UNE, and then adapted for the 2020 Australia and New Zealand Law and History Society virtual conference. On a personal note, I have spent my professional life dealing with armed conflicts one way or another and talked about them all over the world, but I grew up in Inverell and Armidale and my ancestors have been in this area since white people came here. The conflict we are discussing here today occurred in my homeland. As a boy I witnessed some of it, but I did not realise that there had been a war.

stockmen from another property of Henry Dangar's came late in the day, tied up and slaughtered approximately 28 people, men, women and children, old and young. The exceptional aspect of this episode is that seven men were hanged for it in Sydney in December 1838.[2] It is important to understand that these events occurred in a broader context of ongoing clashes and massacres across the region, on which Callum Clayton Dixon has compiled accounts from contemporary records in *Surviving New England* (2019) and also *Mugun & Gun* (2018), both published by the Anaiwan Language Revival Program.

There are historical arguments for the existence of a war, and a strong contrary sense in Australian society that there was no war at all. The Australian War Memorial does not accept it and the Myall Creek massacre memorial has been defaced.[3] This paper argues that, as a matter of the English law of the time as applicable in the Colony of New South Wales, there was a war.

Part of the difficulty with arguing for the existence of a war is that Captain Cook had claimed the eastern two thirds of this continent for Britain. English law did not acknowledge any conquest nor treaty of cession.[4] Despite the single judge decisions of *Ballard*[5] and *Bonjon*,[6] according to the NSW Supreme Court decision in *Murrell*[7] Aboriginal people in the Colony of New South Wales were then, as far as English law was concerned, subjects of the Crown. They did not have the status of being a foreign nation nor, as individuals, enemy aliens. If one takes the view that war can only exist between nation states then there can have been no war in a legal sense. Whatever fighting occurred was criminal activity and not resistance to an invasion nor an insurgency after the colonists occupied the land.

Even so, we are used to describing the conflicts in Afghanistan and Vietnam as wars, as indeed they are or were. Australian and New Zealand forces did not fight against a foreign government in those wars but rather for a foreign government against an insurgency that conducted operations with a scale and intensity and a level of organised command that amounted to a war. As a matter of the international law of armed conflict today these wars are considered non-international armed conflicts in accordance with the 1977 *Additional Protocols* to the *Geneva Conventions* of 1949.[8]

The international law of the twentieth century may provide a guide but it does not address the legal status of the conflict in this region in the nineteenth century. It is important to understand that then, and now, the Crown may wage war against its own subjects when they are in open revolt.[9] Dicey, perhaps the most quoted English constitutional scholar, even while rejecting the concept of martial law still recognised:

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[2] National Museum of Australia, 'Myall Creek Massacre', https://www.nma.gov.au/defining-moments/resources/myall-creek-massacre
[3] https://www.theage.com.au/national/vandals-deface-aboriginal-memorial-20050131-gdzgx3.html 31 January 2005.
[4] See *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 77-78 (Deane and Gaudron JJ).
[5] Dowling, *Proceedings of the Supreme Court*, Vol 22, Archives Office of New South Wales, 2/3205, 98 and discussed by Bruce Kercher in '*R v Ballard, R v Murrell* and *R v Bonjon*' [1998] *Australian Indigenous Law Reporter* 410.
[6] *Port Phillip Patriot,* 20 September 1841, 1.
[7] (1836) 1 Legge 72.
[8] Particularly common article 3, and Art I of *Additional Protocol II*. See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (International Committee of the Red Cross, 2009).
[9] See Cameron Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (ANU Press, 2017) https://press.anu.edu.au/publications/crown-and-sword, 139.

> the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot or generally of any violent resistance to the law.[10]

This occurred at the Eureka Stockade in 1854. The Victorian *Martial Law Indemnity Act* followed the famous incident. On 3 December 1854, police and soldiers had attacked a fortification built by miners protesting against government taxes and the way they were collected. Twenty-two miners and four of the troops died in the fighting.[11] With respect to the power to take this action, at clause II the *Act* stated:

> Nothing in this Act contained shall be construed to interfere with Her Majesty's Royal Prerogative or to abridge the right of Her Majesty to do any act warranted by law for the suppression of treason or rebellion.

Suppression of insurrection is what occurred here in the New England region too. There is documentary evidence of widespread fighting and loss of life, white and black.[12] There are two key difficulties with this argument however. The first is that the Myall Creek massacre was prosecuted as a crime.[13] This was a war crime, as Mark Tedeschi and others have argued, and this paper will return to this point. The other problem is that the fighting that occurred in this region was not covered by a declaration of martial law, as had occurred in other places in NSW and the rest of the British Empire.[14] If there had been such a declaration it would be more difficult to refute that there had been an insurrection. In the absence of such a declaration however it is still possible to argue that there was an insurrection in terms of the common law of the time, because martial law declarations were made to cover exactly the same sorts of violence in other parts of the colony. It is also important to establish at this point that a martial law declaration would not then in any way justify the horrific brutality that occurred, it just would have put much of it beyond the jurisdiction of the courts.[15] This is the key difference between what Henry Dangar's men[16] and Major Nunn and many others did in this region[17] and what occurred around Bathurst under martial law in 1824.[18] It was not the nature of the violence but the jurisdiction of the courts to deal with it.

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[10] A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 288.
[11] See Philip Lynch, 'Juries as Communities of Resistance: Eureka and the Power of the Rabble' (2002) 27(2) *Alternative Law Journal* 83.
[12] Callum Clayton-Dixon *Surviving New England: A History of Aboriginal Resistance and Resilience Through the First Forty Years of the Colonial Apocalypse* (2019) and *Mugun and Gun: Resisting New England: Frontier Wars* Edition 1, (2018), both published by Anaiwan Language Revival Program, Armidale; Roger Milliss, *Waterloo Creek: The Australia Day Massacre of 1838, George Gipps and the British Conquest of New South Wales* (McPhee Gribble, 1992); Michael Organ, 'Secret Service: Governor Macquarie's Aboriginal War of 1816', *Proceedings of the National Conference of Royal Australian Historical Society*, Mittagong, 25-26 October 2016; Tim Rowse, 'The Moral World of the Native Mounted Police' [2018] 5:1 *Law & History*, 1; Mark Tedeschi, 'Speech at the Annual Myall Creek Memorial Ceremony on 11 June 2017 for Those Who Died in the Myall Creek Massacre' [2018] 5:1 *Law & History,* 150.
[13] *R v Kilmeister* (NSWSC, 1838), see Milliss, ibid, ch 17, and Tedeschi, ibid.
[14] See Moore, above n 9, ch 3.
[15] *Marais v General Officer Commanding the Lines of Communication* [1902] AC 109.
[16] Milliss, above n 12, ch 10.
[17] Ibid, ch 7.
[18] *Proclamation of Martial Law*, Governor Brisbane, 14 August 1824 https://trove.nla.gov.au/newspaper/article/2183147.

What is martial law then?

Martial law is a strange legal creature in that references to it date back centuries yet it is still far from settled as to what martial law actually is. This is mainly because its nature meant that the courts did not ever get much of a chance to clarify it, as it is not the Crown's prerogative to wage war as such but actually a device to put military action beyond the jurisdiction of the courts. The *Petition of Right 1628* (Imp) purported to abolish the practice of martial law in England yet proclamations of martial law continued to occur after that in many places where English law applied.[19] The authorities for martial law are limited and Lord Hale described martial law as 'no Law, but something indulged rather than allowed as a Law'.[20] Martial law is distinct from military law in that it describes a set of circumstances rather than a body of law. There is no body of martial law as such. If the imposition of martial law results in the application of military law to civilians, then this is as a means of affording some sort of due process in a way familiar to military officers. It is not because military law applies of its own force by virtue of a state of martial law. [21]

One of the best examples of this is the Jamaica Rebellion. In 1865, a number of districts in Jamaica saw an uprising by black plantation workers and other poor against white plantation owners and colonial authorities. Governor Edward Eyre (already famous as the first European to cross the Nullarbor Plain[22]) declared martial law and authorised the suppression of the rebellion with brutal force, summary executions and floggings, as well as courts martial followed by executions.[23] Much of the controversy arising from the Rebellion turned on whether martial law authorised the court martial and execution in particular of George Gordon, a coloured Jamaican landowner and politician. [24] The Jamaica Committee, created in England in response to the events by a group of reform minded public figures, which included J S Mill,[25] attempted a private prosecution of Governor Eyre. The Committee also attempted the private prosecution of a British Army officer, Brigadier Nelson, and a Royal Navy officer, Lieutenant Brand, who had been members of a court martial which had imposed death penalties.[26] In neither case, *R v Eyre*[27] nor *R v Nelson and Brand*, [28] did Chief Justice Cockburn's charge

[19] See Moore, above n 9.
[20] Charles Clode, *The Administration of Justice Under Military and Martial Law: As Applicable to the Army, Navy, Marines and Auxiliary Forces* (John Murray, 1872) 179 quoting Lord Hale, *History of the Common Law*.
[21] Military Board, *Australian Edition of Manual of Military Law* (Commonwealth Government Printer, 1941) 5; See discussion of this point in Clode, *Military and Martial Law*, ibid, 183-186; W S Holdsworth 'Martial Law Historically Considered' (1902) 18 *Law Quarterly Review* 117, 128; H Erle Richards,'Martial Law' (1902) 18 *Law Quarterly Review* 133, 133-134; R W Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford University Press, 2005) 331-338.
[22] Peter Handford, 'Edward John Eyre and the Conflict of Laws' (2008) 32(3) *Melbourne University Law Review* 822, 828-829.
[23] Kostal, above n 21, 12-15.
[24] Ibid 14-17.
[25] Handford, above n 22, 836.
[26] *Frederick Cockburn's Special Report of the Charge of the Lord Chief Justice of England to the Grand Jury at the Central Criminal Court in the Case of The Queen Against Nelson and Brand* (2nd ed, 1867) ('*Frederick Cockburn's Special Report*'). [This was the report of the case as such and is cited in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 555.]
[27] Being a charge to a Grand Jury and not a judicial decision as such, W F Finlason, *Report of the Case of The Queen v Edward Eyre on his Prosecution in the Court of Queen's Bench containing the Charge of Mr Justice Blackburn* (Stevens, 1868). See Kostal, above n 20, 395-404. *R v Eyre* (1867—68) LR 3 QB 487 is a report of the earlier decision on whether this matter was triable in England, as distinct from *Phillips v Eyre* (1870) LR 6 QB 1, which was a civil proceeding against Governor Eyre arising out of the same rebellion and supported by the Jamaica Committee.
[28] Being a charge to a Grand Jury and not a judicial decision as such, *Frederick Cockburn's Special Report*, above n 26.

to the Grand Jury support fully the prosecution arguments, and the grand juries did not find that the prosecutions should proceed to trial. [29]

Another authority is the Privy Council case of *Marais*[30] arising from the Boer War in 1902. Mr Marais was in military custody after his arrest and charge for breaching martial law regulations. He had appealed to the Privy Council from a decision of the Supreme Court of the Colony of the Cape of Good Hope. The Privy Council took the affidavit evidence of Mr Marais himself as grounds for determining that war was actually raging. [31] The Privy Council stated that where actual war is raging, the actions of the military authorities are non-justiciable:

> It may often be a question whether a mere riot or disturbance neither so serious nor so extensive as really to amount to a war at all has not been treated with an excessive severity and whether the intervention of the military force was necessary but once let the fact of actual war be established and there is an universal consensus of opinion that the Civil Courts have no jurisdiction to call in question the propriety of the action of the military authorities. [32]

The Privy Council stated 'the truth is, that no doubt has ever existed that where war actually prevails the ordinary Courts have no jurisdiction over the military authorities'.[33] Notably the advice of the Privy Council closed with the words 'the framers of the *Petition of Right* knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure'.[34] The Councillors, therefore, directly considered the *Petition of Right* and did not see it as applicable to situations of actual war, even an internal war.

The constitutional scholar Holdsworth stated of *Marais* at the time:

> This prerogative is quite different from the power which all citizens have at common law of using the degree of force which is necessary to prevent outrage. That power merely provides the necessary means for quelling a riot. It merely allows an amount of force exactly proportioned to the necessities of the case. It does not allow, as a proclamation of martial law allows, an absolutely freehand in dealing with the enemy. [35]

An even more extreme view is that martial law is an instrument of state terror. It knows very few bounds and authorises extreme measures of brutality against even innocent civilians in order to terrorise a subject population into submission, 'terror

[29] Each charge differed on this question, Cockburn LCJ in *R v Nelson and Brand* was equivocal on the issue, *Frederick Cockburn's Special Report*, above n 25, 159, and Blackburn J focused more on Jamaican colonial statutory authority, Finlason, above n 26, 81; Kostal, above n 20, 336-341, 395-404. See Moore, *Crown and Sword*, above n 9, 134-136.
[30] *Marais v General Officer Commanding the Lines of Communication* [1902] AC 109.
[31] Ibid, 114.
[32] Ibid, 115.
[33] Ibid.
[34] *Marais* [1902] AC 109, 5; see also Charles Clode, *The Military Forces of the Crown: Their Administration and Government* (John Murray, 1869) 157, on *The Petition of Right* only applying during time of peace.
[35] Holdsworth, above n 21, 127, 129-130; See Moore, *Crown and Sword*, above n 9, 141-143.

is of the very nature of martial law, and deterrent measures – that is measures deterrent by means of terror – are its very essence'. [36]

The limitations are that martial law can only be for the purpose of maintaining or restoring governmental control and cannot be for wanton purposes. The procedure of courts martial must observe some sense of natural justice, although summary executions may also be permissible. [37] The leading proponent of this view was Finlason. He wrote a number of books and letters on the subject of martial law at the time of the Jamaica controversy in the 1860s. [38] It is tempting to dismiss such extreme views as the views of just one author, but Finlason appears to have articulated a widespread belief that this approach was necessary to maintain the Empire. [39] The use of such an approach in so many parts of the British Empire, such as in the Indian Mutiny of 1857,[40] in General Dyer's ordering of the Amritsar massacre in 1919,[41] the government of the African colonies,[42] the attempted suppression of the Irish Republic between 1916 and 1922[43] and in the Jamaica Rebellion of 1865 itself, and with so little by way of legal consequences for these actions, would suggest that Finlason's view reflects much of the practice of martial law in the British Empire.

This leads us to the Myall Creek massacre, which did go before the courts. The well-known and unusual aspect of the Myall Creek Massacre is not that it occurred but that it went to court. Men were charged with murder and hanged.[44] The reason we can discuss it today is because we know about it, and that is mainly because of the prosecution. However, it is entirely consistent with the pattern of violence around this region, all over the colony of New South Wales and the rest of the British Empire, much of which occurred under cover of martial law. The absence of a declaration of martial law in this region, the prosecution and the attempts to hold Major Nunn to account are more to do with the fact that elements within the government, even at that time, saw these actions as wrong. [45] This was part of an ongoing tension throughout the British Empire between brutal imposition of power and a belief in the civilising and restraining influence of English law, as seen in the Jamaica prosecutions or the *Report of the Parliamentary Select Committee on Aboriginal Tribes (British Settlements)* of 1837 from the parliament at Westminster.

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[36] W F Finlason, *Treatise on Martial Law as Allowed by the Law of England in Time of Rebellion: With Illustrations Drawn from the Official Documents in the Jamaica Case, and Comments Constitutional and Legal* (Stevens, 1866) quoted in Kostal, above n 21, 232.
[37] See Kostal's discussion of Finlason, Kostal above 21, 235-236; see Clode, *The Military Forces of the Crown*, above n 4, 159-162; See Moore, *Crown and* Sword, above n 9, 149-150.
[38] Kostal above 21, 419-420.
[39] Kostal above 21, 455-456 citing the British *Manual of Military Law* (1899) and C E Calwell *Small Wars: Their Principles and Practice* (3rd ed 1899), as well as the sadistic slaughter of Kooka prisoners in the Punjab in 1872, 451-453; see the Australian *Manual of Military Law,* above n 18, 197, stating that the laws of war do not apply to 'uncivilised states and tribes'; see also G J Cartledge, *The Soldier's Dilemma: When to Use Force in Australia* (AGPS Press, 1992), 155-158.
[40] See eg Captain Thomas Spankie, 'The Siege of Delhi - 1857' in William Robson, *The Great Sieges of History* (Routledge, Warne & Routledge, 1859) 633, 655-656; Kostal, above n 21, 206.
[41] Nasser Hussain, *The Jurisprudence of Emergency* (University of Michigan Press, 2003) 99-101.
[42] Bernard Porter, *The Lion's Share: A Short History of British Imperialism 1850-1983* (Longman, 2nd ed 1984) 180-181.
[43] Mark Neocleous, 'Whatever Happened to Martial Law? Detainees and the Logic of Emergency' (2007) 143 *Radical Philosophy* 13, 14-15.
[44] See Tedeschi, above n 12.
[45] Milliss, above n 12, chapters 19 &20.

It does not change however that Aboriginal people were in open resistance to the invasion and carried on an insurgency long afterwards.[46] The lack of a martial law declaration also does not change that military, police and civilian armed groups conducted punitive campaigns against this resistance.[47] The violence was there and it looked just like those situations covered by declarations of martial law. This was no riot or mere disturbance.[48] This was a concerted effort to reject British sovereignty. It was a war. In this sense, the significance is that we can consider the Myall Creek Massacre as being a war crime within a broader war, and not an isolated criminal action.

This has current significance for the state of the law in Australia. The *Mabo* decision accepted de Vattel's taxonomy for the reception of English law by settlement, cession or conquest.[49] This case appeared to overturn the doctrine of terra nullius.[50] Given that *Mabo* did not accept that there was a treaty or a conquest, then it cannot really have over turned terra nullius. *Mabo* effectively only modified the doctrine by recognising very limited property rights in the form of native title.[51] If instead the common law recognised that there was a war, then it is possible to argue that English law applied by way of conquest. This would mean that all Aboriginal and Torres Strait Islander law, not just native title, continued to apply until displaced by the new sovereign.[52] It may even be that the onus would be on those arguing for displacement, rather than on those arguing for continuation of Aboriginal and Torres Strait Islander law. This could provide a very different basis for current state based treaty negotiations and the Makarrata process.[53] Something of this approach appears to have been underlying the successful arguments of the plaintiff in *Love v Cth* in the High Court of Australia in 2020, to the effect that it is for traditional law to determine who is or is not an Aboriginal or Torres Strait Islander. The power of the Commonwealth under the *Constitution* with respect to aliens must be interpreted by reference to that law.[54]

There are other reasons that the criminal trial of the Myall Creek Massacre is important, as was the inquiry into Major Nunn and indeed the British Parliamentary Report into the treatment of Aboriginal Tribes in the British Empire of 1837. They indicate that it was the colonists who often perpetuated this war against the efforts of parts of the British government. It is an unfortunate part of Australian culture to blame the British for atrocities committed by Australians, particularly in our military history with the *Breaker Morant* story one of the best examples.[55] To do that in this case would be to whitewash our history. To say that the British did it would be a way of trying to avoid responsibility. It would ignore the attempts to restrain the people who perpetuated this violence. In many cases those people were the colonists who were making their future in Australia. They may have seen themselves as British but their descendants are Australians. It is for Australians

[46] Above n 12.
[47] Ibid.
[48] See *Marais* above n 32.
[49] *Mabo v Queensland (No 2)* (1992) ('*Mabo*') 175 CLR 1, 32 (Brennan J).
[50] Ibid 40, 58.
[51] Ibid 50-51. See Kiefel CJ in *Love v Commonwealth* [2020] HCA 3 [25], [31], [35], [37]-[36].
[52] *Mabo* 55.
[53] See Daniel McKay, *Uluru Statement: A Quick Guide*, Law and Bills Digest Section , Parliament of Australia, 19 June 2017, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/UluruStatement; For a summary of state based treaty processes, see https://antar.org.au/campaigns/time-treaty
[54] See [2020] HCA 3 [75]-[81] (Bell J).
[55] *Breaker Morant* (South Australian Film Corporation, 1980), and also *Gallipoli* (Associated R&R Films, 1980)

then to accept that this is our history and take responsibility for its ongoing consequences today.