

## **‘THEY WANT TO SUFFOCATE ME, BUT I WILL NOT ALLOW IT’: INDIGENOUS RESISTANCE AND INCARCERATION IN KANAKY (NEW CALEDONIA)**

LISA N BILLINGTON\*

*During 2024, France embarked on a project to unilaterally reconstruct the electoral roll in Kanaky (New Caledonia) in favour of French colonial interests. The decision represented the most recent move in a long history of French efforts to undermine Kanaky's Indigenous-led independence movement. When Indigenous Kanak resisted, the recruitment of colonial criminal law into the service of the French colonial state was both immediate and comprehensive. Characterising Kanak resistance as an unprecedented insurrection, France declared a state of emergency. Breaches of this French-declared state of emergency were punishable under French-administered criminal law and enforced by thousands of French-deployed law enforcement personnel. Drawing on recent scholarship and on eyewitness reports from Indigenous Kanak leaders, activists and advocates, this article focuses on the period between May and September 2024 to isolate and analyse how criminal law is being deployed by the French colonial state as a frontline mechanism to pursue Kanak erasure.*

### **I INTRODUCTION**

On 12 December 2021, French President Emmanuel Macron declared: 'Tonight France is more beautiful because New Caledonia has decided to stay part of it'.<sup>1</sup> Macron was referring to the result of the third of three independence votes which had taken place in the French sui generis collectivity earlier that day. The result appeared unequivocal: when asked 'Do you want New Caledonia to accede to full sovereignty and become independent?', 96.5% of valid ballots voted 'No'.<sup>2</sup> At

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\* Lecturer, University of Technology Sydney. All translations are by the author, except where otherwise indicated.

1 "‘Tonight France Is More Beautiful’: Macron Hails New Caledonia's Rejection of Independence', *France 24* (online, 12 December 2021) <<https://www.france24.com/en/live-news/20211212-new-caledonia-rejects-independence-from-france-in-referendum-boycotted-by-separatist-camp-partial-results>> ('Macron Hails New Caledonia's Rejection of Independence').

2 Pacific Islands Forum, *Ministerial Committee to New Caledonia Report on the 2021 New Caledonia Independence Referendum* (Report, 2 February 2022) 1 [4]–[5] ('*Ministerial Committee to New Caledonia Report*').

the time, many nations, including Australia, praised both the openness of France to New Caledonian independence, and the French Government's facilitation of a peaceful referendum. English-language media reports and government statements on the referendum result largely referred to the archipelago by translating the French *Nouvelle-Calédonie* as 'New Caledonia'. Throughout the remainder of this article, however, the archipelago will be referred to as 'Kanaky'. The reasons for this will become clear shortly.

Fast forward almost three years to 24 September 2024. It is 'Citizenship Day' in Kanaky: an annual 'celebration' marking French annexation of the archipelago's largest island in 1853.<sup>3</sup> Over recent months, France has deployed more than 6,000 French law enforcement personnel to Kanaky under the guise of peace and security.<sup>4</sup> Protests have been breaking out across the islands, particularly in and around the capital, Nouméa.<sup>5</sup> French Prime Minister Gabriel Attal has characterised the French deployment as a 'massive means to restore order'.<sup>6</sup> Many of these personnel are armed with heavy weaponry.<sup>7</sup> With a total population of around 270,000,<sup>8</sup> in Kanaky there is now at least one law enforcement official for every 45 people on the islands. Further, these officers are not distributing their so-called 'peacekeeping' functions evenly throughout the archipelago – their presence is concentrated in areas where Kanaky's decolonisation and independence are the most hotly contested.<sup>9</sup> These are also some of the areas of Kanaky with high population concentrations of Kanaky's Indigenous peoples: Kanak.<sup>10</sup> Speaking of France's violent repression of Kanak protests, head of the Young Kanaks Movement Daniel Wea testified: 'Kanak want

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- 3 David Chappell, *The Kanak Awakening: The Rise of Nationalism in New Caledonia* (University of Hawai'i Press, 2013) 24.
  - 4 Charlotte Antoine-Perron, 'New Caledonia Marks Anniversary of French Colonization with Tight Security and Simmering Tensions', *Associated Press* (online, 25 September 2024) <<https://apnews.com/article/france-new-caledonia-colonisation-anniversary-1f5102f1390a469ab4d01da4a3bb844a>>.
  - 5 Dubravka Voloder and Jenny Cai, 'France Declares a State of Emergency in New Caledonia, 500 Police Sent to Quash Deadly Riots', *ABC News* (online, 16 May 2024) <<https://www.abc.net.au/news/2024-05-16/france-declares-state-of-emergency-on-new-caledonia-amid-riots/103853654>>; 'France to Declare State of Emergency in New Caledonia as Unrest Turns Deadly', *France 24* (online, 15 May 2024) <<https://www.france24.com/en/asia-pacific/20240515-dozens-arrested-in-new-caledonia-constitutional-reform-unrest>>.
  - 6 Voloder and Cai (n 5).
  - 7 Margot Staunton, 'France Sends Armoured Vehicles with Machine Gun Capability to New Caledonia', *Radio New Zealand* (online, 4 June 2024) <<https://www.rnz.co.nz/international/pacific-news/518600/france-sends-armoured-vehicles-with-machine-gun-capability-to-new-caledonia>>; Roselyne Makalu and Anaïs Duong-Pedica, 'Decolonizing Kanaky in Our Sea of Islands' (2024) 55 *Funambulist* 6, 6–7.
  - 8 Institut de la Statistique et des Études Économiques Nouvelle-Calédonie [Institute of Statistics and Economic Studies (New Caledonia)], 'Recensement de la Population 2019 en Nouvelle-Calédonie' [Population Census: New Caledonia, 2019] (Spreadsheet, 2019) <<https://www.isee.nc/component/phocadownload/category/193-recensement?download=1980:rp2019-population-menages-logement-province>> ('2019 Population Census').
  - 9 *Ministerial Committee to New Caledonia Report* (n 2) 10–11 [52]–[56].
  - 10 The term 'Kanak' is used by Indigenous peoples in Kanaky to distinguish themselves from 'caldoche' (French settler colonists and their descendants): see Anaïs Duong-Pedica, 'Unsettling "We're All Mixed-Race": *Métis.Sé*/Colonial Futurity, Settler Colonialism and the Countering of Kanak Sovereignty' (2022) 25(3) *International Journal of Francophone Studies* 211, 218 <[https://doi.org/10.1386/ijfs\\_00051\\_1](https://doi.org/10.1386/ijfs_00051_1)> ('Unsettling "We're All Mixed-Race"').

to declare to the world: "I exist as a people. They want to suffocate me, but I will not allow it."<sup>11</sup>

Kanak leaders and activists have been calling urgently and repeatedly for the global community to pay attention, to mobilise, and to stand in solidarity with Kanak peoples.<sup>12</sup> One Kanak group summarises: 'Our civilisation is in danger. This is a distress signal that we are sending out to you. We are strong, yes, as our history shows, but we are also in mourning, stunned, overwhelmed ...'.<sup>13</sup> This article honours and magnifies these calls in the Australian context. Kanak representatives are calling for the world to pay attention and, as one of Kanaky's nearest neighbours in the Pacific, Australians must heed their call.

The objective of colonialism is always Indigenous erasure.<sup>14</sup> Kahnawà:ke Mohawk philosopher and political strategist Taiaiake Alfred and Cherokee scholar Jeff Corntassel have observed that to maintain this central objective across shifting landscapes of time and space, colonialism itself has developed an 'almost unworldly capacity'<sup>15</sup> for shapeshifting:<sup>16</sup>

Contemporary Settlers follow the mandate provided for them by their imperial forefathers' colonial legacy, not by attempting to eradicate the physical signs of Indigenous peoples as human bodies, but by trying to eradicate their existence *as peoples* through the erasure of the histories and geographies that provide the foundation for Indigenous cultural identities and sense of self.<sup>17</sup>

Colonial erasure may be *physical*: that is, genocide.<sup>18</sup> Colonial erasure may also be *legal*: that is, the legal construction, deconstruction and reconstruction of Indigenous peoplehood on terms dictated by (and biased toward the interests

11 Esra Taşkın, 'Granting Voting Rights to Settlers in New Caledonia "Life-or-Death Matter," Says Kanak Movement Leader', *Anadolu Agency* (online, 29 May 2024) <<https://www.aa.com.tr/en/europe/granting-voting-rights-to-settlers-in-new-caledonia-life-or-death-matter-says-kanak-movement-leader/3234452>>.

12 Makalu and Duong-Pedica (n 7); Customary Senate of New Caledonia, *Summary of Violations and Recommendations: Human Rights Situation on the Territory of New Caledonia/Kanaky* (Interim Report, 13 September 2024) ('*Summary of Violations*').

13 World March of Women – Kanaky, 'Letter to Our Sisters in the World March of Women and All Over the World' (Letter, 4 June 2024) 5, on file with author ('World March of Women Letter'). See also World March of Women, 'Stop the Genocide: International Call for Kanaky' (Webinar, 5 July 2024) <<https://marchemondiale.org/2024/07/01/stop-the-genocide-international-call-for-kanaky-webinar/>>.

14 Taiaiake Alfred and Jeff Corntassel, 'Being Indigenous: Resurgences against Contemporary Colonialism' (2005) 40(4) *Government and Opposition* 597, 598 <<https://doi.org/10.1111/j.1477-7053.2005.00166.x>>.

15 Chris Cunneen and Juan Tauri, *Indigenous Criminology* (Policy Press, 2016) 28 <<https://doi.org/10.46692/9781447321781>>.

16 Alfred and Corntassel (n 14) 601–5.

17 Ibid 598 (emphasis added).

18 Stephen James Minton (ed), *Residential Schools and Indigenous Peoples: From Genocide via Education to the Possibilities for Processes of Truth, Restitution, Reconciliation, and Reclamation* (Routledge, 2021) <<https://doi.org/10.4324/9780429463044>>; Bonnie St Charles, 'You're on Native Land: The Genocide Convention, Cultural Genocide, and Prevention of Indigenous Land Takings' (2020) 21(1) *Chicago Journal of International Law* 227; Maria Giannacopoulos, 'White Law/Black Deaths: Nomocide and the Foundational Absence of Consent in Australian Law' (2020) 46(2) *Australian Feminist Law Journal* 249 <<https://doi.org/10.1080/13200968.2021.1959994>>; Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) <<https://doi.org/10.1080/07329113.2015.1016258>>; Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8(4) *Journal of Genocide* 387 <<https://doi.org/10.1080/14623520601056240>>; Alan Berman, 'Future Kanak Independence in New Caledonia: Reality or Illusion?' (1998) 34(2) *Stanford Journal of International Law* 287, 287 ('Future

of) colonial states.<sup>19</sup> Whatever form it takes, Indigenous erasure remains the unquenchable objective of colonial states. This article focuses on one of colonial erasure's many faces:<sup>20</sup> the face of criminal law.

The colonial power dynamics embedded in criminal law have been subject to increasing scholarly scrutiny over recent decades. In his work on counter-colonial criminology, decolonial criminologist Biko Agozino identifies criminology as an *inherently* colonial enterprise:<sup>21</sup> 'imprisonment with or without walls, a widening of the net of incarceration'.<sup>22</sup> Critical scholar Stephen Toth has referred to this as the 'reciprocally dependent relationship'<sup>23</sup> between colonialism and carceralism. Understood, as critical Ngati Porou Māori scholar Juan Tauri observes, as 'one of the principal colonial projects of the contemporary settler-colonial state',<sup>24</sup> the disproportionate interventions and impacts of colonial 'criminal justice' on Indigenous peoples becomes an entirely predictable phenomenon. Indigenous hyperincarceration, for example – such a long recognised phenomenon in Australia – can be understood for what it is: not an anomaly, but a predictable corollary of the colonial state's desire for Indigenous erasure. Writing of the colonial carceral project in Canada, critical scholar Efrat Arbel summarises:

Indigenous mass imprisonment is neither anomalous nor transitory. Rather, like colonialism itself, it is entrenched in the fabric of the Canadian legal system. There is nothing extraordinary about the steadily rising rates of Indigenous incarceration; they are as predictable and fixed as the colonial structures that produce them.<sup>25</sup>

Western criminological discourse offers a veneer of so-called 'justice' for the colonialist ideal of Indigenous erasure. This is true in Australia, as it is in Kanaky.

Frantz Fanon argues that contemporary colonialism's frontiers are defined by military barracks and police stations;<sup>26</sup> that 'the policeman and the soldier ... are the official, instituted go-betweens, the spokesmen of the settler and his rule of oppression'.<sup>27</sup> This article scrutinises this frontier in contemporary Kanaky. Focusing on the period between May and September 2024, this article identifies and examines the ways criminal law is being deployed by the French colonial state as a frontline mechanism to pursue Kanak erasure.

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Kanak Independence'); Hurst Hannum, 'New Developments in Indigenous Rights' (1988) 28 *Virginia Journal of International Law* 649.

19 Alfred and Cornassel (n 14).

20 Ibid 601–5.

21 Biko Agozino, 'Imperialism, Crime and Criminology: Toward the Decolonisation of Criminology' (2004) 41 *Crime, Law and Social Change* 343, 344 <<https://doi.org/10.1023/b:cris.0000025766.99876.4c>>.

22 Ibid 349.

23 Stephen A Toth, 'Colonisation or Incarceration? The Changing Role of the French Penal Colony in *Fin-de-Siecle* New Caledonia' (1999) 34(1) *Journal of Pacific History* 59, 59 <<https://doi.org/10.1080/00223349908572891>>.

24 Juan Tauri, 'The Plastic Shamans of Restorative Justice' in Chris Cunneen et al (eds), *The Routledge International Handbook on Decolonizing Justice* (Routledge, 2023) 43, 52 <<https://doi.org/10.4324/9781003176619>>.

25 Efrat Arbel, 'Rethinking the "Crisis" of Indigenous Mass Imprisonment' (2019) 34(3) *Canadian Journal of Law and Society* 437, 438–9 <<https://doi.org/10.1017/cls.2019.37>>.

26 Frantz Fanon, *The Wretched of the Earth*, tr Constance Farrington (Grove Press, 1963) 38.

27 Ibid.

Nic Maclellan, Isabelle Leblic, Isabelle Merle and Adrian Muckle have written critically and comprehensively of the colonial history of Kanaky, from its proclamation as a 'French possession' by French Rear Admiral Auguste Febvrier-Despointes in 1853 through to the institution of the *Nouméa Accord* in 1998.<sup>28</sup> Matthias Kowasch, Simon PJ Batterbury, Séverine Bouard and Eddie Wayoune Wadrawane have made valuable contributions to English-language scholarship on the more recent history of Kanaky, particularly in relation to geopolitics and the mining and military interests enmeshed with France's presence in the region.<sup>29</sup> Others, like Denise Fisher and Anaïs Duong-Pedica, have examined broader thematic narratives around France's relationship with its colonial outposts generally, and with Kanak peoples specifically.<sup>30</sup> This article builds on the research of these scholars, and others, to scrutinise how colonial power dynamics are embedded in Kanaky's French-administered 'criminal justice' system, continually 'shapeshifting', as Alfred and Corn tassel identify,<sup>31</sup> to maintain France's colonial project in Kanaky across time and space.

The remainder of this article is presented in three parts. Part II situates the 2024 attempts by France to (yet again) erase Kanak identity and sovereignty within the wider context of Kanaky's colonisation and, in particular, the recent

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- 28 See, eg, Isabelle Merle and Adrian Muckle, *The Indigénat and France's Empire in New Caledonia: Origins, Practices and Legacies* (Palgrave Macmillan, 2022) <<https://doi.org/10.1007/978-3-030-99033-6>>; Isabelle Leblic, 'Sovereignty and Coloniality in the French-Speaking Pacific: A Reflection on the Case of New Caledonia, 1980–2021' (2022) 92(1) *Oceania* 107 <<https://doi.org/10.1002/ocea.5335>> ('Sovereignty and Coloniality'); Adrian Muckle, 'Contesting Colonial Violence in New Caledonia' in Philip Dwyer and Amanda Nettelbeck (eds), *Violence, Colonialism and Empire in the Modern World* (Palgrave Macmillan, 2018) 221; Isabelle Leblic, 'Naming in Kanak Groups: Names, Relations, and Personal Identity among the Païci Kanak (Ponerihouen, New Caledonia)' (2016) 39(1–2) *Pacific Studies* 54; Adrian Muckle, 'Troublesome Chiefs and Disorderly Subjects: The *Indigénat* and the Internment of Kanak in New Caledonia (1887–1928)' (2010) 11 *French Colonial History* 131 <<https://doi.org/10.1353/fch.0.0024>> ('Troublesome Chiefs and Disorderly Subjects'); Isabelle Leblic, 'Présentation: Nouvelle-Calédonie, 150 Ans après la Prise de Possession' [Presentation: New Caledonia, 150 Years after Taking Possession] [2003] (117) *Journal de la Société des Océanistes* [Journal of the Oceanists Society] 135 <<https://doi.org/10.4000/jso.1242>>; Nic Maclellan and Jean Chesneaux, *After Moruroa: France in the South Pacific* (Ocean Press, 1998).
- 29 See, eg, Matthias Kowasch and Simon PJ Batterbury (eds), *Geographies of New Caledonia-Kanaky: Environments, Politics and Cultures* (Springer, 2024) <<https://doi.org/10.1007/978-3-031-49140-5>>; Matthias Kowasch et al., 'The Third Independence Referendum in New Caledonia: A Fallback to Colonialism?' [2022] (57) *Pacific Geographies* 11 <<https://doi.org/10.23791/571115>>; Simon PJ Batterbury, Matthias Kowasch and Séverine Bouard, 'The Geopolitical Ecology of New Caledonia: Territorial Re-ordering, Mining, and Indigenous Economic Development' (2020) 27(1) *Journal of Political Ecology* 594 <<https://doi.org/10.2458/v27i1.23812>>.
- 30 See, eg, Anaïs Duong-Pedica, 'Thinking Kanaky Decolonially' (2021) 20(2) *Artha Journal of Social Sciences* 141; Anaïs Duong-Pedica, 'Mixed-Race Kanak in "A World Cut in Two": Contemporary Experiences in Kanaky/New Caledonia' (2023) 2(1) *Journal of Critical Mixed Race Studies* 71 <<http://doi.org/10.5070/C82161755>> ('A World Cut in Two'); Duong-Pedica, 'Unsettling "We're All Mixed-Race"' (n 10); Denise Fisher, *France in the South Pacific: Power and Politics* (ANU E Press, 2013) ('*Power and Politics*'); Denise Fisher, 'The Crowded and Complex Pacific: Lessons from France's Pacific Experience' (2020) 16(1) *Security Challenges* 37; Denise Fisher, 'New Caledonia's Independence Referendum: Re-defining the Future' (2019) 54(2) *Journal of Pacific History* 202 <<https://doi.org/10.1080/00223344.2019.1600647>>.
- 31 Alfred and Corn tassel (n 14) 601–5.

so-called ‘independence referenda’. The purpose of this section is to orient Australian readers who may be unfamiliar with colonial history and contemporary colonial practice in one of our nearest Pacific neighbours. Part II also provides the context of the current so-called ‘civil unrest’ and the colonial power dynamics which underlie the accelerating criminalisation of Kanak resistance by the French colonial state. Building on this background, Part III scrutinises the deployment of ‘criminal justice’ by France as an instrument of the colonial project in the period between May 2024 (when the French National Assembly adopted a bill which would introduce voter registration changes in favour of the settler population in Kanaky)<sup>32</sup> and ‘Citizenship Day’ in September 2024 (when the National Council of Kanak High Chiefs unilaterally declared Kanaky’s independence from France).<sup>33</sup> Drawing on recent scholarship and on eyewitness reports from Indigenous Kanak leaders, activists and advocates, this section examines the weaponisation of France’s ‘White Justice’ (*Justice des Blancs*)<sup>34</sup> against Kanak peoples to repress what French authorities have referred to as an unprecedented Kanak insurrection.<sup>35</sup> A clear arc of colonial oppression emerges from this analysis; the entire sequence bears witness to

the manner by which France, through its colonial administration, deploys a repressive security arsenal that on the one hand protects the settlers on the land and their reactionary militias, and on the other, attempts to destroy the country’s Kanak independence movement.<sup>36</sup>

‘Imprisonment and incarceration’, suggests Samidoun Paris Banlieue, are the ‘weapon of choice in this overall colonial strategy’.<sup>37</sup> As analysed below, this is borne out by the evidence: between May and September 2024 alone, the equivalent of 2% of the Kanak population in Kanaky were arrested.<sup>38</sup> This article concludes by looking ahead to identify how the contours of coloniality in Kanaky are again ‘shapeshifting’ in order to maintain the French colonial objective: Kanak erasure.

32 José Francisco Cali-Tzay et al, ‘Statement of the United Nations Experts on the Rights of Kanak Indigenous People in the Non-self-governing Territory of New Caledonia and the *Nouméa Accord*’ (Statement, 20 August 2024) 3.

33 ‘Kanak Chiefs Proclaim Sovereignty over New Caledonia’s Ancestral Lands’, *Radio France Internationale* (online, 26 September 2024) <<https://www.rfi.fr/en/france/20240926-kanak-chiefs-proclaim-sovereignty-over-new-caledonia-s-ancestral-lands>>.

34 Chantal Deltenre, *Camp Est: Journal d’une Ethnologue dans une Prison de Kanaky Nouvelle-Calédonie* [Camp Est: Diary of an Ethnologist in a Prison in Kanaky, New Caledonia] (Anacharsis Éditions, 2022) 115.

35 ‘Nouvelle-Calédonie: Emmanuel Macron Demande le Retrait des Barrages “dans les Heures qui Viennent” Afin de Lever l’État d’Urgence’ [New Caledonia: Emmanuel Macron Calls for the Removal of Roadblocks “in the Coming Hours” in Order to Lift the State of Emergency], *La Dépêche* [The Dispatch] (online, 23 May 2024) 8:17am <<https://www.ladepeche.fr/2024/05/23/direct-nouvelle-caledonie-emmanuel-macron-demande-le-retour-a-la-paix-mais-aussi-au-dialogue-apres-les-emeutes-11968460.php>> (‘Calls for Removal of Roadblocks’).

36 Samidoun Paris Banlieue, ‘From Kanaky to Palestine, Resistance to Colonial Incarceration’, *Samidoun: Palestinian Prisoner Solidarity Network* (online, 19 July 2024) <<https://samidoun.net/2024/07/from-kanaky-to-palestine-resistance-to-colonial-incarceration/>>.

37 Ibid.

38 *Summary of Violations* (n 12) 23.



## II CONTEXTUALISING CRIMINAL LAW IN KANAKY

Kanaky is located less than 1,500 kilometres off the coast of Queensland. Kanaky's largest (and best-known) island, also called New Caledonia or Grande Terre, is just under 600 square kilometres – around a quarter of the size of the Australian Capital Territory ('ACT'). Common themes emerge from the colonial histories of Australia and Kanaky. Although France claimed annexure of Grand Terre in 1853, it was Lieutenant James Cook (who commanded the *Endeavour* on its first incursion onto Dharawal Country, Australia) who named Kanaky 'New Caledonia' – a reference to his Scottish homeland.<sup>39</sup> Kanaky, as Australia, was targeted by imperial powers as a site of penal colonisation. Indeed, it was Britain's 'Botany Bay Experiment'<sup>40</sup> which inspired France's penal colonisation of Kanaky.<sup>41</sup> As in Australia,<sup>42</sup> fictitious assertions of terra nullius were employed to declare Kanaky a possession of the imperial power.<sup>43</sup> And, as in Australia, Indigenous hyperincarceration is an intractable feature of Kanaky's prisons.<sup>44</sup>

Recent events in Kanaky must be understood against the backdrop of colonial French presence in the archipelago. The recent independence votes are an outworking of the commitment made by France in the 1998 *Nouméa Accord*. The agreement was signed by representatives of France, the *Rassemblement pour la Calédonie dans la Caledonia République* ('RCPR'), who wished to remain a part of France, and the *Front de Libération Nationale Kanak et Socialiste* ('FLNKS'), who sought Kanaky's independence. The *Nouméa Accord* followed years of heated, sometimes violent, disagreement between pro-independence and anti-independence groups in the archipelago,<sup>45</sup> as France intentionally and repeatedly moved to undermine both Kanak rights and Kanaky's independence movement. One of the most infamous examples in recent history, and one which led directly to the *Nouméa Accord* negotiations, was the *Ouvéa Massacre*.

In the late 1980s, the French Government declared it would hold an independence referendum in Kanaky. At the same time, France insisted that equality demanded all people who had lived in Kanaky for more than three years

39 James Cook, 'Cook's Journal: Daily Entries' (Archival Journal, 29 April 1770) <<http://southseas.nla.gov.au/journals/cook/17700429.html>>.

40 LF Fitzhardinge, 'Some "First Fleet" Reviews' (1959) 9(33) *Historical Studies: Australia and New Zealand* 85 <<https://doi.org/10.1080/10314615908595154>>.

41 See, eg, Colin Forster, *France and Botany Bay: The Lure of a Penal Colony* (Melbourne University Press, 1996) ch 1; Louis-José Barbançon, *L'Archipel des Forçats: Histoire du Bagne de Nouvelle-Calédonie (1863–1931)* [The Convicts' Archipelago: History of the Penal Colony of New Caledonia (1863–1931)] (Presses Universitaires du Septentrion [University Press of the North], 2003) bk 1 ch 1 [34]–[36].

42 See *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ('Mabo').

43 Alan Berman, 'The Noumea Accords: Emancipation or Colonial Harness' (2001) 36(2) *Texas International Law Journal* 277, 283 ('Emancipation or Colonial Harness').

44 Deltenre (n 34) 34, 102; Yoram Mouchenik et al, 'Quelle Prise en Charge pour les Populations Autochtones du Pacifique sous Main de Justice?' [What Support is Available for the Indigenous Peoples of the Pacific in the Hands of Justice?] (Research Paper No 54, Cahiers d'Etudes Pénitentiaires et Criminologiques [Penitentiary and Criminological Study Notebooks], March 2021) 1–2.

45 See Jean-Marie Tjibaou, *Kanaky*, tr Helen Fraser and John Trotter (Pandanus Books, 2005); Berman, 'Future Kanak Independence' (n 18).

be included in the electoral roll.<sup>46</sup> These assertions followed decades of concerted efforts by the French Government to encourage ‘mass immigration of Metropolitan French citizens’<sup>47</sup> to the archipelago in order to maintain and improve the so-called ‘demographic ratio between communities’.<sup>48</sup> French control of the electoral roll, therefore, would have ensured a victory for France and the loyalist movement. The pro-independence *FLNKS* boycotted the referendum as a ‘sham’.<sup>49</sup>

In the months following the sham referendum, the French Government banned protest demonstrations in Kanaky and established a ‘highly visible police and military presence’.<sup>50</sup> More than 8,000 French military officers and police were deployed across the archipelago, and peaceful demonstrations were violently dispersed by riot squads.<sup>51</sup> At the urging of loyalist *RCPR* representatives, the French Government declared the pro-independence *FLNKS* terrorists.<sup>52</sup> Kanak independence leaders were arrested and forcibly deported from Kanaky to France to face the ‘criminal justice’ system there.<sup>53</sup> In the midst of the crisis, a group of Kanak independence activists tried to take over a police station in Ouvéa; during the attempt, three French military police were killed and another 23 were taken hostage.

The Ouvéa crisis led to a major military mobilisation on the island and the torture and maltreatment of villagers to find the location of the hostages. Djubelli Wea, a Protestant theology student, pastor and independence activist in Gossanah, was dragged from his sick bed, questioned about the location of the hostages and tied to a tree. His father, beaten by French troops, later died.<sup>54</sup>

Two weeks of negotiation between those holding the hostages, the *FLNKS*, and the French Government secured the hostages’ release. However, wishing to deter future ‘insurrections’, the French Government launched *Opération Victor*.<sup>55</sup>

On 5 May 1988, the French government launched a military attack, with the storming of the cave [where the hostages had been held] by navy commandos, members of the ... action service of the DGSE [*Direction Générale de la Sécurité Extérieure*, or French Secret Service] ... and elite police units ... Nineteen Kanak activists were killed, with at least three executed after surrendering. Two French soldiers also died in the attack. The Kanak leader, Alphonse Dianou, a former theology student, was shot in his knee during capture, and left to die. Twenty-nine other men from around Ouvéa, including Djubelli Wea, were arrested and transported to jail in Paris.<sup>56</sup>

46 Berman, ‘Future Kanak Independence’ (n 18) 322.

47 Tate Augusta LeFevre, ‘Creating Kanaky: Indigeneity, Youth and the Cultural Politics of the Possible’ (PhD Thesis, New York University, 2013) 79–80, discussing a letter written by French Prime Minister Pierre Messmer.

48 Ibid.

49 Berman, ‘Future Kanak Independence’ (n 18) 322.

50 Ibid 323.

51 Maclellan and Chesneaux (n 28) 162, 165.

52 Alban Bensa and Eric Wittersheim, ‘Jean Guiart and New Caledonia: A Drama of Misrepresentation’ (1998) 33(2) *Journal of Pacific History* 221, 221 <<https://doi.org/10.1080/00223349808572871>>.

53 Denise Fisher, ‘New Caledonia: France’s Way or the Pacific Way?’, *The Interpreter* (online, 26 June 2024) <<https://www.lowyinstitute.org/the-interpreter/new-caledonia-france-s-way-or-pacific-way>>.

54 Maclellan and Chesneaux (n 28) 166.

55 LeFevre (n 47) 90.

56 Maclellan and Chesneaux (n 28) 166.



All the elements of the colonial playbook so clearly present in these events reprise in Part III of this article, when examining the most recent so-called 'independence votes' in Kanaky, and the events which have followed.

The *Nouméa Accord* emerged against this sociopolitical colonial backdrop. The *Ouvéa Massacre* provided the final catalyst for a series of accords between the French Government and *FLNKS* and *RCPR* representatives – agreements which would ultimately culminate in the *Nouméa Accord* and provide the framework for the independence votes which have been taking place in Kanaky over recent years. A deeply political document, in some ways the *Nouméa Accord* epitomises what Aboriginal legal scholar of the Tangane-kald, Meintang-k and Boandik peoples Irene Watson has referred to as colonialism's 'illusion of recognition':<sup>57</sup> a 'giving with one hand and taking with the other'.<sup>58</sup> The World March of Women cogently summarise:

France, historically a colonial empire, has not completed a single peaceful decolonial process. Today, faced with the rapidity and intensity of colonial repression, we now see that the entire process, including the *Nouméa Accords*, was a fundamentally hypocritical colonial manoeuvre aiming to extinguish Kanak revolt. It was a process of pacification aiming to serve their interests and further the process of settler colonialism.<sup>59</sup>

While the *Nouméa Accord* acknowledges the 'dark side of the colonial period', it simultaneously insists French colonial presence in the region is 'not entirely devoid of light'.<sup>60</sup> The *Nouméa Accord* states that 'treaties signed with the customary authorities in 1854 and subsequent years did not constitute well-balanced agreements' but were 'unilateral acts',<sup>61</sup> yet (erroneously) asserts that France taking possession of Grande Terre was 'in accordance with the conditions of international law recognized at that time by the nations of Europe and the Americas'.<sup>62</sup> (As the British did in Australia,<sup>63</sup> France falsely asserted the doctrine of terra nullius to claim Kanaky as 'land belonging to no one'.)<sup>64</sup> The *Nouméa Accord* notes the violent French repression of Kanak resistance,<sup>65</sup> yet insists that 'new relations with France' and a 'common destiny' with non-Kanak peoples who have 'acquired the legitimate right to live' on confiscated Kanak lands is the pathway forward:<sup>66</sup> 'The time for colonization was in the past. The present is the time for sharing and realignment. The future should be the time for expressing an identity in a common destiny.'<sup>67</sup> Concepts of Kanak sovereignty, self-determination, independence and freedom are wholly absent from the *Nouméa Accord*.

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57 Watson (n 18) 94.

58 Ibid.

59 'World March of Women Letter' (n 13) 6.

60 Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *New Caledonia: Working Paper Prepared by the Secretariat*, UN Doc A/AC.109/2114 (3 June 1998) annex Preamble para 3 ('Working Paper').

61 Ibid annex Preamble para 1.

62 Ibid.

63 See *Mabo* (n 42).

64 Duong-Pedica, 'A World Cut in Two' (n 30) 75.

65 *Working Paper* (n 60) annex Preamble para 3.

66 Ibid annex Preamble paras 3–4.

67 Ibid annex Preamble para 4.

In addition to its preambular provisions, the *Nouméa Accord* outlined concrete changes to the original pathway to Kanaky's independence from France, which had been laid out in earlier agreements.<sup>68</sup> The *Nouméa Accord* purported to herald a new, 20-year 'transition to sovereignty'<sup>69</sup> period during which a 'citizenship of New Caledonia' would be developed.<sup>70</sup> This new 'Caledonian' identity is distinct from that of Kanak peoples; indeed, the text of the agreement requires that *any* of Kanaky's possible futures be grounded in the 'common destiny' of the settler population and Kanak. This 'transition to sovereignty' period concluded in 2018 with the undertaking of the first of three independence consultations. These continue to be popularly referred to in English-language media as 'referenda'. However, it is noteworthy (and France has stressed), that this series of votes were 'independence consultations' rather than referenda: that is, the declaration of Kanaky's independence would still need be an act of the French Parliament, even where votes for Kanaky's independence from France surpassed the required 50%.<sup>71</sup>

The first consultation was held on 4 November 2018, the second on 4 October 2020, and the third on 12 December 2021. The trajectory of the consultations was a positive one for the pro-independence movement in Kanaky. A 50% 'Yes' vote in any one of the three consultations would be the catalyst for an irreversible transfer of sovereign powers from France to Kanaky. In the first consultation in 2018, 43.3% of voters were in favour of Kanaky's independence from France; in 2020, that figure rose to 46.7%.<sup>72</sup> With the votes planned at 2-year intervals, the third and final independence vote was scheduled to take place in November 2022. This timeline, however, was not to France's taste.

In May 2021, barely six months after the previous independence vote, France developed and strategically disseminated a confidential paper highlighting the consequences of Kanaky voting to become independent.<sup>73</sup> In mid-2021, France also invited selected political representatives from Kanaky to a meeting in France to lay out the consequences for the archipelago in the event of voting 'Yes' to independence from France.<sup>74</sup> While the tone of the *Nouméa Accord* had positioned France as an impartial arbiter between the *FLNKS* and *RCPR*, the 'Discussion Paper' under review was clearly skewed in favour of the interests of the French colonial state maintaining control over Kanaky. More than three quarters of the

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68 See *ibid* 2–7 [6], [10]–[15].

69 *Ibid* annex Preamble para 5.

70 *Ibid*.

71 Ministère des Outre-Mer [Ministry of the Overseas], 'Discussions sur l'Avenir Institutionnel de la Nouvelle Calédonie: Les Conséquences Du « Oui » et du « Non »' [Discussions on the Institutional Future of New Caledonia: The Consequences of "Yes" and "No"] (Discussion Paper) 5 ('Discussions on the Institutional Future of New Caledonia').

72 Kowasch et al (n 29) 11.

73 'Discussions on the Institutional Future of New Caledonia' (n 71).

74 Denise Fisher, 'France Precipitates Abrupt End to the Nouméa Accord', *The Strategist* (Blog Post, 20 July 2021) <<https://www.aspistrategist.org.au/france-precipitates-abrupt-end-to-noumea-accord-in-new-caledonia/>>; Denise Fisher, 'New Caledonian Independence Leaders Challenge France Over Final Referendum Date', *The Strategist* (Blog Post, 22 October 2021) <<https://www.aspistrategist.org.au/new-caledonian-independence-leaders-challenge-france-over-final-referendum-date/>>.

report was dedicated to reinforcing any potential negative impacts of Kanaky voting 'Yes' to independence.<sup>75</sup>

Following the meeting, France's then-Minister of the Overseas Sébastien Lecornu announced that France had unilaterally determined it would hold the third independence consultation almost a year early, in December 2021. The move delighted French loyalists, who were hoping to undermine the momentum of the independence vote.<sup>76</sup> Speaking of the decision, Lecornu acknowledged: 'This date is not the subject of a consensus ... It's not an agreement. It's an initiative that we are taking within the strict framework of the powers of the French State'.<sup>77</sup> Writing for the French newspaper *Le Monde*, a group of experts in 'Caledonian' history and society described France's move as not only a political and moral mistake, but a step backwards.<sup>78</sup> The full impact of this 'backward step' was exacerbated in September 2021, when the COVID-19 Delta variant arrived on Kanaky's shores.

Kanaky's health protocols were largely successful in containing outbreaks of COVID-19 in Kanaky during 2020. The first case of COVID-19 in Kanaky was recorded by health authorities on 18 March 2020 in a couple arriving in Kanaky from France. Barely two weeks and just 18 cases later (14 imported cases, two flight attendants, and two close contacts), the last case of COVID-19 was recorded on 4 April 2020.<sup>79</sup> This situation largely remained until the first recorded community case of COVID-19 was identified in Kanaky on 6 September 2021. The disaster which followed has been compared to a fatal plane crash.<sup>80</sup>

Between 6 September and the third independence consultation on 12 December, more than 12,000 COVID cases were recorded in Kanaky.<sup>81</sup> COVID-related death rates soared, disproportionately impacting Kanak communities.<sup>82</sup>

75 Leblic, 'Sovereignty and Coloniality' (n 28) 125; *Ministerial Committee to New Caledonia Report* (n 2) 8.

76 Leblic, 'Sovereignty and Coloniality' (n 28) 115.

77 Translated in Nic MacLennan, 'Third Time Lucky in New Caledonia?', *Inside Story* (online, 15 June 2021) <<https://insidestory.org.au/third-time-lucky-in-new-caledonia/>>, citing Eline Ulysse, 'Nouvelle-Calédonie: Le Troisième Référendum d'Autodétermination Aura Lieu le 12 Décembre 2021' [New Caledonia: Third Self-Determination Referendum to Take Place on 12 December, 2021], *Outremers 360°* (online, 2 June 2021) <<https://outremers360.com/bassin-pacifique-appli/nouvelle-caledonie-le-troisieme-referendum-dautodetermination-aura-lieu-le-12-decembre-2021>>, reporting on a speech delivered by Sébastien Lecornu.

78 Collectif de Spécialistes de l'Histoire et de la Société Calédoniennes [Collective of Experts in Caledonian History and Society], 'Respectons le Deuil Kanak, Reportons le Référendum en Nouvelle-Calédonie' [Let's Respect Kanak Mourning, Let's Postpone the Referendum in New Caledonia], *Le Monde* (online, 23 November 2021) <[https://www.lemonde.fr/idees/article/2021/11/23/respectons-le-deuil-kanak-reportons-le-referendum-en-nouvelle-caledonie\\_6103237\\_3232.html](https://www.lemonde.fr/idees/article/2021/11/23/respectons-le-deuil-kanak-reportons-le-referendum-en-nouvelle-caledonie_6103237_3232.html)>.

79 Jad Kerbaj et al, 'COVID-19: The New Caledonia Experience' (2020) 71(16) *Clinical Infectious Diseases* 2279, 2280 <<https://doi.org/10.1093/cid/ciaa600>>.

80 Kowasch et al (n 29) 19.

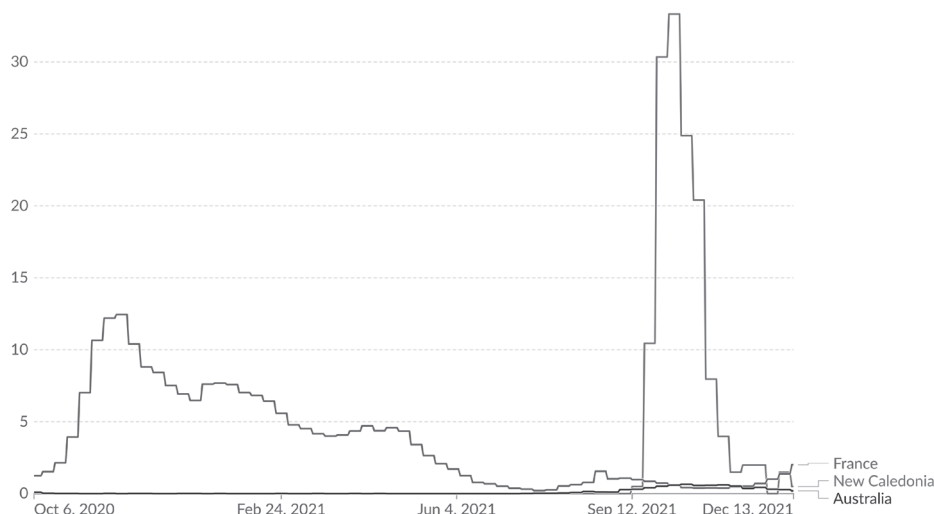
81 *Ministerial Committee to New Caledonia Report* (n 2) 3 [16].

82 *Ibid* 1 [6].

## Daily new confirmed COVID-19 deaths per million people

7-day rolling average. Due to varying protocols and challenges in the attribution of the cause of death, the number of confirmed deaths may not accurately represent the true number of deaths caused by COVID-19.

Our World  
in Data



Data source: World Health Organization (2024); Population based on various sources (2024)

CC BY

Figure 1: Comparing the 7-day rolling average of deaths from COVID-19, per 1,000,000 people for the period between the second and third independence referenda in Kanaky (France, Kanaky, Australia)<sup>83</sup>

The Kanak Customary Senate (*Sénat Coutumier*) – itself established under the *Nouméa Accord*<sup>84</sup> – declared an official 1-year Kanak customary mourning period, commencing on 6 September 2021.<sup>85</sup>

The protests of Kanak peoples, their allies, and their legal and political representatives against France continuing to pursue the third independence consultation in the midst of a health disaster in Kanaky were ignored by France.<sup>86</sup> In late 2021, lawyer Vincent Brengarth made submissions to the French Council of State (*Conseil d'État*) on behalf of 149 largely Kanak applicants,<sup>87</sup> arguing the third consultation was fundamentally flawed and did not adhere to the principles of freedom of expression and equal suffrage prescribed by French law.<sup>88</sup> The applicants sought a postponement of the consultation until October 2022, after the officially

83 Edouard Mathieu et al, 'Coronavirus (COVID-19) Deaths', *Our World in Data* (Web Page, 2020) <<https://ourworldindata.org/covid-deaths>>.

84 *Working Paper* (n 60) annex Preamble para 5.

85 *Ministerial Committee to New Caledonia Report* (n 2) 7 [32].

86 *Ibid.*

87 Vincent Brengarth, 'Nouvelle-Calédonie: Quand le Conseil d'État Rejoint la Réticence du Gouvernement à La Pleine Souveraineté' [New Caledonia: When the Council of State Joined the Government's Reticence toward Full Sovereignty] [2022] (May) *Revue des Droits de l'Homme* [Human Rights Review] 1, 3 [8].

88 *Ibid* 3–4 [8]–[14].

declared 12-month period of Kanak mourning had concluded.<sup>89</sup> The Council of State – the French colonial state's highest administrative court – refused. Writing later of the court's decision, Brengarth identified the same 'illusion of recognition'<sup>90</sup> so cogently described by Watson: the incredible paradox (*'l'incroyable paradoxe'*)<sup>91</sup> of the French colonial state, on the one hand expressing support for the rights of Indigenous peoples, and on the other, undertaking an independence vote in a manner which not only fundamentally undermined the rights of Kanak peoples, but *ensured* Kanak non-participation. Speaking of the third consultation, Kanak student and pro-independence decolonial feminist Marylou Mahe reflected: 'I have the impression that my culture is being ignored, that my Kanak identity is being denied. We are being set back more than 30 years, to a time when our voice did not count. It is as if we do not exist.'<sup>92</sup>

At the height of the COVID-19 pandemic in Kanaky and during a period of cultural mourning for Kanak peoples, France conducted its unilaterally declared consultation on Kanaky's independence. The Pacific Islands Forum, whose presence as an observer of the consultation was welcomed by both the French and New Caledonian Governments, observed that:

[T]he referendum was not carried out in the spirit of the *Nouméa Accord*, which empowers the status of Kanak identity and custom in New Caledonia and France. The Committee was regretful that key principles of the Accord such as fellowship, humility and consensus building, which had guided relatively peaceful and consensual exchanges between the parties for over two decades, had regressed. The Committee does not believe that the result accurately reflects the will of registered voters. It was a referendum on self-determination that took place *without* the majority of first peoples of New Caledonia and their supporters.<sup>93</sup>

Further, the Pacific Islands Forum decried the overwhelming reinforcement of French law enforcement, both in the lead up to the consultation and at polling places on 12 December. Recalling Kanaky has a total population of around 270,000 people,<sup>94</sup> more than 1,800 additional French law enforcement personnel were sent to the archipelago to supplement the security forces already based in Kanaky.<sup>95</sup> This included police, *équipes régionales d'intervention et de sécurité* (units specialised to respond to penitentiary issues), French military personnel, *gendarmes* (French military police), and *Formations Militaires de la Sécurité Civile* (French military personnel trained in responding to natural and technological disasters).<sup>96</sup> Observers reported that in Kanaky's capital, Nouméa, French law enforcement personnel 'equipped with

89 Ibid 3 [8].

90 Watson (n 18) 94.

91 Brengarth (n 87) 5 [19].

92 Marylou Mahe, 'Opinion: The New Caledonian Independence Referendum Is Undemocratic', *Radio New Zealand* (online, 11 December 2021) <<https://www.rnz.co.nz/news/pacific/457720/opinion-the-new-caledonian-independence-referendum-is-undemocratic>>.

93 *Ministerial Committee to New Caledonia Report* (n 2) 1–2 [6] (emphasis in original).

94 '2019 Population Census' (n 8).

95 *Ministerial Committee to New Caledonia Report* (n 2) 10 [52]; Nic Maclellan, 'To Vote or Not to Vote? Debating a New Caledonia Referendum Delay', *Islands Business* (online, 19 October 2021) <<https://islandsbusiness.com/news-break/new-caledonia-referendum/>>.

96 *Ministerial Committee to New Caledonia Report* (n 2) 10 [52].

firearms [were] stationed at all major entry points into the city in what seemed [like a] deliberate [effort] to dissuade any attempt at disrupting the poll'.<sup>97</sup>

Military vehicles were also parked in plain sight, or patrolling the streets of Nouméa. The Committee observed a police unit stopping a vehicle to remove a Kanak flag it was flying.

Members of the Committee have seldom witnessed such a display of armed force during a referendum/election, and heard from its consultations that people were scared. While the Committee acknowledges that safety is a priority and that visibility of security personnel can be a deterrent to violence, the presence of state coercive forces carries with it the potential to intimidate. ... The Committee believes that such displays of force will be counterproductive in the post-referendum period and should be minimised or avoided altogether.<sup>98</sup>

On 12 December 2021, the third French-administered independence consultation took place in Kanaky. The abstention rate was high: more than half of voters in Kanaky (56.13%) abstained from voting in the final consultation compared with a 14.31% abstention rate in the previous consultation in 2020, and an abstention rate of 18.99% for the first consultation in 2018.<sup>99</sup> Most voters were French loyalists. When asked 'Do you want New Caledonia to accede to full sovereignty and become independent?', 96.5% of valid ballots voted 'No'.<sup>100</sup> That evening, Macron triumphantly declared that New Caledonia had decided to stay part of France.<sup>101</sup> The measures used to secure this result – a result so profoundly in French interests – reprise with the French colonial playbook. It is France's perpetual duplicity in relations with Kanak peoples, both during and following the 12 December 'consultation', which are the direct cause of the events of 2024.<sup>102</sup>

### III COLONIAL CRIMINAL LAW IN KANAKY: PAST AND PRESENT

That colonial criminal law has been deployed in Kanaky's past to physically and legally erase Kanak peoples is indisputable.<sup>103</sup> Due to the inherently 'shapeshifting'<sup>104</sup> nature of colonialism, tracing the recruitment of criminal law into the colonial project in some jurisdictions can present challenges. The coloniality of French criminal law in Kanaky, however, is enmeshed in the very fabric of French presence in the region.<sup>105</sup>

97 Ibid 11 [54].

98 Ibid 11 [54]–[56].

99 *Summary of Violations* (n 12) 9.

100 *Ministerial Committee to New Caledonia Report* (n 2) 1 [5].

101 'Macron Hails New Caledonia's Rejection of Independence' (n 1).

102 See 'Summary of Violations' in *Summary of Violations* (n 12). See also at 10.

103 See Part I above.

104 See Alfred and Cornetassel (n 14).

105 Lisa N Billington, 'A Response to Colonial Carceral Control: Conceptualising a Decolonial Approach to Self-Determination' (PhD Thesis, University of Technology Sydney, 2022) 81–99 <<https://doi.org/10453/172014>>.



By the mid-1800s, France's attempts at penal colonisation in other parts of the world were failing. Transforming Kanaky into a penal colony promised France not only much-needed labour on the archipelago, but also the 'conquering hordes'<sup>106</sup> required to minoritise and overwhelm the Kanak population.<sup>107</sup> Toth, in his scholarship on France's use of penal colonisation in Kanaky, notes that convicts sent to Kanaky were 'agent[s] in the service of France's larger colonial project. Through his labour he would pay his debt to the mother country while simultaneously increasing the domain of her rule'.<sup>108</sup> Indeed, French naval officer Captain Charles Guillain (who was destined to become Kanaky's first Governor), argued that the only way Kanaky could be of any value to France would be through the archipelago's transformation into a penal colony.<sup>109</sup>

The earliest French-administered census in Kanaky recorded just 432 persons of European descent.<sup>110</sup> At that time, there were estimated to be at least 50,000 Kanak in Kanaky.<sup>111</sup> By the turn of the century, France had shipped more than 30,000 convicts and political exiles to the islands.<sup>112</sup> By this time, Kanaky was being described as 'the Land of the Chain, of the Lash, and the Guillotine, a hell upon earth, a paradise of Nature transformed by despotism into an inferno of crime and cruelty, and, above all ... the Land of Banishment'.<sup>113</sup>

Initially a repository for France's convict colonists (*forçats-colons*),<sup>114</sup> Kanaky's penal settlements soon began to overflow with Kanak peoples. In 1886 the *Indigénat* entered into force in Kanaky, introducing to the archipelago a French-developed, French-administered and French-enforced 'regime of exception'.<sup>115</sup> The *Indigénat* applied *only* to Kanak. It criminalised Kanak leaving their French-delineated 'reserve' lands, introduced Kanak-specific taxes, empowered colonial administrators to appoint 'chiefs' of French-delineated, 'legally fictitious'<sup>116</sup> *tribus*, and required Kanak to provide labour for the colonial project.<sup>117</sup> For infractions, 'administrators could impose fines (of up to 100 francs) and prison sentences (of up to 15 days) without recourse to the civil or common law jurisdictions'.<sup>118</sup>

106 Biko Agozino, *Counter-Colonial Criminology: A Critique of Imperialist Reason* (Pluto Press, 2003) 35 <<https://doi.org/10.2307/j.ctt18fsbt7>> ('Counter-Colonial Criminology').

107 See Barbançon (n 41) bk 1 ch 2 [82]–[94].

108 Toth (n 23) 59.

109 See Barbançon (n 41) bk 1 ch 2 [88].

110 Fisher, *Power and Politics* (n 30) 30.

111 Isabelle Merle and Marine Coquet, 'The Penal World in the French Empire: A Comparative Study of French Transportation and Its Legacy in Guyana and New Caledonia' (2019) 47(2) *Journal of Imperial and Commonwealth History* 247, 254 <<https://doi.org/10.1080/03086534.2019.1605706>>.

112 Ibid 256.

113 George Chetwynd Griffith, *In an Unknown Prison Land: An Account of Convicts and Colonists in New Caledonia with Jottings Out and Home* (Hutchinson & Co, 1901) 83.

114 Clare Anderson, 'Introduction: A Global History of Convicts and Penal Colonies' in Clare Anderson (ed), *A Global History of Convicts and Penal Colonies* (Bloomsbury Publishing, 2018) 8.

115 Gregory Mann, 'What Was the *Indigénat*? The "Empire of Law" in French West Africa' (2009) 50(3) *Journal of African History* 331, 333 <<https://doi.org/10.1017/S0021853709990090>>.

116 Berman, 'Emancipation or Colonial Harness' (n 43) 279.

117 Fisher, *Power and Politics* (n 30) 30.

118 Muckle, 'Troublesome Chiefs and Disorderly Subjects' (n 28) 132.

The *Indigénat* remained in place in Kanaky until 1946.<sup>119</sup> It was one of the most important elements in the French colonial administration of Kanak peoples over almost a century of colonial aggression. The *Indigénat* simultaneously vested judicial and administrative power in colonial administrators, criminalising multiple, overlapping elements of Kanak sovereignty, identity and resistance. The regime sanctioned ‘swift punishments for any challenge, real or perceived, to their personal authority [that of colonial administrators] and that of the colonial state’.<sup>120</sup> Recalling Tauri’s assertion that colonial ‘criminal justice’ systems are also ‘one of the principal colonial projects of the *contemporary* settler-colonial state’,<sup>121</sup> it is unsurprising this colonial-carceral reciprocity persists beyond these annals of history.

Most (if not all) Australians are aware of the disproportionate impact of Anglo-Australian criminal law on Aboriginal and Torres Strait Islander peoples. Since the 1980s, when the *Royal Commission into Aboriginal Deaths in Custody* (‘*Royal Commission*’) was convened, Indigenous hyperincarceration has been recognised as an intractable feature of the Anglo-Australian ‘criminal justice’ system. The levels of Indigenous hyperincarceration, which were so shocking to the public in 1991 when the *Royal Commission* tabled its report in Parliament, are dwarfed by today’s statistics. In 1999, Australian Corrective Services reported that the Indigenous incarceration rate at the turn of the century was 1,790 per 100,000 of the adult Aboriginal and Torres Strait Islander population.<sup>122</sup> Now, a quarter of a century later, Aboriginal and Torres Strait Islander people are incarcerated at a rate of 2,651 per 100,000 Indigenous adults – almost 13 times the national prison population rate.<sup>123</sup> As familiar as Australians may be with such statistics, few of us are as familiar with the ways this colonial-carceral reciprocity manifests beyond Australia’s borders.<sup>124</sup>

Even before the events of 2024, Kanak people were profoundly overrepresented in Kanaky’s French-administered ‘criminal justice’ system.<sup>125</sup> Kanak represent

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119 See Merle and Muckle (n 28) ch 9.

120 Mann (n 115) 334.

121 Tauri (n 24) 52 (emphasis added).

122 Australian Bureau of Statistics, *Corrective Services, Australia, September Quarter 1999* (Catalogue No 4512.0, 21 December 1999) 5 <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4512.0Sep%201999?OpenDocument>>.

123 ‘Corrective Services, Australia: June Quarter 2024’, *Australian Bureau of Statistics* (Web Page, 19 September 2024) <<https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/jun-quarter-2024>>.

124 See, eg, Lisa N Billington, ‘Colonial Goals through Colonial Gaols: The Imperative of Indigenous Self-Centred Self-Determination for Indigenous Decarceration’ (2024) 27(1) *Law Text Culture* 85 <<https://doi.org/10.14453/ltc.500>> (‘Colonial Goals through Colonial Gaols’).

125 See, eg, James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples: The Situation of Kanak People in New Caledonia, France*, UN Doc A/HRC/18/35/Add.6 (23 November 2011) 14 [49] (‘*Report of the Special Rapporteur*’); Congrès Populaire Coutumier Kanak [Kanak Customary People’s Congress], *Rapport et Recommandation au Conseil des Droits de l’Homme en Prévision de l’Examen Périodique Universel de la France* [Report and Recommendation to the Human Rights Council in Anticipation of the Universal Periodic Review of France] (Report, 2012).

41.2% of Kanaky's total population,<sup>126</sup> yet between 90 and 95% of the prison population,<sup>127</sup> and up to 99% of the youth detainee population.<sup>128</sup> Kanaky's prison population rate is almost double that of France,<sup>129</sup> despite crime rates being comparable:

While the crime rate in New Caledonia is no higher than in France, the rate of convictions is higher, according to prison authorities, indicating a troubling tendency by the judiciary in New Caledonia to incarcerate offenders at a higher rate or impose harsher sentences.<sup>130</sup>

Prison conditions in Kanaky have also long been the subject of international condemnation. Up until 2023, Kanaky had one institutional prison: *Camp Est* (East Camp). For decades, *Camp Est* has been the 'shame of the Republic'.<sup>131</sup> Self-harm is endemic among Kanak detainees, and suicides are not uncommon.<sup>132</sup> The father of one Kanak prisoner who died by suicide denounced the racism entrenched in Kanaky's so-called 'criminal justice' system and its inherent opposition to '*la vie en tribu*'<sup>133</sup> – the 'tribal life'.

The *Yengo v France* case decided in 2015 before the European Court of Human Rights drew international attention to the degrading conditions of *Camp Est*: overcrowding, toilet facilities embedded in the floors of showers, sewerage which would overflow the shower on a regular basis and soak inmates' mattresses.<sup>134</sup> The 2019 report from the *Contrôleur Général des Lieux de Privation de Liberté* (Chief Inspector of Places of Deprivation of Liberty) found the conditions in *Camp Est* remained 'precarious, degraded and unhealthy':<sup>135</sup>

Two-thirds of the cells in the institution are made up of [shipping] containers occupied by more than 330 people. Throughout the prison complex, the cell windows are screened, providing little visibility or natural light, while the lack of ventilation causes extreme heat. Hygiene is unsatisfactory, sheets are changed only once a month at best, most often every two months, and some prisoners do not have access to washing machines for their personal laundry. ... In the remand wing, there are regular sewage backups, there is no system to ensure privacy in the sanitary facilities, and the cells are always dark. The minors' wing, due to lack of upkeep, offers undignified detention conditions with unhygienic sanitary facilities and degraded partitions. ... These degrading detention conditions are aggravated by prison overcrowding. On the day of the inspection, 90 people were sleeping on mattresses on the floor. In the remand wing, out of 35 cells, which were nonetheless equipped with bunk beds, 12 had one mattress on the floor and 21 had two. While

126 'Une Mosaïque Pluriethnique' [A Multi-Ethnic Mosaic], *Institut de la Statistique et des Études Économiques Nouvelle-Calédonie* [Institute of Statistics and Economic Studies (New Caledonia)] (Web Page, 2019) <<https://www.isee.nc/population/recensement/communautes>>.

127 Mouchenik et al (n 44) 2; Deltenre (n 34) 34, 102.

128 *Report of the Special Rapporteur* (n 125) 16 [58].

129 Helen Fair and Roy Walmsley, *World Prison Population List: Fourteenth Edition* (Report, 2024) 13, 16.

130 *Report of the Special Rapporteur* (n 125) 16 [58]. See also *Summary of Violations* (n 12) 23.

131 'The State Invests 82 Million Dollars in a Prison', *The French Pacific Journal* (online, 24 February 2024) <<https://www.pacific-journal.com/area/the-state-invests-82-million-dollars-in-a-prison/>>.

132 See, eg, Deltenre (n 34).

133 *Ibid* 11.

134 *Yengo v France* (European Court of Human Rights, Chamber, Application No 50494/12, 21 May 2015) [8]–[9].

135 Adeline Hazan, *Le Contrôleur Général des Lieux de Privation de Liberté: 2019 Annual Report* [Chief Inspector of Places of Deprivation of Liberty: 2019 Annual Report] (Report, 2019) 72.

the legislation provides for individual cells for persons imprisoned in mixed institutions, as is applied in metropolitan France, all the cells in the detention centre wings and the pre-release wing are double cells; in the open detention centre, one-third of the cells have a mattress on the floor. In addition, the times spent in cells are particularly long. People are kept in overcrowded cells from 5 pm to 7 am, i.e. for 14 hours, which exceeds the maximum time provided for by the regulations. In the absence of cultural activities, training or employment, prisoners are also kept in cells for a large part of the day, even for up to 22 hours.<sup>136</sup>

In his 2011 *Report on the Situation of Kanak People in New Caledonia, France*, then-Special Rapporteur on the Rights of Indigenous Peoples James Anaya observed that in Kanaky, there are ‘no Kanak lawyers, judges ... police chiefs’.<sup>137</sup> With this situation largely unchanged,<sup>138</sup> it is unsurprising Kanak prisoners report a profound sense of being under the thumb of French authorities.<sup>139</sup> Such was the situation prior to the commencement of the 2024 ‘civil unrest’. In April 2024, Kanaky’s prisons warehoused 587 persons<sup>140</sup> – a prison population rate of 199 per 100,000.<sup>141</sup> With an official capacity of 390 persons, the prison occupancy rate in Kanaky was already at 150%.<sup>142</sup> In May 2024, that changed.

On 15 May 2024, in the early hours of the morning and thousands of kilometres away from Kanaky in Metropolitan France, the French Parliament’s Lower House (the French National Assembly) voted to impose changes to voter registration criteria in Kanaky in favour of the French settler (*caldoche*)<sup>143</sup> population. If successfully implemented, this legislation – combined with other French initiatives secreted in the ‘Martyr’ documents<sup>144</sup> (sometimes dubbed the ‘Marty Project’)<sup>145</sup> – would effectively dismantle key protections for Kanak peoples guaranteed by the *Nouméa Accord*.<sup>146</sup> As the United Nations Experts on the Rights of Kanak Indigenous People in the Non-Self-Governing Territory of New Caledonia and the *Nouméa Accord* stated:

In all such processes, the basic rights to participation, consultation and free, prior and informed consent of the Kanak Indigenous People and customary institutions clearly have not been respected. In addition, the attempt to dismantle the *Nouméa Accord*, an Accord which brought back peace after years of bloody conflict

136 Ibid 72–3.

137 *Report of the Special Rapporteur* (n 125) 15–16 [56].

138 *Summary of Violations* (n 12) 12.

139 Deltenre (n 34) 141.

140 Fair and Walmsley (n 129) 16.

141 Ibid.

142 ‘New Caledonia (France)’, *World Prison Brief* (Web Page, 1 April 2025) <<https://www.prisonstudies.org/country/new-caledonia-france>>.

143 Corinne David-Ives, ‘Atai’s Return to New Caledonia: Reconciliation Politics and the Embarrassing Legacy of Colonial Anthropology’ (2017) 5(2) *Journal of New Zealand and Pacific Studies* 175, 176 <[https://doi.org/10.1386/nzps.5.2.175\\_1](https://doi.org/10.1386/nzps.5.2.175_1)>.

144 See Françoise Tromeur, ‘Avenir Institutionnel: NC la 1ère Dévoile le Projet d’Accord Proposé par l’Etat dans le Document “Martyr”’ [Institutional Future: NC the 1st Unveils the Draft Agreement Proposed by the State in the “Martyr” Document], *FranceInfo* (online, 14 September 2023) <<https://la1ere.francetvinfo.fr/nouvellecaledonie/avenir-institutionnel-nc-la-1ere-devoile-le-projet-d-accord-propose-par-l-etat-dans-le-document-martyr-1428092.html>>.

145 Cali-Tzay et al (n 32) 3.

146 See *ibid*.

during which more than 90 people died, undermines the integrity of the overall decolonization process.<sup>147</sup>

As noted in Part II of this article, the colonial strategy to redraw the lines of democracy in Kanaky to favour French colonial interests is hardly new. Again in 2024, the composition of Kanaky's electoral roll was firmly in the sights of the French colonial state: the French National Assembly voted 351:153 in favour of amending *La Constitution du 4 Octobre 1958* (the French Constitution of 4 October 1958) to unfreeze the electoral rolls in Kanaky and enable the reconstitution of the electorate in favour of French colonial interests. Again, Kanak resisted.

There are conflicting reports of events in Kanaky, both leading up to and following the French National Assembly vote in 2024. That France deployed a massive military presence to the archipelago is undisputed. That Kanak were protesting France's latest attempts to 'recolonise' Kanaky is also clear. That violence ensued is undisputed. France characterised Kanak protests and resistance as an unprecedented insurrection.<sup>148</sup> The recruitment of colonial criminal law to serve the shapeshifting interests of the colonial project in Kanaky was immediate, overt and comprehensive.<sup>149</sup>

France declared a state of emergency.<sup>150</sup> Movements were restricted, curfews imposed and gatherings prohibited:<sup>151</sup>

The state of emergency allowed for exceptional measures such as searches without the intervention of the public prosecutor, and house arrests when the state of emergency came into force. ... The government justified this measure on the basis of the 'theory of exceptional circumstances', which allows derogations from the law in times of crisis.<sup>152</sup>

As France prepared to welcome the world to the 2024 Olympics, French authorities closed Kanaky's only international airport, La Tontouta, and banned TikTok, claiming protesters were using the platform to organise riots.<sup>153</sup>

Breaches of the French-declared state of emergency conditions were punishable under French-administered criminal law and enforced by French-deployed police and military personnel. The impact on Kanak was immediate. In April 2024, prior

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147 Ibid.

148 'Calls for Removal of Roadblocks' (n 35) 8:17am.

149 See 'Nouvelle-Calédonie: Ce que Contient la "Circulaire Pénale" Envoyée par Éric Dupond-Moretti' [New Caledonia: What is in the "Penal Circular" Sent by Éric Dupond-Moretti], *FranceInfo* (online, 17 May 2024) <[https://www.francetvinfo.fr/france/nouvelle-caledonie/info-franceinfo-nouvelle-caledonie-ce-que-contient-la-circulaire-penale-envoyee-par-eric-dupond-moretti\\_6549659.html](https://www.francetvinfo.fr/france/nouvelle-caledonie/info-franceinfo-nouvelle-caledonie-ce-que-contient-la-circulaire-penale-envoyee-par-eric-dupond-moretti_6549659.html)> ('Penal Circular').

150 Haut-Commissariat de la République en Nouvelle-Calédonie [High Commission of the Republic in New Caledonia], 'Point de Situation Sur Les Graves Troubles à l'Ordre Public' [Update on Serious Public Order Disturbances] (Press Release, 14 May 2024) <<https://www.nouvelle-caledonie.gouv.fr/Actualites/Point-de-situation-sur-les-graves-troubles-a-l-ordre-public>> ('Update on Serious Public Order Disturbances').

151 See *ibid*; *Arrête No 135 HC/CAB/DSS/BSI du 14 Mai 2024 portant Réglementation Temporaire relative au Rassemblement et à la Circulation des Personnes sur la Voie Publique et dans les Lieux Publics des Communes du Grand Nouméa* [Order No 135 HC/CAB/DSS/BSI of 14 May 2024 Establishing Temporary Regulations on the Gathering and Movement of People on Public Highways and in Public Places in the Municipalities of Greater Nouméa] (New Caledonia).

152 *Summary of Violations* (n 12) 18.

153 See 'From Kanaky to Palestine' (n 36).

to the state of emergency coming into effect, the entire prison population of Kanaky was 587 persons (largely Kanak).<sup>154</sup> On the first day of the state of emergency alone, then-French High Commissioner of the Republic in New Caledonia Louis Le Franc reported that 36 people had been arrested.<sup>155</sup> Over the following 24 hours, 130 protestors were arrested and dozens more taken into custody.<sup>156</sup> By mid-September, more than 2,343 Kanak had been arrested – the equivalent of 2% of the Kanak population.<sup>157</sup> Prisons – already over capacity – overflowed.<sup>158</sup> More than 60 Kanak leaders were forcibly transferred from Kanaky to France to face the ‘criminal justice’ system there,<sup>159</sup> sometimes without the knowledge of the detainees’ families and without the consent of the detainees.<sup>160</sup>

In the opening days of the French-declared state of emergency, then-French Minister of (so-called) Justice, Éric Dupond-Moretti, issued a confidential circular urging Kanaky’s public prosecutor’s office to take the strongest possible action and seek the heaviest available penalties for offences committed under the state of emergency.<sup>161</sup> The Minister also called for the deployment of criminal investigation in administrative contexts, such as house arrests.<sup>162</sup> Dupond-Moretti’s circular, issued on 17 May 2024, was identified by the Kanak Customary Senate as marking France’s formal ‘judicialisation and criminalisation’<sup>163</sup> of the 2024 conflict between Kanak and the French colonial state.

France has perpetuated ‘massive and systematic violations’<sup>164</sup> of the rights of Kanak peoples, not only in 2024, but throughout the generations prior to the current crisis. The French colonial state remains, in Leblic’s words, ‘imperturbably paternalistic and colonialist’.<sup>165</sup> In 2024, France yet again attempted Kanak *legal erasure* through the constitutional construction, deconstruction and reconstruction of Kanak peoplehood in Kanaky; the colonial state then criminalised those who resisted.

*Physical erasure* of Kanak also remains part of the 2024 colonial arsenal. The multi-pronged assault on Kanak people and peoplehood by the French colonial state has been described as a combination of *gradual* destruction and *brutal* destruction.<sup>166</sup> There are reports from United Nations experts that 500 Kanak people

154 Fair and Walmsley (n 129).

155 ‘Update on Serious Public Order Disturbances’ (n 150).

156 Haut-Commissariat de la République en Nouvelle-Calédonie [High Commission of the Republic in New Caledonia], ‘Point de Situation n° 3 sur les Graves Troubles à l’Ordre Public’ [Update No 3 on Serious Public Order Disturbances] (Press Release, 15 May 2024) <<https://www.nouvelle-caledonie.gouv.fr/Actualites/Point-de-situation-n-3-sur-les-graves-troubles-a-l-ordre-public>>.

157 See ‘Summary in Figures’ in *Summary of Violations* (n 12).

158 Ibid 23–4.

159 Ibid 23. See also Barbara Surk, ‘New Caledonia Indigenous Independence Leader Transferred to Mainland France for Pretrial Detention’, *The Associated Press* (online, 24 June 2024) <<https://apnews.com/article/new-caledonia-france-independence-kanak-activists-custody-5df9580a2ec652bee8bbaa9970d2cbe1>>.

160 *Summary of Violations* (n 12) 24.

161 ‘Penal Circular’ (n 149).

162 *Summary of Violations* (n 12) 20.

163 Ibid.

164 Ibid 17.

165 Leblic, ‘Sovereignty and Coloniality’ (n 28) 122.

166 ‘World March of Women Letter’ (n 13) 10.



have been subject to enforced disappearances over the course of 2024.<sup>167</sup> By 12 September 2024, barely four months after the French National Assembly's efforts to constitutionally enshrine the acceleration of Kanak minoritisation in Kanaky,<sup>168</sup> the Kanak Customary Senate confirmed French police and military personnel have been responsible for:

1. 169 injured Kanak people, including 11 life-threatening injuries, 24 shot in the head, four flash-ball injuries (a controversial LBD40 rubber bullet used by French riot police);
2. At least six Kanak men killed, including: Jybril Salo, Dany Tidjite, Josh Poulawa, Lionel Paita (grandson of the Grand Chief of Païta, shot in the head by someone alleging to be a plain-clothes French military police officer), Johan Kaidine and Samuel Moekia;
3. The gang rape of a young Kanak woman by five personnel attired in black emergency uniforms and bullet proof vests;
4. The execution of Victorin Wamytan (nephew of senior pro-independence leader and High Chief of St Louis, Roch Wamytan) by an elite French military police sniper;
5. The execution of Marco Caco by French military police.<sup>169</sup>

In its concluding observations on France's sixth period report to the United Nations Human Rights Committee in relation to the *International Covenant on Civil and Political Rights*,<sup>170</sup> the Committee noted its grave concerns over the allegations of excessive use of force in Kanaky since the declaration of the state of emergency:<sup>171</sup> extensive reports of 'police violence, extrajudicial killings and/or executions and ... alleged rapes of Kanaks'.<sup>172</sup>

The [Human Rights] Committee is gravely concerned about allegations concerning the excessive use of force by the law enforcement authorities in New Caledonia since the outbreak, in May 2024, of demonstrations and incidents in response to the constitutional bill that would modify voting lists in the territory. Some events are reported to have turned violent; a number of individuals, including around 10 members of the Kanak community and two gendarmes, lost their lives, while hundreds of others were injured ...

The State party should ensure that all alleged cases of excessive use of force by the law enforcement and security forces during the demonstrations and incidents that have taken place in New Caledonia since May 2024 are promptly, impartially and effectively investigated, that the perpetrators of crimes and offences committed in the context of these events are prosecuted and, if found guilty, punished with penalties commensurate with the gravity of their acts, and that victims receive full reparations.<sup>173</sup>

167 Cali-Tzay et al (n 32) 2.

168 Makalu and Duong-Pedica (n 7) 6.

169 See 'Summary in Figures' in *Summary of Violations* (n 12); Nic Maclellan, 'Deaths at Saint Louis Overshadow Anniversary of French Colonisation', *Islands Business* (online, 23 September 2024) <<https://islandsbusiness.com/news-break/deaths-at-saint-louis-overshadow-anniversary-of-french-colonisation/>>; *ibid*.

170 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

171 Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of France*, UN Doc CCPR/C/FRA/CO/6 (3 December 2024) 12 [48]–[49] ('*Concluding Observations*').

172 *Summary of Violations* (n 12) 18.

173 *Concluding Observations* (n 171) 12 [48]–[49].

The physical injuries and fatalities effected by French police and military personnel are *in addition* to those carried out by French loyalist militias. Although the use of weapons was banned in Kanaky under the state of emergency measures, the Kanak Customary Senate has confirmed at least two Kanak – 17-year-old Nassaié Daouka and Chrétien Neregote – were both killed by armed European civilians. On 4 June 2024, a Kanak police officer was beaten by a loyalist militia.<sup>174</sup> Right wing loyalist Gil Brial, Vice-President of Kanaky's Southern Province, was reportedly present at the scene.<sup>175</sup> Eyewitness reports on the actions of these loyalist militias are chilling. Noteworthy from these reports is that *caldoche* who violate the provisions of French-imposed criminal laws in Kanaky, yet act in alignment with the repressive interests of the French colonial state, escape criminal punishment.<sup>176</sup> Judicial officers in Kanaky have reported the disappearance of the rule of law as French authorities give groups of armed residents of European origin in Kanaky a 'blank cheque' (*'blanc-seing'*) when it comes to violence against Kanak.<sup>177</sup> The French colonial state is, as the Kanak Customary Senate identifies, co-authoring homicide.<sup>178</sup> French representatives characterise the existence and actions of these loyalist militias as 'self-defence',<sup>179</sup> describing them as 'protection groups',<sup>180</sup> and as residents 'taking charge of their own security by forming militias'.<sup>181</sup> In contrast, Kanak resistance of colonial erasure is characterised today, as it has been throughout history, as revolt and insurrection<sup>182</sup> – a threat to peace and security which justifies repression (in the words of then-High Commissioner Le Franc) *at any cost*.<sup>183</sup> This is the fundamental hypocrisy of the French colonial state as it criminalises Indigenous resistance and ignores not only 'crimes of imperialism'.<sup>184</sup>

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174 *Summary of Violations* (n 12) 19.

175 'Un Jeune Policier Passé à Tabac Par Des Voisins Vigilants Dans Le Quartier de Tuband, à Nouméa' [A Young Police Officer Beaten by Vigilant Neighbours in the Tuband District of Nouméa], *FranceInfo* (online, 4 June 2024) <<https://la1ere.francetvinfo.fr/nouvellecaledonie/province-sud/noumea/un-jeune-policier-passe-a-tabac-par-des-voisins-vigilants-dans-le-quartier-de-tuband-a-noumea-1493840.html>>.

176 *Summary of Violations* (n 12) 21–2.

177 Pascale Pascariello, 'Lors Des Révoltes En Nouvelle-Calédonie, Des Habitants Armés Ont Été Soutenus Par La Police' [During the Revolts in New Caledonia, Armed Residents Were Supported by the Police], *Mediapart* (online, 29 May 2024) <<https://www.mediapart.fr/journal/france/290524/lors-des-revoltes-en-nouvelle-caledonie-des-habitants-armes-ont-ete-soutenus-par-la-police>>; *ibid* 19.

178 See 'Summary in Figures' in *Summary of Violations* (n 12).

179 *Ibid* 21.

180 'Émeutes en Nouvelle-Calédonie: Un Nouveau Conseil de Défense Ce Lundi pour "Rétablir l'ordre"' [Riots in New Caledonia: A New Defence Council This Monday to "Restore Order"], *Ouest-France* [West-France] (online, 20 May 2024) <<https://www.ouest-france.fr/monde/nouvelle-caledonie/nouvelle-caledonie-nouveau-conseil-de-defense-lundi-a-18h30-letat-veut-retablir-lordre-aaaa8d7c-161c-11ef-a482-9d66515b057a>> ('Riots in New Caledonia').

181 *Summary of Violations* (n 12) 21.

182 See 'Calls for Removal of Roadblocks' (n 35) 8:17am; LeFevre (n 47); Muckle, 'Troublesome Chiefs and Disorderly Subjects' (n 28); Berman, 'Emancipation or Colonial Harness' (n 43); Linda Latham, 'Revolt Re-examined: The 1878 Insurrection in New Caledonia' (1975) 10(3) *Journal of Pacific History* 48 <<https://doi.org/10.1080/00223347508572278>>.

183 'Riots in New Caledonia' (n 180).

184 Biko Agozino, 'Editorial: What Is Criminology? A Control-Freak Discipline!' (2010) 4(1) *African Journal of Criminology and Justice Studies* i, xii ('What Is Criminology?').

and state violence, but the violence of any who share the colonial state's objective: Indigenous erasure.

#### IV CONCLUSION: RESISTING COLONIAL SUFFOCATION IN THE 21<sup>ST</sup> CENTURY

From invasion, to *Indigénat*, to repression, to accord, to 'consultation', to suffocation. While the faces of French colonialism in Kanaky are continually shapeshifting, the objective of the French colonial state remains stagnant. The same 'imperialist logic'<sup>185</sup> which drove the hoisting of the *tricolore* over Kanak lands in 1853 continues to drive French engagement with Kanak today. Kanak erasure – legal and physical – remains the goal.

As I have argued elsewhere, colonial gaols are repositories of colonial goals.<sup>186</sup> In February 2024, just prior to the commencement of the French Constitutional amendment vote on the composition of Kanaky's electoral roll, France announced it would be making its single largest public investment in Kanaky's history. The destination for this largesse is the development of a new, €500 million prison facility for 600 people.<sup>187</sup> In addition to the notoriously overcrowded *Camp Est* facilities and the new, 120-person prison opened in *Koné* in 2023, completion of this new prison will increase Kanaky's official penitentiary capacity to 1,110 people (or 1,307 people, including the overcrowding already happening in *Camp Est*). Construction is slated to commence in 2029.<sup>188</sup> Considering that between 90% and 100% of prisoners in Kanaky were Kanak *prior* to the events of 2024, this signal of French intentions in the archipelago is sobering.

Agozino urges criminologists to make the effort to go beyond 'pick pockets and street criminals' and 'see the big picture of the greatest organized crime that there ever was, the crimes of imperialism'.<sup>189</sup> Between 1886 and 1946, the *Indigénat* constituted a French-developed, French-administered and French-enforced 'regime of exception'<sup>190</sup> in Kanaky and a profound and sustained violation of the rights of Kanak. While the *Indigénat* has lapsed into history, it remains the forerunner of the contemporary weaponisation of French 'criminal justice' in pursuit of Kanak erasure. The declaration and maintenance of a prolonged state of emergency in Kanaky in 2024, and the accelerated criminalisation of Kanak which the institution of these 'exceptional measures' has facilitated, are likewise a French-developed,

185 Agozino, *Counter-Colonial Criminology* (n 106) 35.

186 See Billington, 'Colonial Goals through Colonial Gaols' (n 124).

187 Éric Dupond-Morett, 'Plan 15 000 Places de Prison: Inauguration du Centre de Détention de Koné' [Plan for 15,000 Prison Places: Inauguration of the Koné Detention Centre] (Press Release, 23 February 2024) <<https://www.justice.gouv.fr/sites/default/files/2024-02/CP%20-%20Inauguration%20du%20centre%20de%20d%C3%A9tention%20de%20Kon%C3%A9%20en%20Nouvelle-Cal%3%A9donie%20-%2023.02.2024.pdf>>.

188 Ibid.

189 Agozino, 'What Is Criminology?' (n 184) xiii (citations omitted).

190 Mann (n 115) 333.

French-administered and French-enforced ‘regime of exception’<sup>191</sup> – ‘exceptional measures’ which persist into 2025.<sup>192</sup>

Furthermore, the accelerated criminalisation of Kanak in Kanaky during 2024 is likely to have profound and ongoing ramifications for Kanak political representation, and Kanaky’s independence, as long as France remains at the helm of Kanaky’s laws and institutions. French law allows the French High Commissioner of the Republic in New Caledonia to declare political representatives and candidates to be ineligible to hold office on the basis of criminal prosecution.<sup>193</sup> With so many Kanak leaders arrested over the course of 2024 alone, the full repressive force of colonial criminal law on Kanak political representation in the months and years ahead is yet to be seen.

As Kanak continue to resist France’s ‘imperialist hubris’<sup>194</sup> into 2025 and beyond, hope remains:

One immutable law of history is that no empire is forever. Empires rise and empires fall precisely because empires are undemocratic and so no amount of force, threat, intellectual deceit or bribery with economic power could sustain an empire forever. Sooner or later, the anti-imperialist forces would win ... the war of the trenches conceptually, institutionally and spatially.<sup>195</sup>

In 2024, Kanak have reminded the world of their sustained resilience against a powerful imperial force. They have also issued renewed calls for solidarity and resistance:

Kanak needs solidarity when Kanaks are being shot by militias, the police and the military, but it also needs solidarity during the everyday colonial ‘normality,’ while the racist policies and practices of France and anti-independence political leaders suffocate the Kanak people.<sup>196</sup>

Kanak representative Wea has testified that although France ‘want to suffocate’ Kanak peoples, Kanak ‘*will not allow it*’.<sup>197</sup> The international community must not allow it either.

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<sup>191</sup> Ibid.

<sup>192</sup> See, eg, Haut-Commissariat de la République en Nouvelle-Calédonie [High Commission of the Republic in New Caledonia], ‘Mesures de Police Administrative’ [Administrative Police Measures], *Haut-Commissariat de la République en Nouvelle-Calédonie* [High Commission of the Republic in New Caledonia] (online, 4 February 2025) <<https://www.nouvelle-caledonie.gouv.fr/Actualites/Mesures-de-police-administrative10>>.

<sup>193</sup> *Loi n° 99-209 Organique du 19 mars 1999 Relative à la Nouvelle-Calédonie* [Organic Law No 99-209 of 19 March 1999 Relating to New Caledonia] (France) JO, 21 March 1999, art 195.

<sup>194</sup> Agozino, ‘What Is Criminology?’ (n 184) xi.

<sup>195</sup> Ibid.

<sup>196</sup> Makalu and Duong-Pedica (n 7) 9.

<sup>197</sup> Taşkın (n 11) (emphasis added).