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Nauru:
International Status, Imperial Form, and the Histories of International Law

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Abstract

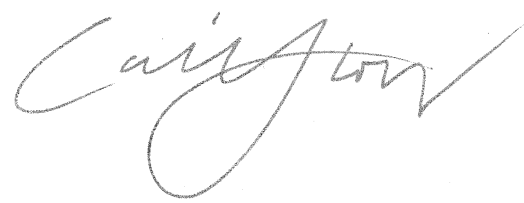
This thesis responds to the following question: what might a close reading of the history of Nauru as an object of international legal administration reveal about the relationship between imperialism and international law that accounts focusing on more 'central' sites of international legal formation do not? The thesis takes the form of an historical narrative of the changing status of Nauru in international law since the island's violent incorporation into the German protectorate of the Marshall Islands in 1888, described in relation to corresponding changes in local administrative form. Considering in turn the imposition of the protectorate, the designation of Nauru as a C Class Mandate by the League of Nations in 1920, its re-designation by the United Nations as a Trust Territory in 1947, and its recognition as a sovereign state independent of Australia in 1968, this thesis argues that while status shifts, form accretes: as the international status of Nauru has shifted in each phase, what has occurred at the level of the administrative form is an accretive process of internal bureaucratisation and external restatement according to the prevailing concepts of the period.

In order to hold the history of Nauru and the history of international law together, the thesis develops a method of redescription that borrows from jurisdictional thinking and from Weberian social theory in order to focus on local administrative form as a site of international legal formation. The focus on administrative form offers detailed insight not only into the Nauruan case, but into the difference between 'the' history of international law as the development of an ideal conceptual framework for governing the world, and the *histories* of international law as actually practised in place. In this sense, this thesis is a work not *of* international law, but about the ways in which histories of international law are constructed, and is offered as a contribution to the genre of histories of imperialism and international law. In fixing a 'marginal' place as the site from which the historical formation of the international legal order is considered, the thesis aligns politically with the imperative to 'provincialise Europe' not only in histories of international law, but in imaginaries of the international order in the present. The political aim of the thesis is to demonstrate not only that presumptions of the centrality of certain places over others prefigures the narrative construction of histories of international law, but that it is possible - even within the confines of disciplinary practice - to see the international legal order from other perspectives.

Declaration

I declare that:

- this thesis comprises only my original work toward the fulfilment of the requirements of the Doctor of Philosophy;
- due acknowledgment has been made in the text to all other material used; and
- the thesis is fewer than the maximum word limit in length, exclusive of tables, maps, bibliographies and appendices.



Anne Caithleen (Cait) Storr

Acknowledgments

Many junior scholars find doctoral work an isolating journey. It may be that I have chosen to disremember the isolating parts of the last four years; nevertheless, I am grateful that the abiding memory I take with me is one of ever-growing solidarity. This project has generated its own community, both real and imagined, and I have drawn elemental strength from the many and varied contributions of others. The list that follows will inevitably omit some who deserve acknowledgment. To that end, I begin by acknowledging that we do not always, or in good time, comprehend the ways in which we are supported by others.

This project was made possible in large part by the granting of an Australian Postgraduate Award from the Australian Government's Department of Education and Training. The dedication of public resources to postgraduate education is basic to the advancement and protection of public knowledge. Postgraduate education remains out of the reach of many scholars of the global South, and access to public funding for doctoral work is a privilege I do not wear lightly.

My principal supervisor, Professor Sundhya Pahuja, has walked this path with me from beginning to end, as both mentor and companion. Sundhya's acumen, intellectual grace and excellent humour have been guiding lights in the construction of this thesis. My co-supervisor Associate Professor Shaun McVeigh, who took on the role in late 2015 on the departure of Professor Gerry Simpson from Melbourne Law School, worked with care and integrity to support me through the final phase of the project. Any clarity in this thesis has been achieved in no small part due to the supervision of Sundhya and Shaun. Gerry Simpson, now Chair of International Law at the London School of Economics, kindly agreed to stay on as external supervisor. His support of this project has been both constant and meaningful.

This project has its origins in a short consultancy I held with the Parliament of Nauru in 2009, and I thank Katherine Le Roy and Professor Cheryl Saunders for suggesting me as a candidate for the role. Seven years later I continue to learn from that brief experience, and am particularly grateful to have had the chance to work alongside Stella Duburiya, Fimosa Temaki, Tini Duburiya, Barina Waqa, Kirstie Dunn and Catriona Steele.

This thesis leans heavily on the earlier scholarship of others. Whilst this is true of all sincere scholarship, I wish to acknowledge a number of historians and lawyers by name here, if only to illustrate that the true value of good scholarship is not measurable in the timeframes of the reporting period and the funding round. This project could not have been completed without the benefit of the work of Wilhelm Fabricius, Stewart Firth, Peter Sack, Dymphna Clark, Dirk Spennemann, Maslyn Williams, Barrie Macdonald, and Nancy Viviani; and the work of Christopher Weeramantry, Antony Anghie and Deborah Cass. Spending years with their work has taught me that we do not work alone, or only for our contemporaries.

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I have received institutional and financial support from a number of research institutes and groups over the last four years, and have drawn heavily on these intellectual communities that have been created over time through the efforts of others. Thank you to the Institute of International Law and Humanities and the Asia Pacific Centre for Military Law at Melbourne Law School; the Institute of Global Law and Policy at Harvard Law School; and Law and Global Justice at Durham. Thanks also to the Melbourne Research Office team; to all those I have taught and worked with at Melbourne Law School over the last five years; and to Kara Connolly for her assistance with preparing the final document.

Finally, deepest thanks are due to my family for their unwavering support, forbearance and love - thank you to Tess, Rob, Mick and Pete, and to Beth, Ali, Tom and Alice; and to my dear friends for truly knowing me – thanks in particular to Andrea, Zoë, Monica, Nigel, and Zoë. I have learnt through this process that very little, if anything at all, is achieved alone.

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Prologue

In 2009, I was briefly engaged by the Parliament of Nauru as a consultant legal adviser. I worked with a local team to formulate a public awareness campaign to ensure the Nauruan public was appropriately informed of the proposals to be put to them in a constitutional referendum the following February.[1] The referendum was the culmination of a lengthy process of constitutional review that had been conducted with United Nations Development Programme funding.[2] In its 2007 Report, the Constitutional Review Commission appointed by the Parliament of Nauru described what it understood to be the historical factors requiring address via constitutional reform – 'what', in other words, had gone 'wrong' with the Republic of Nauru:

> 'The failure of institutions due to defective or ineffective laws, including the Constitution and statutes.
>
> Lack of motivation or incentive to preserve wealth for the future, and account for its management and drawings upon it.
>
> Absence of machinery for enforcing accountability and transparency, and for punishing breaches.
>
> Failure of leaders to learn the principles of good governance and elements of the cabinet parliamentary system, and make a commitment to them.
>
> In planning for improvement in the above areas, a serious shortage of human capital, particularly people with appropriate skills, and accountants and lawyers.'[3]

Failure of institutions, failure to learn good governance, shortage of people with appropriate skills. The implication was that the 'problem' of Nauru was to be understood as a problem of administration, to be solved with better institutions, better laws, and better training of leaders in the business of democratic governance. To effectively achieve these goals, Nauru required constitutional reform. It also required more 'human capital' – the shortage of which was, in the meantime, to be filled by people like myself, paid with international aid funding. The small Nauruan public service was interspersed at management level with Australians, many on secondment from the Australian public service.

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[1] The referendum team comprised Stella Duburiya, Tini Duburiya, Barina Waqa, Fimosa Temaki, Kristie Dunn, Catriona Steele, and Katy Le Roy - each of whom taught me things I needed to learn, for which I remain grateful.

[2] Government of the Republic of Nauru and United Nations Development Programme, *Nauru Constitutional Reform Project*, project document prepared in 2008, <https://info.undp.org/docs/pdc/Documents/FJI/00058097_Nauru%20CRC_Prodoc.pdf>.

[3] The Nauru Constitutional Review Commission, Naoero Ituga: *Report*, Yaren, Nauru, 28 February 2007, <http://www.paclii.org/nr/other/Nauru_Constitutional_Review_Commission_Report_28Feb07.pdf>, 3-4.

Armed with comparative constitutional studies of Pacific island states, the Commission recommended a suite of amendments to bring the Nauruan constitution in line with 'internationally recognised principles and standards'.[4] The 1968 Constitution had been drafted rapidly, two years after proposals for resettlement of the Nauruan people on Curtis Island in Queensland under some form of self-government had failed, for want of agreement on whether this 'self-government' would attract sovereign status, as the Nauruans demanded, or status as a municipal council within Australian sovereign territory, as the Commonwealth maintained.[5] Proposed amendments were designed to strengthen the separation of the legislature and the executive, particularly with respect to financial transparency, which had proven an issue in executive management of the Nauru Phosphate Royalties Trust; to recognise at constitutional level the status of customary law as 'continuing to have effect as part of the law of Nauru, to the extent that such law is not repugnant to the Constitution or to any Act of Parliament';[6] and to introduce social and economic rights into the Constitution – a proposal which would have made Nauru's Constitution one of the most progressive in the world.

The constitutional review process had commenced in 2004, when the first iteration of Australia's offshore detention regime was in full swing. In 2001, the Australian federal executive under Liberal Prime Minister John Howard had alighted upon what it labelled a 'Pacific solution' to Australia's 'asylum seeker crisis'. This 'crisis' consisted of the arrival of comparatively small numbers of asylum seekers in the north-eastern waters of Australia, most then from Afghanistan and Sri Lanka.[7] The last asylum seekers of the Howard era were relocated from Nauru to Australia in 2007, by the federal executive under new Labor Prime Minister Kevin Rudd. When I arrived in late 2009, the detention centre had been repurposed as a government storage depot. Yet that group of hangar-sized sheds is now in use again as a detention centre. In 2012, the offshore detention regime was recommenced by the federal executive under Labor Prime Minister Julia Gillard. Asylum seekers who arrive by sea in

[4] Nauru Constitutional Review Commission, above n 3, 3.
[5] Nancy Viviani, *Nauru: Phosphate and Political Progress* (Australian National University Press, 1970) 140-147.
[6] The 1968 Constitution made no reference to the effect or status of 'customary law' in Nauruan law; although custom was recognised in legislation and frequently applied with respect to land ownership and usufruct, the Report noted that 'the Supreme Court has at times been ambivalent about the application and proof of custom'. Nauru Constitutional Review Commission, above n 3, 13.
[7] On the 'Pacific Solution', see Janet Phillips, 'The 'Pacific Solution' Revisited: A Statistical Guide to the Asylum Seeker Caseloads on Nauru and Manus Island', Background Note published 4 September 2012, Department of Parliamentary Services, Parliament of Australia, <http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1893669/upload_binary/1893669.pdf;fileType=application%2Fpdf>.

Australian waters are detained and sent to Nauru, and to Manus Island in Papua New Guinea, ostensibly for 'processing' of their asylum claims.[8] According to the Australian government, the Nauruan 'regional processing centres' are run not by Australia, but by private contractors under Nauruan sovereign control - albeit on Australia's instigation and with Australian funding.[9] In February 2016, the High Court endorsed this interpretation of the offshore detention regime: asylum seekers on Nauru are not detained by the Australian executive, because they are detained by the Nauruan executive.[10] In 2009, however, offshore detention seemed to be in the past. Nauru – in extreme foreign debt, without a bank, and owing years of back pay to its public servants – had been left to raise revenue in other ways.

My Nauruan story is minor, and a common one: ambitious student from a privileged first world law school takes up a temporary international position, nigh on oblivious to the historical and political context in which they are working. But the experience nagged at me. What I learnt of Nauru whilst on the island was enough only to make me aware of my ignorance. Beyond the clichés picked up in my white Australian childhood – phosphate island, poor then rich then poor again – I knew next to nothing about Nauru. A Nauruan boarder at my secondary school, there for the first years of the 1990s then suddenly gone. A geography subject called 'Our Pacific Neighbours', which in its determination to orient Australian high school students as to their geographical whereabouts was actually quite radical. In that class, I had learnt a little of Nauru's 'phosphate wealth', amid textbook sketches of the Dutch colonisation of Irian Jaya, Australia's role in the Portuguese handover to Indonesia of East Timor in 1976, and the import of Indian indentured labourers to Fiji. If I was taught anything about German imperialism in the Pacific in that high school class, I don't remember it. I had a German great-grandfather who had left Kiel, north of Hamburg, before the First World War to 'escape conscription' by the Wilhelmian Reich; and a grandfather who had fought in Papua New Guinea against the Japanese in the early 1940s. But the connection between the inadequacy of my grasp of Pacific history and what I was doing in Nauru as a legal adviser has only become apparent through this project.

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[8] Between September 2013 and January 2017, 1,355 'illegal maritime arrivals' were sent to Nauru, and 770 to Manus Island. See Department of Immigration and Border Protection, 'Operation Sovereign Borders Monthly Operational Update', January 2017, <http://newsroom.border.gov.au/channels/Operation-Sovereign-Borders/releases/monthly-operational-update-january-2>.

[9] *Plaintiff M68/2015 v Minister for Immigration and Border Protection and Others* (2016) 327 ALR 369, 375.

[10] *Plaintiff M68 v Commonwealth of Australia* (2016) 327 ALR 369; Gordon J dissenting.

In Nauru, I did my best to fulfil what I understood to be the professional and ethical imperatives of the role. I attended meetings with 'H.E.' - His Excellency, the President - then Marcus Stephen. I visited the house of the ambassador of the Republic of Taiwan. I shared a hotel corridor with a Russian delegation, as Nauru announced it would recognise the independence of the Georgian provinces Abkhazia and South Ossetia, and receive AUD$50 million in development aid from the Russian Federation.[11] I ate at 'Chinese' restaurants, never sure whether 'Chinese' Nauruans identified as Chinese or Nauruan, or both, or neither. I drove a Japanese car, donated as part of the Japanese aid programme to Nauru; Nauru, I was informed, voted with Japan in the International Whaling Commission.[12]

But mostly, I walked. Before work I walked along the beach, separated from the open ocean of the Pacific by the limestone reef that fringes the entire coast. After work I walked up to topside, following the paths that meandered through the limestone pinnacles and the noddy bird carcasses. On the weekends I walked Nauru's perimeter road, passing unprepossessing monuments marking the Japanese occupation of Nauru in the early 1940s. If I walked clockwise from the hotel, I would pass the cantilever hulking from the shoreline across the reef to the deep water, built in the 1920s to cart phosphate from topside right down into the holds of cargo ships moored offshore. If I walked anti-clockwise, I would pass Anibare Bay, blown out of the limestone reef with dynamite in the early twentieth century by the Pacific Phosphate Company to create a harbour for the otherwise harbourless island. One day I bumped into the Australian High Commissioner out the front of Parliament House. He advised me to quit it with the walking. I didn't understand, he told me. My walking routine was attracting attention. The stray dogs were dangerous; and despite appearances, the Nauruans too would prove dangerous given the opportunity, especially after dark. The exchange bristled with Forsterian subtext. One hundred years ago, the High Commissioner would have warned me that a white woman in the colonies shouldn't be alone with the natives.

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[11] Luke Harding, 'Tiny Nauru Struts World Stage by Recognising Breakaway Republics', *The Guardian* (online) 15 December 2009 <https://www.theguardian.com/world/2009/dec/14/nauro-recognises-abkhazia-south-ossetia>.

[12] 'Japan 'Bullying' Countries to Back Whaling', *Sydney Morning Herald* (online) 20 June 2005 <http://www.smh.com.au/news/National/Japan-bullying-countries-to-back-whaling/2005/06/20/1119119762974.html>.

I had an uncanny slip in perspective one day, out walking in defiance of the High Commissioner's advice. Standing on a beach watching a container ship disappear over the horizon, I nearly lost my balance. In that moment, I felt I had not simply boarded a plane and shifted location in a fixed world; had not simply flown from one point to another in the same world I had worked so hard to discipline into order through my studies in international history, politics and law. Rather, the world itself unfolded differently from the point at which I stood. I didn't recognise it. The net of historical encounters cast by Nauru over the world created a different structure of the international to the one I knew.[13] The one I knew was already, or so I had thought, an alternative to Eurocentrist imaginaries of the international; already disciplined in the imperialism of European knowledge structures, sensitive to the legacies of colonial violence and the contemporary politics of difference. But for all my studies of postcoloniality, it had never occurred to me that the periphery has a periphery, that there are margins to the margins. I have since travelled to many other parts of the world, as white professionals tend to be free to do, and I've never felt that sensation so strongly again. Standing on that beach, it simply made no sense to think of Nauru as peripheral, as an anomaly in the international order. As much as The Hague or New York, or India or South Africa or Australia, Nauru was what was. It was me with my UNDP-funded contract that had it all wrong.

The 2010 referendum failed. The Nauruan people voted against the proposed constitutional changes. I left Nauru with an uncanny memory of that slip in perception, caused by simply being in the place. Only in retrospect have I been able to gain an appreciation of the referendum, and my minor role in it, as a contemporary episode in the administrative history of Nauru.[14] This thesis began as an attempt to think through two things I learnt from my experience of Nauru: firstly, that as contemporary as it may have seemed in 2009, the disjuncture between international ideals and administrative practice in Nauru took root in

[13] Doreen Massey describes the world-making effect of imagining space as a surface across which the discoverer moves: 'the way we imagine space has effects – as it did, each in different ways, for Moctezuma and Cortés. Conceiving of space as in the voyages of discovery, as something to be crossed and maybe conquered, has particular ramifications…It differentiates Hernán, active, a maker of history, who journeys across this surface and finds Tenochtitlan upon it…this way of imagining space can lead us to conceive of other places, peoples, culture simply as phenomena 'on' this surface. It is not an innocent manoeuvre, for by this means they are deprived of histories'. Doreen Massey, *For Space* (London: SAGE Publications, 2005), 4.

[14] As Pahuja has written, 'if we are interested in the idea of taking responsibility for our own role in the conduct of law and legal relations, then it is useful to understand what it is we might actually be engaged in'. Sundhya Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law' (2013) 1 *London Review of International Law* 1, 63-98 at 66.

the context of German imperialism in the late nineteenth century; and secondly, that the international order one perceives is radically determined by the place in which one stands. The thesis has ended as a history of the changing status of Nauru in international law that is also a history of modern international law as it has been administered in Nauru. I dedicate it to Stella, for whom I was just one in a long line of *iburbur* to wash up on her island.

Chapter 1

Nauru: international status, imperial form and the histories of international law

> 'A beautiful little island, perhaps four miles long (by double altitude) Lat. 0.20 S. Long, 167.18 East. This solitary spot was found extremely populous, although the nearest known land is placed by the charts above six equatorial degrees distant. The want of a meridional observation may have caused some error in latitude, but it is hoped not a great one. I named it 'Pleasant Island".
>
> - Captain John Fearn of the *Hunter*, 8 November 1798 on a voyage from New Zealand to the South China Sea, reproduced in *The Naval Chronicle*, Volume II, 1799, p 536.

1. Introduction: thesis statement

This thesis began as a response to an apparently simple question: how did the tiny island of *Naoero* in the Western Pacific become the Republic of Nauru in 1968? It has developed into a response to a more complex question: what might a close reading of the history of Nauru as an object of international legal administration reveal about the relationship between imperialism and international law that accounts focusing on more 'central' sites of international legal formation do not? The thesis takes the form of an historical narrative of the changing status of Nauru in international law since the island's violent incorporation into the German protectorate of the Marshall Islands in 1888, considered against the corresponding changes in the administrative form of Nauru at the local level. Considering in turn the imposition of the protectorate, the designation of Nauru as a C Class Mandate by the League of Nations in 1920, its re-designation by the United Nations as a Trust Territory in 1947, and its recognition as a sovereign state independent of Australia in 1968, I argue that while status shifts, form accretes: as the international status of Nauru has shifted in each phase, what has occurred at the level of the administrative form is not structural change, so much as an accretive process of internal bureaucratisation and external restatement according to the prevailing concepts of the period. Rejecting assumptions both of the anomalousness of the Nauruan state to the international legal order, and of sovereign territorial statehood as the natural and final expression of political self-determination,[1] this thesis offers insight not only into the Nauruan case, but into the way that writing from a specific place 'up' to

[1] See Vasuki Nesiah, 'Placing International Law: White Spaces on a Map' (2003) 16 *Leiden Journal of International Law* 1; Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press, 2008); and Deborah Whitehall, 'A Rival History of Self-Determination' (2016) 27 *European Journal of International Law* 719.

'international law', as opposed to writing from 'international law' 'down' to the world, radically reconfigures the perspective of 'international law' that emerges.

The project is offered as a contribution to - or perhaps more accurately as a counterpoint within - the genre of histories of imperialism and international law. In order to hold the history of Nauru and the history of international law together, this thesis adopts a method of redescription that borrows from jurisdictional thinking and Weberian social theory in order to focus on local administrative practice as a site of international legal formation.[2] The focus on administrative form distinguishes this project from conceptual histories of imperialism and international law, and constructs a particular archive around two categories of source: firstly, the primary legal instruments and decisions that effected changes in the status of Nauru in international law; and secondly, contemporaneous accounts of how and why those instruments were created. This project does not privilege recourse to 'the' sources of international law as recognised today - namely treaty, custom, principle, judicial decisions and received juridical writings - except as they fall within either category of source described above. In this sense, this thesis is a work not *of* international law, but *about* international law; and in fixing a 'marginal' place as the site in which the formation of the international legal order is considered, it aligns politically with the imperative to 'provincialise Europe'[3] not only in histories of the formation of the international order, but in imaginaries of the international order in the present.[4]

---

[2] The reception of critical redescription in international legal scholarship owes much to the varied contributions of Shaunnagh Dorsett and Shaun McVeigh, Anne Orford and Sundhya Pahuja on how we might understand the construction of legal authority through attention to practices of authorisation. See section 3.2.1. 'Intersections with Jurisdictional Thinking' below. This vein of work on 'redescription' is one branch of a number of cross-disciplinary lineages of the term. Quentin Skinner's seminal formulation of 'rhetorical redescription' as historical method in the 1970s deals primarily with approaches to conceptual change. See Quentin Skinner, 'The Techniques of Redescription' in *Reason and Rhetoric in the Philosophy of Hobbes* (Cambridge University Press, 1996); Quentin Skinner, 'Rhetoric and Conceptual Change' (1999) 3 *Redescriptions: Yearbook of Political Thought and Conceptual History,* 60–73; and Kari Palonen, 'Rhetorical and Temporal Perspectives on Conceptual Change: Theses on Quentin Skinner and Reinhart Koselleck' (1999) 3 *Redescriptions: Yearbook of Political Thought and Conceptual History,* 41–59.

[3] For Chakrabarty, 'European thought is at once both indispensable and inadequate in helping us to think through the experiences of political modernity in non-Western nations and provincialising Europe becomes the task of exploring how this thought – which is not everybody's heritage and which affects us all – may be renewed from and for the margins'. Dipesh Chakrabarty, *Provincialising Europe: Postcolonial Thought and Historical Difference* (Princeton University Press, 2nd ed, 2008) 16. Drawing on Foucauldian and postcolonial traditions, David Scott urges 'an approach to colonialism in which Europe is historicized, historicized in such a way as to bring into focus the differentials in the political rationalities through which its colonial projects were constructed'. David Scott, 'Colonial Governmentality' (1995) 43 *Social Text*, 191, 214.

[4] The point on imaginaries of the international order thinks with critical geographer Doreen Massey, and specifically with her observation of the world-making effect of imagining 'space' as 'open' and 'abstract' and 'place' as 'fixed' and 'lived'. Doreen Massey, *For Space* (SAGE Publications, 2005).

2. Arriving at the question

This project proceeded from an intuition that the Republic of Nauru is not anomalous to but somehow symptomatic of the international legal order. The intention of the project is to reconsider the emergence of Nauruan statehood as indicative of the way in which the international system of states has developed in continuation of European imperial administrative practices of the late nineteenth century. While rejecting the presumption of Nauru as anomaly, I was equally suspicious of the 'Nauru-as-metonym' trope that is often substituted for historical research in accounts of the island. Since the early 1990s, 'Nauru' has often been figured as a parable in essays warning of impending environmental collapse due to unsustainable resource use practices, or alternatively of economic collapse due to poor governance practices.[5] Since the early 2000s, 'Nauru' has also been cast as the scene-setting dystopia to essays damning the cruelty of Australia's policy of offshore detention of asylum seekers who arrive by sea.[6]

Given the international attention that offshore detention has attracted since it was re-implemented in 2012, the common elements of the 'Nauru-as' trope will now be familiar to most.[7] Tiny coral atoll, around 21 square kilometres in area, in the Western Pacific south of the equator; smallest state by area and population, if one discounts the Holy See; strip-mined for phosphate under the control of Australia, Britain and New Zealand from the early 1920s to the late 1960s, when Nauru gained independence; high GDP per capita throughout the 1970s and into the 1980s due to the nationalisation of the phosphate industry; economic collapse in the mid-1990s due to almost comically corrupt economic mismanagement;[8] a series of revenue-raising schemes from the unconventional to the bizarre throughout the

[5] See for example Carl N McDaniel and John M Gowdy, *Paradise for Sale: A Parable of Nature* (University of California Press, 2000); Naomi Klein, *This Changes Everything: Capitalism versus the Climate* (Penguin Group, 2014), 161–169; John Connell, 'Nauru: The First Failed Pacific State?' (2006) 95(383) *The Round Table*, 47; David Kendall, 'Doomed Island' (2009) 35 *Alternatives Journal* 1, 34–37.

[6] See for example Martin McKenzie Murray, 'The Dysfunction of Offshore Detention on Nauru', *The Saturday Paper* (Melbourne), 27 August 2016; and Stephen Charles, 'Our Detention Centres are Concentration Camps and Must be Closed', *The Sydney Morning Herald* (Sydney), 4 May 2016. Nauruan President Baron Waqa responded to such characterisations of Nauru in Baron Waqa, 'Media Mudslingers Distort the Image of Nauru', *The Australian* (Sydney), 22 August 2016.

[7] Examples include The Economist, 'Paradise Well and Truly Lost', *The Economist* (London), 20 December 2001; ABC Radio National, 'How Nauru Threw it All Away', 11 March 2014 <http://www.abc.net.au/radionational/programs/rearvision/how-nauru-threw-it-all-away/5312714>; Tony Thomas, 'The Naughty Nation of Nauru' (2013) *Quadrant* 30.

[8] Rowan Callick, 'Conmen's Paradise', *The Australian* (Sydney), 19 January 2007.

1990s, including money laundering, passport sales, and erratic clientelism;[9] and from the early 2000s, self-interested complicity as a rented site in Australia's offshore detention regime.[10] This narrative is so regularly recycled in popular discourse that it creates an impression that there is nothing else to say. But Nauru is not a parable of future collapse or an island dystopia. Nauru is not out of time, nor out of place. Nauru is a place that belongs in the contemporary moment, in the international order, in the global environment. Stated another way, the intention of the project was to find a way of narrating the history of Nauruan statehood that could take seriously the contemporaneity of Nauru and Versailles, of Nauru and The Hague, of Nauru and New York, as sites of international legal formation.

The broad strokes of the legal history of Nauru are reasonably well known. The island was incorporated into the German protectorate of the Marshall Islands in 1888 under a contractual arrangement between the Bismarckian Reich and a Hanseatic trading company from Hamburg, the *Jaluit Gesellschaft*. It was designated as a C Class Mandate of the British empire by the League of Nations in 1920, and administered by Australia pursuant to an agreement between the United Kingdom, Australia and New Zealand. Nauru was re-designated as a trust territory under Australian administration by the United Nations in 1947, and gained sovereign status in 1968 - after Australia had attempted to resettle the entire population of Nauru in Queensland as Australian citizens, as a cheaper alternative to remedying the severe environmental damage caused by phosphate mining and handing over self-government.[11] The protectorate, the mandate and the trust territory were iteratively developed modes of external administration, and the Eurocentrism of the concepts of protection, mandate, trust and sovereignty that informed that development has been well traversed.[12]

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[9] Jon Henley, 'Pacific Atoll Paradise for Mafia Loot', *The Guardian* (online), 23 June 2001 <https://www.theguardian.com/world/2001/jun/23/jonhenley>; Glenn R Simpson, 'Tiny Island Selling Passports Is Big Worry for U.S. Officials', *The Wall Street Journal* (online), 16 May 2003 <http://www.wsj.com/articles/SB105303631570539800>; Joy Su, 'Nauru Switches its Allegiance back to Taiwan from China', *Taipei Times*, 15 May 2005 <http://www.taipeitimes.com/News/front/archives/2005/05/15/2003254718>.

[10] Michael Koziol and Michael Gordon, 'UN Slams Australia's Regional Processing Centres in Nauru', *Sydney Morning Herald* (Sydney), 7 October 2016.

[11] Nancy Viviani provides a good summary of the negotiation process in Nancy Viviani, *Nauru: Phosphate and Political Progress* (ANU Press, 1970), 141–155. Weeramantry reconsiders the primary sources on resettlement and rehabilitation in Christopher Weeramantry, *Nauru: Environmental Damage under International Trusteeship* (Oxford University Press), 265–305.

[12] See for example Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005); Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500–2000* (Cambridge University Press, 2014); W Ross Johnson, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late*

Yet the administrative form to which the changing status of protectorate, mandate and trust territory attached deviated in basic ways from the ideal form of each mode as conceived at the international level. As instantiated in Nauru, the protectorate, mandate and trust territory defied clear articulation according to fundamental concepts or principles of international law. Examination of the primary sources relevant to the transition to protectorate, mandate, and to a lesser extent the trust territory, revealed that in each instance, the constituent sources of authority effectively formalised ambiguity as to where the various elements of 'sovereignty' resided, over which elements of 'territory' such power could be exercised, and the basic principles according to which administrative authority was constituted and exercised. From the perspective of Nauru, the history of international law from the period of imperial competition in the late nineteenth century through to universalisation of the state form in the later twentieth century does not unfold as a conceptually driven process in which each key phase marked a progressive advance in international legal thought.[13] It appears rather as a process of experimentation in imperial administration driven by commercial and geopolitical imperatives, in which the state is recast as a phase in the development of an administrative form established in the late nineteenth century, rather than a radical shift in type.

With this insight, the research question descended from the realm of conceptual history and into the mundane business of local administration: resisting reversion to conceptual explanations, *how* did the island of Nauru become a protectorate, a mandate, a trust territory, and then a state, and how were these shifts in the international status of Nauru reflected in local administrative practice? More generally, what might a close reading of the history of Nauru as an object of international legal administration reveal about the relationship between imperialism and international law that accounts focusing on more 'central' sites of international legal formation do not? What emerges most strongly in this narrative is a sense of the difference between 'the' history of international law as the development of an ideal conceptual framework for governing the world, and the *histories* of international law as actually practised in place.

Nineteenth Century (Duke University Press, 1973); Gerrit Gong, *The Standard of Civilization in International Society* (Oxford University Press, 1984). On Eurocentrism, see section 5.2.2 'The problem of 'Eurocentricity' below.

[13] Many international law textbooks commence with accounts of the history of international law that posit this form of progressive conceptual development; see for example Alina Kaczorowska-Ireland, *Public International Law* (Routledge, 4th ed, 2010), 3–4.

3. Methodology

3.1 The sources

The narrative method adopted in this project emerged from my attempt to bring these questions to bear on a particular set of sources relating to the historical formation of Nauru as an object of international law. The sources drawn upon in this project fall into two categories, one narrowly and the other broadly construed. The first narrowly cast category comprises the primary legal instruments that effected changes in the international status and in the administrative form of Nauru. This category traverses contemporary distinctions between public and private law, and includes contracts, agreements, legislative instruments, executive ordinances, treaties and constitutions. The second category comprises contemporaneous sources that offer insight into how and why those legal and official instruments were created. These include administrative correspondence, legislative papers and transcripts, commission reports, newspaper articles, and scholarly works. I have not privileged recourse to the 'traditional' sources of international law – treaty, custom, principle, judicial decisions and received juridical writings – drawing on them only when they deal with the legal status or administrative form of Nauru. I have done so as the primary means of holding the island of Nauru, rather than 'international law', at the centre of the narrative.

My initial observations of these two categories of source created interesting problems in thinking through how to order an historical narrative around them. The first was the centrality of the company to the administrative formation of Nauru. The line from Hanseatic firm *Goddefroy & Sohn*, through the *Jaluit Gesellschaft*, the Pacific Phosphate Company, and the British Phosphate Commission to the Nauru Phosphate Corporation was as significant to the administrative formation of Nauru as the line of 'public' officials and bodies to which international status officially attached. The second observation was that shifts in international status did not necessarily result in or correlate with substantive changes in administrative form. This highlighted a need to attend to status and form as related but distinct phenomena. The third observation was that most of the instruments and decisions that purported to effect major changes in the status of Nauru – such as the official declaration of protectorate status, or the Mandate for Nauru - were brief, if not cursory. Such document therefore required contextualisation within their site of production. Regulations and ordinances of the Bismarckian Reich required placement in the Reichstag and the *Rechtskolonialamt* (the German

Colonial Office); decisions of the Pacific Phosphate Company required placement in its company offices; and so on. It was in finding a way to address these issues whilst resisting the temptation to simply contextualise the history of the formation of Nauru within received narratives of the history of imperialism and international law that a method developed for this project. In this sense, the focus on Nauru required that administrative practice in place be taken seriously as an historical phenomenon. There was thus a real recursivity between the sources, the method, and the argument constructed in this project.

3.2 Theoretical influences

This project builds upon literatures and traditions that have been formative in my own training across the disciplines of law, history, and social theory. The theoretical influences that proved most helpful in engaging with the Nauruan sources were critical redescription as developed within the renewed jurisprudential tradition of jurisdictional thinking, and Weberian sociological analysis. Each is considered in turn here.

3.2.1 Jurisdictional thinking

In this project, 'jurisdictional thinking' is understood less as a theory of law than as a sensibility that attends to the practices of authorisation that precede the articulation of law, rather than to the content of the law that is articulated.[14] Dorsett and McVeigh describe 'jurisdictional thinking' as 'giv(ing) us a distinct way of representing authority' through attending to the forms that law takes, as a question precedent to the content of that law. In their treatment, jurisdictional thinking reveals the way in which the 'abstractness and immateriality of law is greatly exaggerated'.[15] Jurisdictional thinking thus emphasises aspects of law as a social phenomenon that are often relegated to introductory paragraphs on the 'history' of a particular area of law, or otherwise to the deceptively dry realm of 'procedural' law; the ritualised behaviours, the forms of words and the symbolic vocabularies that mark out the 'legal' from other registers of socio-political conduct.[16] Stated another way, paying

[14] Sundhya Pahuja, 'Laws of Encounter: A Jurisdictional Account of International Law' (2013) 1 *London Review of International Law* 63.
[15] See Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge, 2012), 5–6. See also Shaunnagh Dorsett and Shaun McVeigh, 'Questions of Jurisdiction' in Shaun McVeigh (ed), *Jurisprudence of Jurisdiction* (Routledge Cavendish, 2007), 3–18.
[16] Dorsett and McVeigh, 'Jurisdiction' above n 15, 24–25; Shaun McVeigh and Sundhya Pahuja, 'Rival Jurisdictions: The Promise and Loss of Sovereignty' in Charles Barbour and George Pavlich (eds), *After Sovereignty: On the Question of Political Beginnings* (London: Routledge Cavendish, 2011), 97–114.

attention to jurisdiction requires paying attention to the thresholds across which the political becomes legal, and to the material forms those thresholds take.[17]

Jurisdictional thinking is particularly relevant to the study of international law, which struggles more than municipal law to establish its identity *as* law.[18] This difficulty is often understood by critical legal scholars theoretically – for example, as a result of the radical indeterminacy of international law as a mode of reasoning[19] - rather than politically, as a result of the failure of the proponents of international law to normalise its legitimacy as an 'international' law or supranational jurisdiction. This is so even though the procedural question of whether or not a matter is 'within jurisdiction' – or in other words, has passed over the threshold from the political to the legal, or alternatively from the municipal to the international – repeatedly proves contentious in cases before international courts.[20] For the postcolonial and the decolonial scholar, jurisdictional thinking is useful in that it holds at arms' length the question of the 'correct' legal interpretation of a given conflict, allowing for the recognition of non-European legal traditions and practices of authorising 'international' conduct that are often practised by non-European subjects, but do not lend themselves to characterisation in legal submissions as 'proper' legal argument or 'proper' legal method.[21] In so doing, jurisdictional thinking reveals the colonial violence inherent in the equation of the subjective 'mastery' of international legal technique with some objective standard of virtue, reason or competence. It also, and most importantly, creates the possibility of imagining

[17] Dorsett and McVeigh, 'Jurisdiction' above n 15, 11–12.
[18] See Umut Özsu, 'Legal Form' in Jean d'Aspremont and Sahib Singh (eds), *Fundamental Concepts for International Law: The Construction of a Discipline* (Edward Elgar, 2017), forthcoming.
[19] As Koskeniemmi describes, the claim of the radical indeterminacy of international law is not that all legal terms are semantically ambivalent, but that international law is 'based on contradictory premises', and that this contradiction in purpose is 'an absolutely central aspect of international law's acceptability'. Martti Koskeniemmi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005), 590–591.
[20] See generally Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2nd ed, 2015). For an account of the Anglo-Iranian Oil Company Case of 1951 that argues for renewed attention to the significance of historical struggles over international jurisdiction in the context of decolonisation, see Sundhya Pahuja and Cait Storr, 'Rethinking Iran and International Law: The *Anglo-Iranian Oil Company Case* Revisited' in James Crawford, Abdul G Koroma, Alain Pellet & Said Mahmoudi, *The International Legal Order: Current Needs and Possible Responses. Essays in Honour of Djamchid Momtaz* (Martinus Nijhoff, 2017), forthcoming.
[21] An example, albeit a highly attenuated one, of this kind of recognition is the allowance of 'cultural artefacts' as evidence in native title cases in Australia. See Kirsten Anker, 'The Truth in Painting: Cultural Artefacts as Proof of Native Title' (2005), 9 *Law Text Culture*, 91–124. See also C F Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2011).

modes of engaging with different legal traditions – of creating spaces of 'encounter'[22] - that do not assume the universality of European legal rationalities.

In terms of methodology, jurisdictional thinking deploys methods more readily associated with historical or sociological analysis, whilst insisting on the propriety of those methods to the study of law. The method deployed in this project is that of critical redescription. The reinvigoration of critical redescription as international legal method owes much to the contributions of Shaunnagh Dorsett and Shaun McVeigh, Anne Orford, and Sundhya Pahuja on how we might understand the construction of legal authority through attention to practices of authorisation. This vein of work on 'redescription' is one branch of a number of cross-disciplinary lineages of the term, many of which inherit from historian Quentin Skinner's influential formulation of 'rhetorical redescription' as historical method in the 1970s.[23] Pahuja defines critical redescription as 'an attempt to redefine through narrative, a world we take for granted, inviting it to be seen differently as a mode of political engagement'.[24] The implication here is that all international legal analysis relies on foundational narratives of 'international law' – of beginnings, of central characters, of formative events, of central places – in order to legitimise its status as legal; and that those foundational narratives are not universally shared. Critical redescription offers a potential means of responding to a radical plurality of perspective without either imposing or purporting to transcend one's own.

In a different rendering of the term, Orford describes the method developed in her key text, *International Authority and the Responsibility to Protect,* as 're-description' that 'attempt(s) to describe practice whilst recognizing that the choice of what to include in such a description is always value-laden'.[25] In 'start(ing) with practices and mov(ing) on to their systematization and articulation in the form of the responsibility to protect concept', Orford borrows from Foucault's mode of describing - as opposed to explaining - transformations in structures of knowledge and power.[26] In Orford's treatment, critical redescription offers a means of

[22] Pahuja asserts that the project of international law might productively be redescribed as a history of encounter between rival jurisdictions. See Pahuja, 'Laws of Encounter' above n 14.
[23] See Quentin Skinner, 'The Techniques of Redescription' above n 2; Quentin Skinner, 'Rhetoric and Conceptual Change' above n 2*,* 60–73; and Kari Palonen, above n 2*,* 41–59.
[24] Pahuja, 'Laws of Encounter' above n 14, 65.
[25] Anne Orford, 'In Praise of Description' (2012) 25 *Leiden Journal of International Law*, 609, 624–625.
[26] Ibid 615–616.

understanding legal concepts and principles not as abstract or philosophical phenomena that exist prior to their application to the 'real' world, but as often retrospective justifications of administrative practices that develop iteratively in response to material or even mundane problems of governance.

3.2.2 Weberian sociological analysis

In addition to this vein of work on critical redescription as a method of jurisdictional thinking, the methodology and writings of German sociologist Max Weber have influenced the sensibility of this project. The concepts and terminology that Weber developed to describe European modernity not only remain foundational to the discipline of sociology but have taken on afterlives of their own across the humanities and social sciences.[27] Weber understood his methodology as a science of economics that built upon the work of Karl Marx, yet from an anti-Hegelian perspective that rejected dialectical materialism as an unscholarly reduction of the complexity of historical fact.[28] Marx was not Weber's only or even his primary interlocutor; Weber rejected any form of structuralism that sought to describe historical phenomena according to singular causal explanations.[29] As such, for Weber Marx's dialectical materialism was not intrinsically wrong; in fact, Weber understood it to describe very well the socioeconomic conditions that prevailed in western Europe in the second half of the nineteenth century.[30] But dialectical materialism could not be held as a universal truth; it was not sufficient as a universal explanation of history, or as an historiographical method.[31]

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[27] The journal *Max Weber Studies* publishes two issues a year, available at http://www.maxweberstudies.org/.

[28] See H H Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Routledge, 2009), 34; and Duncan Kennedy, 'The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought' (2004) 55 *Hastings Law Journal* 1031, 1036–1037.

[29] Max Weber, 'The 'Objectivity' in the Social and Economic Sciences' in Hans Henrik Bruun and Sam Whimster (eds), *Max Weber: Collected Methodological Writings* (Routledge, 2012 [first published in Aarchiv Für Sozialwissenschaft und Sozialpolitik, 1904]), 100, 111. Weber was particularly critical of Rudolf Stammler's philosophy of law in his 'Sociology of Law' in *Economy and Society*; see Max Rheinstein (ed), *Max Weber on Law in Economy and Society* (Harvard University Press, 1954), 27–29. Kennedy notes that Weber positioned himself in counterpoint to both Marxist and 'social' critiques of mainstream legal thought. See Kennedy, above n 28, 1034–1076.

[30] 'Weber thus tries to relativize Marx's work by placing it into a more generalized context and showing that Marx's conclusions rest upon observations drawn from a dramatized 'special case', which is better seen as one case in a broad series of similar cases. This series as a whole exemplifies the comprehensive underlying trend of bureaucratization. Socialist class struggles are merely a vehicle implementing this trend'. Gerth and Mills above n 28, 46, 50; see also 65–69.

[31] 'Anyone who has ever worked with Marxist concepts will be aware not only of the eminent, indeed unique, *heuristic* importance of those ideal types, when they are used as *comparisons* with reality, but also of how dangerous

Whilst to contemporary sensibilities, Weber's writing can feel oddly mechanistic in its attempt to outline what is in effect a critical epistemology, his work relates to the questions posed by this thesis in a number of productive ways. Firstly, Weber's career as a scholar spanned the period covered in the first two chapters of this history, from the early 1880s to his death in 1920.[32] His work therefore offers an immanent insight into German administrative practice of this period, and a reading that is not anachronistically overdetermined by the effects of the Versailles settlement, the rise of National Socialism and the expansionism of the Third Reich on the German state, as many accounts of pre-war German imperialism tend to be.[33] Secondly, his methodology of ideal types offers a way of considering the historical detail of local administrative practice without either assuming or foreclosing structuralist explanations of the development of international law. Thirdly, Weber's account of bureaucratisation across public and corporate practice as a significant modern European phenomenon offers a way of holding together the mutual development of company and public office in the Nauruan story. The latter two contributions are considered in further detail below.

Firstly, however, it is important to note that Weber is perhaps best known for his account of the relationship between the 'Protestant' ethic and the character of modern capitalism in the United States, and for his definition of the state as monopolising the legitimate use of force within a given area.[34] Whilst neither formulation is deployed in this project, some clarification is warranted. In his essay, *The Protestant Ethic and the Spirit of Capitalism*, Weber develops the concept of 'elective affinity' to describe the connection between political ideology and

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they can be whenever they are presented as empirically valid, or even as *real* (which in fact means: metaphysical)…' Weber, 'Objectivity in the Social Sciences', above n 29, 132–133. Kevin Anderson has recently written that in Marx's later notebooks, many of which are yet been published in English, Marx engaged with the fact of cultural difference of non-Western societies subject to colonial and imperial rule, including India, Indonesia, and Algeria. Anderson argues that this engagement had an effect on Marx's formulation of historical materialism, which shifted from the fixed unilinearity of the *Communist Manifesto* toward a more nuanced, non-reductionist critique of capitalist expansion. See Kevin B Anderson, *Marx at the Margins: On Nationalism, Ethnicity and Non-Western Societies* (University of Chicago Press, 2016), 237–245.

[32] For a good biographical summary, see Gerth and Mills, above n 28, 3–31.

[33] On Weber, see generally Wolfgang Mommsen, *Max Weber and German Politics 1890–1920* (Michael S Steinberg trans, University of Chicago Press, 1984) [trans of: *Max Weber und die deutsche Politik, 1890–1920* (2nd ed, 1974)]. For treatments of the complex debate over historiography and the German state, see Hans-Ulrich Wehler, *The German Empire 1871–1914* (Kym Traynor trans, Berg Publishers, 1985) [trans of Deutsche Gessellschaftsgeschichte 1871–1914 (first published 1973)]; cf Michael Blackbourn and Geoff Eley, *The Peculiarities of German History: Bourgeois Society and Politics in Nineteenth Century Germany* (Oxford University Press, 1984); Theodore S Hamerow, 'Guilt, Redemption and Writing German History' (1983) 88 *The American Historical Review* 1, 53; and Sven Oliver Muller and Cornelius Torp (eds), *Imperial Germany Revisited: Continuing Debates and New Perspectives* (Berghahn Books, 2011).

[34] See Wilhelm Hennis, *Max Weber's Central Question* (Keith Tribe trans, 2nd ed, Threshold Press, 2000), 10.

material interests.[35] In contradistinction to Marx, Weber argued that it was not the case that the political subject's material interests determined their ideological position, producing fixity of class; rather, the political subject would tend to adopt ideological positions that aligned with their interests construed broadly, and including religion and culture, which he regarded as wrongly minimised by strict application of dialectical materialism.[36] Although Weber's text sought to explain the differences between the trajectories of modern capitalism as practiced in western Europe and in the United States whilst remaining critical of both as modes of legitimised domination,[37] reductive interpretations of Weber's work have been subsequently instrumentalised to support universalist theories of development.[38] Similarly, Weber is known for the definition of the state initially offered in his essay *Politics as a Vocation* as a 'human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory'[39], a formulation taken up to various ends in political theory, international relations, and international law. Weber himself however did not hold this formulation of the state to be universally true across time and space.[40] Whilst this project in one sense comprises an account of postcolonial state formation, it does not take up interpretations of Weber that hold his work out as offering a template of state development.[41]

3.2.2.1 Weber on causal analysis

Rather, this project borrows most readily from aspects of Weber's methodological approach to causal analysis, and from his account of bureaucratisation. Each is considered here in turn. In his later writings, Weber outlined a methodology he described as 'singular causal

[35] Max Weber, *Protestant Ethic and the Spirit of Capitalism* (Talcott Parsons trans, Routledge, 1992 [trans of Die protestantische Ethik und der Geist des Kapitalismus (first published 1904)]; Gerth and Mills, above n 28, 61–63.

[36] See generally Weber, *Protestant Ethic*, above n 35, 2–12; 102–125. As Chantal Thomas notes, Weber cautioned against a reductive interpretation of his thesis in the *Protestant Ethic* via the simple substitution of cultural and religious causes for the economic causes he regarded as overdetermined in Marx's theory of history. Chantal Thomas, 'Max Weber, Talcott Parsons and the Sociology of Legal Reform: A Reassessment with Implications for Law and Development' (2006) 15 *Minnesota Journal of International Law* 2, 383, 391, 412–414.

[37] Weber's use of Goethe to effectively denounce the effects of modern capitalism in the United States is famously damning: 'Specialists without spirit, sensualists without heart; this nullity imagines that is has attained a level of civilisation never before achieved'. Weber, *Protestant Ethic*, above n 35, 124.

[38] Thomas, above n 36, 410.

[39] Max Weber, 'Politics as a Vocation', reproduced in H H Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Routledge, 2009) [trans of: *Politik als Beruf* (first published 1921)], 77, 78, 82–83.

[40] 'The assumption that a state 'exists' only if and when the coercive means of the political community are superior to *all* others, is anti-sociological'. Rheinstein, above n 29, 16; also Weber, above n 29, 130.

[41] See Thomas above n 36, 423–424.

analysis'.[42] For Weber, what was singular was the historical event, object or process to be described, and the 'causal analysis' was the method to be applied to its description. Weber's notion of causal analysis relied on the use of what he termed the 'ideal type'.[43] The ideal type was not a normative or evaluative ideal of how a thing should be, but rather an abstracted conceptualisation of what a thing is.[44] Weber used the phrase interchangeably with 'concept' and 'principle'.[45] However, Weber's point was not that his ideal types were essential renderings of concepts as generally deployed in scholarly discourse. His point was that a scholar should make explicit the ideal types or concepts with which they work, and deploy them not as explanations of social phenomena, but heuristic devices against which social phenomena could be described.[46] In this way, the practitioner was forced to make explicit the conceptual assumptions which they necessarily brought to bear on purportedly objective descriptions of fact.[47] In some contexts, the ideal type and the historical reality would accord very well; in others, they would be at odds.[48]

What Weber offered in his methodology was one means of navigating the task of historical description without either assuming structural explanation, or foreclosing any possibility of structural explanation in favour of radical contingency.[49] Weber's care to avoid reductive ascription of causation allows for numerous causal processes to intersect in historical description, without abandoning the scholarly imperative of bringing an organising conceptual framework to bear on the object of study. The possibility of structural or metaphysical explanation for historical processes is not disavowed by Weber; indeed his concept of 'rationalisation', although deployed in different senses in his work, grounds his account of the historical development of European modernity.[50] But his insistence on causal complexity and on the discontinuities between heuristic 'ideal types' and historical reality allowed for divergences from type to be kept within description.[51] As such his methodology

[42] Weber, 'Objectivity in the Social Sciences', above n 29, 125–126; also Frtiz K Ringer, *Max Weber's Methodology: The Unification of the Cultural and Social Sciences* (Harvard University Press, 1998), 1–6.
[43] Weber, 'Objectivity in the Social Sciences', above n 29, 125; Bruun and Whimster, above n 29, xxiv–xxv.
[44] Weber, 'Objectivity in the Social Sciences', above n 29, 116; Gerth and Mills, above n 28, 59–60.
[45] Weber, 'Objectivity in the Social Sciences', above n 29, 116–138. Bruun and Whimster note that Weber's use of his own terminology was not always consistent. Bruun and Whimster, above n 29, xvi.
[46] Ringer, above n 42, 5.
[47] Weber, 'Objectivity in the Social Sciences', above n 29, 126; Ringer, above n 42, 5–6.
[48] Weber, 'Objectivity in the Social Sciences', above n 29, 127.
[49] Gary Wilder describes the risk of 'descriptive empiricism...masquerad(ing) as theoretical insight' in Gary Wilder, 'From Optic to Topic: The Foreclosure Effect of Historiographic Turns' (2012) 117(3) *American Historical Review* 723, 730.
[50] Gerth and Mills, above n 28, 51; 57–58.
[51] Ibid 51–54.

engenders a praxis in which actually existing reality can be ever better described, but never perfectly 'explained'.[52] The purpose of sociological analysis was not 'evaluation', or normative judgment, of social phenomena; as Kennedy describes, 'Weber is famous for his insistence on a sharp distinction between the sociological is and the ethical or political ought'.[53] The purpose was rather to acknowledge the inevitability of the gap between the analytical concepts deployed by the scholar in the register of historical description, and the actually existing reality of what was described.[54] That acknowledgement created the possibility of better appreciating how and in what circumstances our conceptual understanding of historical development differs from historical reality.[55]

Weber was trained as a lawyer.[56] He completed his academic and his legal professional training concurrently.[57] Weber's legal training seems to have influenced both his methodology and his account of the modern European state as given in his sociology of law.[58] With respect to methodology, there is much in his account of the use of the ideal type as a heuristic tool for constructing analyses of historical phenomena that resonates with legal doctrinal methodology of the application of legal rules and principles to fact scenarios.[59] The difference is that, unlike the doctrinal lawyer, Weber was not seeking to reach a conclusive interpretation of fact situation according to legal principle; he was not, in other words, seeking to reduce the mess of historical reality to conformity with concepts.[60] The stated intention of Weber's methodology was precisely the inverse. His use of the ideal type - of the concept, the principle - as a heuristic tool was designed not to describe historical phenomena in conceptual terms, but rather to better apprehend the gap between analytical concept and historical fact, a task taken up in this project.

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[52] Weber, 'Objectivity in the Social Sciences', above n 29, 11.
[53] Kennedy, above n 28, 1036; Weber in Rheinstein, above n 29, 12.
[54] Gerth and Mills, above n 28, 60.
[55] Weber, 'Objectivity in the Social Sciences', above n 29, 113–114.
[56] Gerth and Mills, above n 28, 10–12. For the seminal biography of Weber, see Marianne Weber, *Max Weber: A Biography* (Harry Zohn trans, Wiley, 1975) [trans of: *Biografie de Max Weber* (first published 1926)].
[57] Gerth and Mills, above n 28, 10–12.
[58] Weber's student, Max Rheinstein, extracted the lengthy chapter on the sociology of law included in the posthumously published in *Economy and Society* in Rheinstein, above n 29. Panu Minkkinen has more recently considered Weber's typology of English and continental legal thinking as offering a 'radically critical position' for the contemporary legal academic. See Panu Minkkinen, 'The Legal Academic of Max Weber's Tragic Modernity' (2010) 19(2) *Social and Legal Studies* 165.
[59] Weber in Rheinstein, above n 29, 11–12.
[60] Weber, 'Objectivity in the Social Sciences', above n 29, 116.

Weber's sociology of law is grounded in his account of modern legal authority as constituted not by objective legitimacy, but by legitimised or legitimate domination.[61] Legality was the type of legitimised domination that characterised the European modern condition.[62] Weber's treatment of legal authority was at odds with liberal legal thought of his time, which held the Rousseauian concept of voluntary consent to be the foundation of legitimate rule.[63] For Weber, the authority of the modern European state – as a 'relation of men dominating men'[64], supported by means of violence – was upheld by 'belief in the validity of legal statute and functional 'competence' based on rationally created rules'.[65] It followed that in order to describe legal authority as an historical phenomenon, one looked not to principles of democracy, monarchy or theism, but to practices of legitimisation. In this sense, Weber's account of law is not dissimilar to the rendering of jurisdictional thinking given above, in directing attention to the practices of legitimisation that occur prior to the law being given content, rather than focusing exclusively on the content of that law.[66]

3.2.2.2 Weber on bureaucracy

In addition to his methodological approach to the relation between concept and practice, this project aligns with Weber's insistence on the significance of bureaucracy as central to the modern European condition.[67] Weber defined modern bureaucracy as possessing a set of characteristics, comprising fixed and official jurisdictional areas ordered by rules; the fixed distribution of authority to give commands, and the fixed hierarchical distribution of activities as official duties; the primacy of written documents or 'files'; the separation of public official activity from private activity; and the development of expertise in the execution of official activity.[68] Weber considered the emergence of modern bureaucracy as common to both 'public' and 'private' organisations of authority: 'bureaucratic authority', in

[61] Rheinstein, above n 29, 8–9, 333–337; Weber, 'Politics as a Vocation', above n 39, 78–79; Kennedy, above n 28, 1038–1039. Thomas considers the interpretive effect of the various translations of Weber's term *Herrschaft* into English in Thomas, above n 36, 418.
[62] Weber in Rheinstein, above n 29, 9, 322–328.
[63] Thomas, above n 36, 420.
[64] Weber, 'Politics as a Vocation', above n 39, 78.
[65] Ibid 78–79.
[66] Dorsett and McVeigh, 'Jurisdiction' above n 15, 10–12.
[67] Max Weber, 'Bureaucracy', reproduced in H H Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Routledge, 2009), 196–244. This chapter was first published posthumously in *Economy and Society* [trans of: Wirtschaft und Gessellschaft (first published 1922)].
[68] Ibid 196–198.

the sense of public administration, and 'bureaucratic management', in the sense of corporate hierarchy, were facets of the same modern phenomenon.[69]

For Weber, the emergence of modern bureaucracy was related to economic and political developments more commonly associated with European modernity, namely capitalism and democracy.[70] The development of a money economy that allowed the regular payment of wages to officials was a necessary but not sufficient condition for the emergence of bureaucracy. The initial stages of bureaucratisation were dependent on the security of income payable to officials, which enabled the separation of official service as an exclusive vocation.[71] The emergence of 'modern mass democracy' was another necessary condition, although it should be noted that Weber's understanding of democracy was not consistent with the contemporary liberal connotations attached to the term;[72] for Weber, democratisation was synonymous with the depersonalisation of authority and its attachment to public offices, and is thus more akin to the contemporary notion of the 'rule of law'.[73] In Weber's schema, there was therefore no necessary contradiction between democratic structure of government and autocratic rule.[74]

This project is particularly interested in Weber's understanding of bureaucratisation. For Weber, democratisation and bureaucratisation in western Europe had occurred in tandem, the former depersonalising political power and levelling traditional status-based power relations, the latter producing organisational complexity that favoured hierarchy and the development of expertise.[75] Once instantiated, bureaucratic organisation tended to prevail as a means of administering authority, for its comparative efficiency or 'technical superiority' in executing authoritative command.[76] At the same time, in consonance with Weber's notion of elective affinity, officials themselves tended to identify their power as justified by objective

[69] Ibid 196, 214–215; Weber, 'Politics as a Vocation', above n 39, 91. Weber submitted his doctoral thesis on the history of trading companies to the University of Heidelberg in 1889. See Gerth and Mills, above n 28, 9–10.
[70] Weber, 'Politics as a Vocation', above n 39, 82; Thomas, above n 36, 393–396.
[71] Weber, 'Bureaucracy', above n 67, 204–209; Weber, 'Politics as a Vocation', above n 39, 80 *et seq*. The influence of Georg Simmel's work on the sociology of money is evident here; Simmel and Weber were friends. See Georg Simmel, *The Philosophy of Money* (Taylor and Francis, 2004).
[72] Thomas, above n 36, 401; Gerth and Mills, above n 28, 38.
[73] Weber, 'Bureaucracy', above n 67, 224–226; Kennedy, above n 28, 1039.
[74] 'Of course one must always remember that the term 'democratization' can be misleading. The demos itself, in the sense of an inarticulate mass, never 'governs' larger associations; rather, it is governed, and its existence only changes the way in which the executive leaders are selected…' Weber, 'Bureaucracy', above n 67, 225. Also Weber, 'Politics as a Vocation', above n 39, 82; Weber in Rheinstein, above n 29, 330.
[75] Weber in Rheinstein, above n 29, 220; Thomas, above n 36, 399–400.
[76] Weber, 'Bureaucracy', above n 67, 214.

ideals in order to maintain that power.[77] Once established, bureaucracy was incredibly hard to dismantle: 'where the bureaucratization of administration has been completely carried through, a form of power relation is established that is practically unshatterable'.[78] 'Bureaucratisation' referred to the qualitative intensification of bureaucratic activity once established, rather than quantitative increase in the scope of tasks.[79] For Weber, there was thus a contradiction in the parallel emergence of 'mass' democracy and bureaucratic organisation of the state in modern Europe. What tended to occur in response to democratic pressures on authority was change in the identity of the persons in office, but not shifts in the power relation institutionalised in bureaucratic form.[80] Bureaucratisation was therefore a process of 'societalising' relations of domination.[81]

3.3 The method deployed in this project

Weber's methodology is not deployed slavishly in this project, which tends to privilege an aesthetic sense of historical narrative. Rather, Weber's understanding of law as legitimised domination and his account of bureaucratisation inform the emphasis of the redescription that is offered here. In that sense, this thesis demonstrates Kennedy's assessment of the diffuse influence of Weber on critical legal studies as the 'reinvention, or adaptation to non-Weberian purposes, of Weberian wheels'.[82] If the approach adopted in this project is articulated in Weberian terms, the 'object of analysis' is the administrative form applied to the island of Nauru. The 'ideal types' against which I am tracing the administrative form applied to Nauru are the status designations of protectorate, mandate, trust territory and state. Articulated in my terms, this project redescribes administrative practice in Nauru as a key site of international legal formation. The thesis describes the shifts in the international status of Nauru and shifts in administrative form at a local level as related but distinct phenomena.

What emerges is not a continuous chronological account of the administration of Nauru since its incorporation into the German protectorate of the Marshall Islands in 1888, but

[77] Ibid 220.
[78] Ibid 228.
[79] Ibid 214.
[80] Ibid 230; Weber applies this characterisation to the German revolution of 1918 in 'Politics as a Vocation', above n 39, 82. See also Kennedy, above n 28, 1062; Thomas, above n 36, 400.
[81] Weber, 'Bureaucracy', above n 67, 228.
[82] Kennedy, above n 28, 1076. Tomlins notes the applicability for Kennedy's assessment of the effect of Weber on the critical legal studies (CLS) movement to the critical legal history (CLH) movement. Christopher Tomlins, 'After Critical Legal History: Scope Scale, Structure' (2012) 8 *Annual Review of Law and Social Science*, 31, 37–39.

rather a detailed account of four fundamental shifts in the status of Nauru in international law, and the impact of those shifts at the level of local administration: the shift into German administration with the incorporation into the Marshall Islands protectorate in 1888 (Chapter 2); the shift to 'mandatory' international administration with the creation of the C Mandate in 1920 (Chapter 3); the shift to international 'trusteeship' with the creation of the Trust Territory of Nauru in 1947 (Chapter 4); and the shift to Nauruan administration with the creation of the Republic of Nauru in 1968 (Chapter 5). In this account, a particular quality of the relationship between imperialism and international law comes into focus. The insistence on the centrality of Nauru demands that attention be paid to administrative practice; and the attention to administrative practice reveals a disjuncture between international status and imperial form. Stated simply, while status shifts, form accretes. As significant changes in the status of Nauru take place, the form of administration does not radically change structure so much as undergo a process of internal bureaucratisation and external restatement according to the prevailing concepts of the period.

Before elaborating this argument, certain key terms require some definition. For the purposes of this project, I use the term 'administration' rather than 'bureaucracy', as in contemporary English usage the former better encapsulates Weber's reference to both public and private authority than does 'bureaucracy', which is more readily associated with public office.[83] I use the term 'status' simply to denote status recognised in international law.[84] I use 'form' not in a philosophical sense, but borrow from Dorsett and McVeigh's work on jurisdiction to define form simply as practice that takes on shape and meaning in its repetition.[85] For the purposes of this project, I draw heuristic parallels between status and concept on the one hand, and form and practice on the other. I use 'administration' simply to mean the collective execution

[83] Weber himself used the terms bureaucracy and administration to similar effect; see Weber in Rheinstein, above n 29, 330–337.

[84] I am sidestepping a literature on international legal personality, which reads status as more constitutive than I do in this project. See Fleur Johns (ed), *International Legal Personality* (Ashgate, 2010); Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser Press, 2004); Rose Parfitt, 'Empire des Nègres Blancs: The Hybridity of International Personality and the Abyssinia Crisis of 1935–36' (2011) 24 *Leiden Journal of International Law*, 849; Natasha Wheatley, 'New Subjects in International Law and Order' in Patricia Clavin and Glenda Sluga (eds), *Internationalisms: A Twentieth-Century History* (Cambridge University Press, 2016), 265.

[85] Dorsett and McVeigh, 'Jurisdiction' above n 15, 139. This approach also sidesteps the literature on legal formalism; for a recent helpful treatment, see Umut Özsu, 'Legal Form' in Jean d'Aspremont and Sahib Singh (eds), *Fundamental Concepts for International Law: The Construction of a Discipline* (Edward Elgar, 2017), (forthcoming).

of authoritative command.[86] I use the term 'authority' in the Weberian sense of legitimate domination, rather than objectively constituted legitimate authority.[87] This approach reflects the influence of jurisdictional thinking, which directs attention to the practices of authorisation that make possible the articulation of law.[88]

3.3 Limitations of the methodology

As described above, this project deals primarily with two categories of source: the primary legal instruments that effected changes in the status of Nauru in international law, and contemporaneous sources which offer insight into how and why those legal and official instruments were created. There is obviously a significant degree of subjective judgment brought to bear in determining the scope of the second category, and certain deviations require acknowledgment here. Firstly, the requirement of contemporaneity has not been applied strictly where I faced limitations in the availability of contemporaneous sources in English translation. This was particularly the case in Chapter 2, which deals with German administrative practice, and I rely more heavily on subsequent historical analyses of the period here than in Chapters 2 and 3. I acknowledge this as a limitation of the methodology and indeed of the content of this chapter. Secondly, there are extended sections where the historical narrative takes recourse to sources and themes that seem to stretch the requirement of relation to instruments in the first category. Examples include the passage on the history of the Hansa in Chapter 2; and the passage on the relationship between the emergence of agricultural chemistry as a discipline, the commodification of phosphate, and comparative mining law in Chapter 3; and the passage on the war of the Pacific in Chapter 4. These choices follow from holding the Nauruan case at the centre of the narrative, which shifts the emphasis of historical context deemed 'necessary' to understanding each period in question.

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[86] Weber in Rheinstein, above n 29, 330. There are other treatments of administration as a contemporary site of analysis in international legal scholarship with which this project does not directly engage; for key texts in this literature see Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15, 15–61; Ralph Wilde, *International Territorial Administration* (Oxford University Press, 2008); and Simon Chesterman, 'International Territorial Administration and the Limits of Law' (2010) 23 *Leiden Journal of International Law*, 437.

[87] Weber in Rheinstein, above n 29, 328. As Dorsett and McVeigh observe, '(w)hile authority can be understood in many ways according to different political and jurisprudential traditions, it has broadly been concerned with the explanation of the legitimate means of affiliation and subordination'. Dorsett and McVeigh, 'Jurisdiction' above n 15, 10.

[88] See Dorsett and McVeigh, 'Jurisdiction' above n 15; Shaunnagh Dorsett and Ian Hunter (eds), *Law and Politics in British Colonial Thought: Transposition of Empire* (Palgrave Macmillan, 2010), 'Introduction', 1–10; Pahuja, 'Laws of Encounter' above n 14, 70.

4. The argument

The argument offered in this thesis is twofold, and can be stated as follows. Sovereign statehood is the latest stage in a series of shifts in the status of Nauru in international law which commenced with the German declaration of protectorate status over the island in 1888, and continued through the designation of Nauru as a C Mandate in 1920, the re-designation of Nauru as a United Nations Trust Territory in 1947, and to the recognition of Nauru as a sovereign state in 1968. Each shift has been justified according to international legal principles of protection, mandate, trust, and then self-government, yet was preceded by commercial and geopolitical instabilities in the maintenance of imperial control over the island. Throughout this series of shifts in status, the administrative form applied to the island has not radically changed structure so much as undergone a process of internal bureaucratisation and external restatement according to the prevailing concepts of the period. The first element of the argument then, is that while international status shifts, imperial form accretes; the shift in the international status of Nauru from trust territory to sovereign state in 1968 corresponded at the level of local administration to a stage in the bureaucratisation of an imperial administrative form instantiated in the late nineteenth century.

A particular relation between form and status – between local administrative practice and international legal concept - emerges in this history. In response to commercial and geopolitical imperatives, an existing administrative form is applied outside of the context in which it developed. The application of existing form to novel circumstance is effected by legal instruments that, insofar as they are held to effect law outside of sovereign territorial jurisdiction, not only renovate administrative form, but innovate legal authority. Each innovation of legal authority is retrospectively justified in terms of legal concepts that support the recognition of a shift in status in international law. As the administrative form becomes institutionalised over time, however, what occurs at the administrative level in response to commercial and political pressure is a bureaucratisation of the existing administrative form. Stated another way, whilst status shifts, form accretes. The relations of authority established by forms of imperial administration, and the external relations that imperial administrative forms facilitate, are not dismantled by shifts in status. Rather, administrative form originally set up to facilitate imperial extraction of resources without regard for place or people is gradually bureaucratised in accordance with the concepts developed in support of status.

Administrative tasks and practices intensify, are restated and renamed, but the form in which they are organised holds.

The second element of the argument is that this relationship between legal status and administrative form becomes visible in the attempt to hold Nauru at the centre of the narrative of a history of international law from the late nineteenth century to decolonisation in the 1960s. The fixing of Nauru at the centre of the narrative produces an account that reveals a disjuncture between status and form. This argument about the effect on historical perspective of fixing one place over another as central to the construction of narrative is the fundamental point gestured toward in this thesis. *All* histories of international law require narrative choices that centralise certain sites of international legal formation over others. This privileging of place, whether it occurs intentionally or not, affects the narrative that is constructed, perhaps as significantly as does ideological presumption. It follows from this simple methodological point that histories that privilege the received 'centres' of international law – Berlin, Versailles, San Francisco, The Hague, New York – may well work to erase as much about the international legal order as they reveal.

The choice to centralise a place habitually regarded as peripheral to or anomalous within the international order is thus both a methodological and a political one. What emerges from this project is a better sense of the difference between 'the' history of international law as a mode of conceptual reasoning – the international law of negotiated agreements, treaty interpretation, judicial decisions and juridical writings – and the *histories* of international law as actually practised in place, in the exercise of administrative powers, the allocation of budgets, the writing of reports, and the *ad hoc* practices of rule that develop in the gaps between 'ideal' concepts and local circumstance. The political intention of the project is to encourage a greater understanding of the partiality of all histories of international law, and to suggest that there is a need for greater nuance in the way the Eurocentricity of international law is understood. As discussed below at 5.2.1, Eurocentricity is quite literally a geographic conceit, as well as an epistemological, normative and protagonal one; and it is a Eurocentricity that can be resisted.

5. Locating this project in the literature on imperialism and international law

Any description of the formation of the international legal order is necessarily an act of intervention in the field which operates within its own conditions of possibility, as Craven

has observed.[89] This project is offered as a contribution to - or perhaps more accurately as a counterpoint within - the genre of histories of imperialism and international law.[90] Treatments of the relationship between imperialism and international law have expanded into something of a transdisciplinary phenomenon over the last few decades.[91] As Susan Marks has usefully sketched out, accounts of the relationship between imperialism and international law tend to fall within three broad narrative tropes, which are distinguished by what 'empire' is assumed to mean.[92] Where 'empire' is equated with colonialism in the sense of direct imposition of administrative control, contemporary international law is figured as defeating imperialism in its centrality to the decolonisation project of the later twentieth century.[93] Where 'empire' is equated with political hegemony such as that of the post-Cold War dominance of the United States, contemporary international law is figured as defeated

[89] Matthew Craven, 'Theorising the Turn to International Law' in Anne Orford and Florian Hoffmann (eds) *Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016).

[90] This genre is distinguished from the genres of 'legal history' and 'law and history'. See generally Ann Genovese, 'How to Write Feminist Legal History: Some Notes on Genealogical Method, Family Law, and the Politics of the Present' in Diane Kirkby (ed), *Past Law, Present Histories* (ANU Press, 2012), 139; and David M Rabban, 'Methodology in Legal History: From the History of Free Speech to the Role of History in Transatlantic Legal Thought' in Anthony Musson and Chantal Stebbings (eds), *Making Legal History: Approaches and Methodologies* (Cambridge University Press, 2012), 88.

[91] Within the discipline of international law, notable works in the development of the field include Martti Koskeniemmi, *Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001); Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005); George Rodrigo Bandeira Galindo, 'Martti Koskeniemmi and the Historiographical Turn in International Law' (2005) 16 *European Journal of International Law* 539; Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff Publishing, 2007); Thomas Skouteris, 'Engaging History in International Law' in José María Beneyto and David Kennedy (eds), *New Approaches to International Law: The European and American Experiences* (TMC Asser Press, 2012), 99–121; Bardo Fassbender and Anne Peters, 'Introduction: Towards a Global History of International Law' in Bardo Fassbender and Anne Peters (eds), *Oxford Handbook of the History of International Law* (Oxford University Press, 2012), 1; Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' (Institute for International Law and Justice Working Papers, History and Theory of International Law Series, 9 September 2011); Rose Parfitt, 'The Spectre of Sources' (2014) 25 *European Journal of International Law* 297; Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (Cambridge University Press, 2015); Matthew Craven, 'Theorising the Turn to History in International Law' in Anne Orford and Florian Hoffmann, *Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016). Works by historians of empire that have influenced the development of this field within international law include Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France 1500–1800* (Yale University Press, 1995); Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires 1400–1900* (Cambridge University Press, 2010); Mark Mazower, *Governing the World: The History of an Idea* (Penguin Press, 2012); Andrew Fitzmaurice, *Sovereignty, Property and Empire 1500–2000* (Cambridge University Press, 2014); and Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press, 2015).

[92] Susan Marks, 'Three Concepts of Empire' (2003) 16 *Leiden Journal of International Law* 901 (published as part of the 'International Symposium on the International Legal Order' in that issue). See also Susan Marks, 'Empire's Law (The Earl A Snyder Lecture in International Law)' (2003) 10 *Indiana Journal of Global Legal Studies* 449.

[93] Marks, 'Three Concepts', above n 92, 902.

by imperialism.[94] Where 'empire' is equated with economic globalisation, international law and imperialism are figured as mutually constituted.[95] Within Marks' broad schema, this project falls most readily within the third approach, in that it holds modern European imperialism and international law to be mutually constitutive. The definition of imperialism adopted in this project is prosaic: imperialism is simply defined as the institutionalisation of practices that authorise extraterritorial conduct, whether commercial, political or otherwise.[96] This is an enabling definition that allows the content of 'imperialism' to change over time and space and allows for difference between empires to emerge from the sources, without foreclosing the possibility of structural explanations of why and how imperialism takes certain forms.[97]

This project bears obvious familial resemblance to the work of Antony Anghie on the relationship between the case of Nauru and the history of international law, and has benefited from Anghie's key interventions in the field.[98] Anghie's work is most readily identified with the Third World Approaches to International Law (TWAIL) movement.[99] The political

[94] The prominent example here is Antonio Negri and Michael Hardt, *Empire* (Harvard University Press, 2000).
[95] Marks, 'Three Concepts', above n 92, 903. See also Akbar Rasulov, 'Writing About Empire: Remarks on the Logic of a Discourse' (2010) 23 *Leiden Journal of International Law* 449, 461–468.
[96] This definition obviously owes a debt to jurisdictional thinking; see Anne Orford, 'Jurisdiction without Territory: From the Holy Roman Empire to the Responsibility to Protect' (2009) 30 *Michigan Journal of International Law* 981.
[97] As Marks suggests, for international lawyers the definition of imperialism one adopts is intimately related to presumptions about the nature of the relationship between imperialism and international law. On Koskeniemmi's reckoning, this suggests a fundamental 'imperial ambivalence' in international law. See Martti Koskeniemmi, 'Introduction: International Law and Empire: Aspects and Approaches' and in Martti Koskeniemmi, Walter Rech and Manuel Jimenez Fonseca (eds), *International Law and Empire: Historical Explanations* (Oxford University Press, 2017), (forthcoming). For a thoughtful treatment on the role and importance of historical narrative in constructing this relationship, see Walter Rech, 'International Law, Empire and the Relative Indeterminacy of Narrative' in Martti Koskeniemmi, Walter Rech and Manuel Jimenez Fonseca (eds), *International Law and Empire: Historical Explanations* (Oxford University Press, 2017), (forthcoming).
[98] Antony Anghie, "The Heart of My Home': Colonialism, Environmental Damage and the Nauru Case' (1993) 34 *Harvard International Law Journal* 445; Antony Anghie, *Imperialism, Sovereignty and International Law* (Cambridge University Press, 2005), 1–12.
[99] See generally Antony Anghie and B S Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflict' in Steven R Ratner and Anne-Marie Slaughter (eds), *The Methods of International Law* (American Society of International Law, 2004), 185; Antony Anghie, 'TWAIL: Past and Future' (2008) 10(4) *International Community Law Review* 479; and James Thuo Gathii, 'TWAIL: A Brief History of its Origins, Its Decentralized Network, and a Tentative Bibliography' (2011) 3 *Trade, Law and Development* 26. For an excellent overview and indicative bibliography of the TWAIL movement, see Gathii, above n 99, 26–64. The political origins of the movement are often located in the advocacy and writings of international legal practitioners active in the 1960s–1980s who broadly identified as 'Third World', including R P Anand, Mohammed Bedjaoui, M Sornarajah, J J G Syatauw, and others. Key collections in the TWAIL movement as restated from late 1990s include Antony Anghie, B S Chimni, Karin Mickelson (eds), *The Third World and International Legal Order: Law, Politics and Globalization* (Bill Publishers, 2003); the symposium introduced in B S Chimni, 'The World of TWAIL: Introduction to the Special Issue (2011) 3 *Trade, Law and Development* 1, 14–25; and most recently, the symposium introduced in Usha Natarajan, John Reynolds, Amar Bhatia and Sujith Xavier, 'Introduction: TWAIL — On Praxis and the Intellectual' (2016) 37(11) *Third World Quarterly* 1946.

sensibility of this project aligns broadly with TWAIL. In its insistence on Nauru as a case of analytical significance, the departure point of this thesis is similar to that of Anghie in *Imperialism, Sovereignty and the Making of International Law*, yet the path traversed from that point is different: this project emphasises administrative practice as instantiated in Nauru, rather than the development of fundamental concepts of international law.[100] As a result, the continuity between imperialism and international law is traced not through concepts of the civilizing mission and cultural difference that condition postcolonial sovereignty, as Anghie argues with such effect, but through grounded practices of administration.[101] The intention is not to query the significance of Anghie's work, or of conceptual analyses of sovereignty and international law more generally.[102] It is rather to give sustained critical attention toward similar political ends to the administrative forms to which sovereign status has been attached.[103]

This project also owes a debt to the vein of literature I broadly group under the banner of conceptual histories of imperialism and international law, whilst remaining somewhat apart in its methodological attention to practice over concept. For present purposes, I define the category of 'conceptual history' as those accounts that take as their primary objects of analysis the written attempts of jurists and practitioners to define a coherent structure of legal concepts as animating the historical development of international law; a prominent example here is the work of Koskeniemmi in *Gentle Civilizer of Nations*.[104] If the category was defined in theoretical rather than methodological terms, it might be termed 'structuralist', as Koskeniemmi has defined his own work; however my emphasis here is on method.[105] The

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[100] Anghie, 'Imperialism, Sovereignty and International Law', above n 98, 1–2; Anghie, 'The Heart of My Home', above n 98.

[101] Anghie, 'Imperialism, Sovereignty and International Law', above n 98, 3, 311–315.

[102] Examples of works that have critiqued concepts of sovereignty in international law include Richard Joyce, *Competing Sovereignties* (Routledge, 2012); Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004).

[103] The state of course receives much attention in other scholarly registers; see for example Gerry Simpson, 'Something to Do With States' in Orford and Hoffman (eds), *Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016), 564; Antonio Cassese, 'States: Rise and Decline of the Primary Subjects of the International Community' in Bardo Fassbender and Anne Peters (eds), *Oxford Handbook of the History of International Law* (Oxford University Press, 2012), 49; and the contemporary classic on statehood: James Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd ed, 2007).

[104] Martti Koskeniemmi, *Gentle Civilizer of Nations*, above n 91. Another example is Stephen C Neff, *Justice Among Nations: A History of International Law* (Harvard University Press, 2014).

[105] I am intentionally sidestepping a field of literature here on structuralist legal history and its relation to critical legal history. In a recent treatment which serves as a useful entry point into the field, Justin Desautels-Stein figures 'structuralist legal history' as counterposed to 'critical legal history', where the former describes the attempt to 'generate intelligibility' through conceptual structure, and the latter the 'elaboration of a never-ending series of social contexts'. See Justin Desautels-Stein, 'Structuralist Legal Histories' (2015) 78 *Law and Contemporary Problems* 37. However this distinction deploys US-centric interpretations both of structuralism and

emphasis of practice over concept in this project might be held to simply rehearse a well-traversed theoretical debate over the relation between the ideal and the material in historical analysis.[106] However emphasis on practice over concept has developed pragmatically, as a means of holding Nauru at the centre of the inquiry, which the conceptually focused method with which I commenced would simply not allow me to do.

5.1 The issue of 'Eurocentricity'

A persistent issue that arises in the field of histories of imperialism and international law is the problem of 'Eurocentricity'. The tendency of conceptual histories of international law, even where offered as critiques of Eurocentr*ism*, to reinscribe Eurocentric narratives, values, knowledge practices, is a commonly identified problem.[107] Indeed, Koskeniemmi has suggested it is an insurmountable one.[108] However as suggested above, there are various senses of 'Eurocentricity' in international legal thought which are not necessarily co-extensive. It is important to parse these various senses in order to determine which might and which might not be resisted by scholars trained in a European epistemological tradition. The first sense of Eurocentricity is epistemological. Scholars writing in the disciplinary tradition inherit knowledge practices that are inescapably Eurocentric in their privileging of a highly particular mode of knowledge production.[109] To that extent, the scholar's choice to remain within the confines of disciplinary practice is itself a choice of Eurocentric medium that relegates non-European laws and modes of knowledge production.[110] A second sense

of critical approaches to law. For an alternative rendering in a European tradition that figures structuralism as a mode of critique, see Martti Koskeniemmi, 'What is Critical Research in International Law? Celebrating Structuralism' (2016) 29 *Leiden Journal of International Law* 727.

[106] For one prominent line of this debate, see E P Thompson, *The Poverty of Theory* (Monthly Review Press, 1978); and Bryan Palmer, 'Critical Theory, Historical Materialism and the Ostensible End of Marxism: The *Poverty of Theory* Revisited' (1993) 38 *International Review of Social History* 133.

[107] Martti Koskeniemmi, 'Histories of International Law: Significance and Problems for a Critical View' (2013) 27 *Temple International and Comparative Law Journal* 215, 222–224. Arnulf Becker Lorca, 'Eurocentrism in the History of International Law' in Bardo Fassbender and Anne Peters (eds), *Oxford Handbook of the History of International Law* (Oxford University Press, 2012), 1034; Akbar Rasulov, 'Writing About Empire: Remarks on the Logic of a Discourse' (2012) 23 *Leiden Journal of International Law* 449; and Pahuja, 'Laws of Encounter' above n 14, 95–98.

[108] Koskeniemmi, 'Histrories of International Law', above n 107, 222.

[109] Chakrabarty notes that postcolonial engagement with European thought is disciplined by the fact that 'the so-called European intellectual tradition is the only one alive in the social science departments of most, if not all, modern universities…this is the genealogy of thought in which the social sciences find themselves inserted.' Chakrabarty, above n 3, 5. Koskeniemmi, 'Histories of International Law', above n 107, 222.

[110] Kombumerri/Munaljahlai scholar Christine Black offers an account of Korumberri law and knowledge in C F Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2011). See also Raewyn Connell, *Southern Theory: The Global Dynamics of Knowledge in Social Science* (Polity, 2007); and Linda Tuiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, 2012).

of Eurocentricity is normative, in that it ascribes universality to the particular configuration of secularised Christian, liberal, and democratic values that characterise European modernity.[111] Although related to the first, strong critiques of the development project and of human rights discourse, for example, have demonstrated that this is a mode of Eurocentricity that can be resisted by scholars working within the disciplinary tradition.[112] A third sense of Eurocentricity is protagonal, in that it concerns the omission of non-European jurists, practitioners and leaders from conceptual histories of international law. This is a mode of Eurocentricity that Chimni identifies as a target of the TWAIL movement, and which Lorca works to correct in *Mestizo International Law*.[113] It is possible to resist protagonal Eurocentricity whilst remaining epistemologically and normatively Eurocentric, and the recovery of the contributions of non-European protagonists in histories of international law is a necessary corrective.

The Eurocentricity that this project works to reveal is simply geographical. Geographical Eurocentricity here describes the presumptive privileging of European sites of international legal formation as more important than others.[114] By focusing on practice in 'marginal' place, the aim is to resist so far as possible the assumption of a 'view from nowhere' in the narration of a history of the development of international law, which in content invariably replicates a 'view from Europe'.[115] In this project, I place Nauru at the centre of an historical account of international legal formation. The account that emerges is in parts unfamiliar for the 'international' events it reveals, and in others contestable for the interpretation of 'international' events it produces. The point is precisely to demonstrate that presumptions of the centrality of certain places over others prefigures the scope of a history of the

[111] Chakrabarty, above n 3, 45; Luis Eslava and Sundhya Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3 *Trade Law and Development* 103. See also David Scott, *Conscripts of Modernity: The Tragedy of Colonial Enlightenment* (Duke University Press, 2004); and Immanuel Wallerstein, *European Universalism: The Rhetoric of Power* (New Press, 2006).

[112] For key examples, see Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011); Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2010).

[113] B S Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8 *Melbourne Journal of International Law* 499, 511; Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (Cambridge University Press, 2014).

[114] Significant accounts of this form of Eurocentricity within the discipline of geography include J M Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (Guilford Press, 1993); Thongchai Winichakul, *Siam Mapped: A History of the Geo-Body of a Nation* (University of Hawaii Press, 1994); and Doreen Massey, *For Space* (SAGE Publications, 2005).

[115] For Chakrabarty, the aim of 'provincializing Europe' is 'precisely to find out how and in what sense European ideas that were universal were also, at one and the same time, drawn from very particular intellectual and historical traditions that could not claim any universal validity. It was to ask a question about how thought was related to place'. Chakrabarty, above n 3, xiii.

relationship between imperialism and international law. This project does not transcend epistemological Eurocentricity, as in most respects it is a conventionally disciplinary historical narrative. Nor does it transcend protagonal Eurocentricity, as it focuses on what men of European heritage – for they are all men – said, did, and wrote. However, in its politics it resists normative Eurocentricity; and in its method, it resists geographical Eurocentricity.

6. Contributions and limitations of the project

To summarise, then, the focus on administrative practice in the 'periphery' over legal concept in the 'centre' allows for productive re-orientations in historical perspective.[116] Firstly, it orients the narrative toward the historical continuities between the protectorate, the mandate, the trust territory and the state as variations in administrative form, rather than treating them as conceptually different phenomena separated by epochal shifts in international legal thought. Secondly, it de-emphasises the categorical distinction between corporate and public authority that can be assumed in contemporary taxonomies of international law, and allows for the recurrent continuities between company and state rule to be appreciated not as exceptional but as fundamental to the development of the contemporary international legal order.[117] Thirdly, it orients the narrative toward the way in which grounded administrative form functions as the site in which the disjunctures between 'universal' legal concepts promulgated in the received sites of international law and 'local' commercial and geopolitical contingencies are negotiated, or simply institutionalised.[118] In this respect, the sorts of 'deviations' from the ideal that Nauru-as-legal-object has demonstrated are not at all anomalous. Nauru is simply representative of the fact that while status shifts, form accretes; that power relations established by form, and the relations that form facilitates, are not easily or necessarily dislodged by shifts in international legal thinking at the conceptual level.

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[116] In a related point, John Haskell has warned of the risk to the contemporary international legal academic of the 'over-prioritization of concepts and ideals over institutional apparatuses in relation to production as the movers of history'. John Haskell, 'From Apology to Utopia's Conditions of Possibility' (2016) 29 *Leiden Journal of International Law* 667, 675.

[117] Critical treatments of the role of commerce and the company in the history of international law include Istvan Hont, *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective* (Harvard University Press, 2011); Fleur Johns, 'Theorizing the Corporation in International Law' in Anne Orford and Florian Hoffmann (eds) *Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 635; Pahuja and Storr, above n 20.

[118] Orford makes a related point in relation to the development of the 'responsibility to protect' concept in practices of international administration, noting that it is in 'the prosaic and everyday practices' that the 'political effects of the responsibility to protect concept would be determined'. See Orford, 'In Praise of Description', above n 25, 614.

The focus on administrative practice in Nauru as a site of international legal formation yields significant insights which warrant identification. First is the re-placement of German imperialism in the narrativisation of international legal formation. Histories of imperialism and international law, at least in English, have not yet considered in much detail the significance of the practice and abrupt curtailment of German imperialism for those peoples and regions that came under German control between the 1880s and the European War of 194-1918.[119] A number of historical narratives are recovered, or re-collected, through the focus on Nauru during the German imperial period. At the 'international' level, focus on the German cases demonstrates that the language of 'civilisation' that circulated during the Versailles negotiations and was codified into Article 22 of the Covenant of the League of Nations was a cypher that invoked the 'barbarism' of German imperial practice just as readily as it did the 'barbarism' of non-European peoples.[120] The concept of a standard of civilisation thus operated not only to inscribe a division between European and non-European modes of socio-political organisation, but between acceptable and unacceptable modes of imperialism.[121]

Another insight this approach yields is into the nature of Australian colonialism. German imperialism in the Pacific was a significant impetus for the project of federation of the Australian colonies.[122] There was close relation between the assumption by the British

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[119] As Koskeniemmi has observed of the focus on the British empire in histories of imperialism and international law, 'Germany's own colonial period (1880–1919) is still largely untreated from the perspective of international legal history'. Martti Koskeniemmi, 'A History of International Law Histories' in Bardo Fassbender and Anne Peters (eds), *Oxford Handbook of the History of International Law* (Oxford University Press, 2012), 944. Exceptions in English, largely the work of German scholars who are linguistically adroit enough to write in or translate works into English, include Jörg Fisch, 'Law as a Means and as an End: Some Remarks on the Function of European and Non-European Law in the Process of European Expansion' in W J Mommsen and J A De Moor, *European Law and Expansion: The Encounter of European and Indigenous Law in 19th and 20th Century Africa and Asia* (Berg, 1992), 15; and Felix Hanschmann, 'The Suspension of Constitutionalism in the Heart of Darkness' in Kelly L Grotke and Markus J Prutsch, *Constitutionalism, Legitimacy and Power: Nineteenth Century Experiences* (Oxford University Press, 2014), 243.

[120] The so-called 'colonial guilt' argument that supported the removal of German colonies in the Versailles settlement was a source of great consternation to German jurists and publicists who, in support of the Wilhelmian Reich and later, the Third Reich, held the Allied Powers' condemnation of German imperial practice to be hypocritical and self-justificatory. See Heinrich Schnee, *German Colonization Past and Future: The Truth about the German Colonies* (George Allen and Unwin, 1926); and G L Steer, *Judgment on German Africa* (Hodder and Stoughton Ltd, 1939).

[121] For renderings of the 'standard of civilisation' that emphasise the 'European versus non-European' inflection of the term over the 'British and French imperialism versus German imperialism' inflection, see Anghie, 'The Heart of My Home', above n 98; Gerrit Gong, *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press, 1984); and Brett Bowden, 'The Colonial Origins of International Law, European Expansion and the Classical Standard of Civilization' (2005) 7 *Journal of the History of International Law* 1.

[122] See section 10 'Concern in Australian colonies over German imperial expansion' in Chapter 2, 'From Trading Post to Protectorate, 1888'.

Dominions of Australia, South Africa and New Zealand of administrative control over the occupied German territories in Africa and the Pacific, and their shift toward sovereign status in international law.[123] This is a surprising recovery made in this project, and my own perspective on the nature and legacy of Australian colonialism has shifted as a result. 'Australian colonialism' was not simply about the essentially linear interaction of pre-existing 'settler' and 'indigenous' subjects within the geographic limits of what is now known as the sovereign territory of Australia, but a densely relational historical phenomenon in which each of these categories was produced.[124] That process of stabilising the basic relational categories that comprise 'Australia' is still underway, and still exceeds the geographic limits of 'Australian' territory. As a geopolitical region, the 'Australia-Pacific' has its origins in the avowedly 'sub-imperial' policies through which the Australian government sought to substantiate its sovereign status in the early twentieth century.[125] It still requires constant effort on behalf of the Australian state to stabilise, as demonstrated by the current legal conflict over the oil and gas reserves in the Timor Sea, by the excision of Australian islands and then the mainland itself from the Australian migration zone, and by the imbrications of Australian and Nauruan sovereignty in the legal framework of the offshore detention regime.[126]

A third insight concerns the interrelations between natural resource commodification and the formalisation of imperial administration in the global South. The fixing of place as narrative frame allows for geological as well as geographic particularities to be considered as relevant to processes of legal formation, and for the post-independence effects of the structuring of imperial administration for the purposes of resource extraction to be better

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[123] See section 10 'Nauru, the European war and Australian 'sub-empire' in the Pacific' in Chapter 3, 'From Protectorate to Mandate, 1920'. In some respects, Anghie presaged the need to tell this story: '(t)here is, then, yet another history to be written about the Nauru Case. It is a history of two overlapping, reinforcing and interpenetrating relationships — between the United Kingdom and Australia; and between Australia and Nauru'. Anghie, 'The Heart of My Home', above n 98, 505.

[124] Again, Anghie makes a related observation: 'Australia is both colonizer and colonized…Given this complex set of experiences, the question remains as to how these histories coexist, and which history will prevail'. Anghie, 'The Heart of My Home', above n 98, 505.

[125] See section 10 'Nauru, the European war and Australian 'sub-empire' in the Pacific' in Chapter 3, 'From Protectorate to Mandate, 1920'. This is not a new observation, but one that is so often omitted from nationalist teleologies of Australia that it bears repeating. See generally Roger C Thompson, *Australian Imperialism in the Pacific: The Expansionist Era 1820–1920* (Melbourne University Press, 1980).

[126] On the Timor Sea, see *Arbitration under the Timor Sea Treaty (Timor-Leste v Australia)* (Permanent Court of Arbitration, Case 2013-16). On the excision of the mainland from the migration zone, see *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth). On the imbrication of Australian and Nauruan sovereignty in the offshore detention regime, see *Plaintiff M68/2015 v Commonwealth of Australia* (2016) 257 CLR 42 (Gordon J, dissent).

understood. Of course, it is hardly new to note the significance of phosphate to the legal formation of Nauru; most of the scholarly treatments of Nauru place phosphate at the centre of their analysis.[127] The phosphate interlude written into Chapter 3 tells this story in a different way, and owes a debt to the field of science and technology studies (STS), which requires materiality to be considered in a far more nuanced, relational way than might a Marxist approach.[128] The basic premise of this passage is that the relationship between phosphate and administrative form in Nauru cannot be well understood without a consideration of the commodification of phosphate in the later nineteenth century, the effect of that commodification on the development of agricultural chemistry, and on the modes of authorising imperial expansion into the Pacific.[129] As such, this passage seeks to hold together agricultural chemistry, natural resource commodification and imperial expansion in order to better understand the context in which phosphate exploitation rights were transferred from the Hanseatic company, the *Jaluit Gesellschaft*, to the British firm, the Pacific Phosphate Company, a key moment in the legal formalisation of Nauru.[130]

The implication here is that the exploitation of the natural resources of the post-colonised South to the benefit of the post-colonising North persists not only through the normalisation of the neoliberal development project in international institutions like the World Trade Organisation and the World Bank, but also through the structural continuities in administrative form from the imperial through to the contemporary era.[131] Stated another way, the outward flow of natural resources is structured into the administrative form of the postcolonial state, and is not undone simply by the substitution of local for imperial executives. Post-independence attempts in postcolonial states to interrupt that outward flow

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[127] Nancy Viviani, *Nauru: Phosphate and Political Progress* (ANU Press, 1970); and Christopher Weeramantry, *Nauru: Environmental Damage under International Trusteeship* (Oxford University Press, 1992).

[128] Texts that influenced the consideration of phosphate in this project include Bruno Latour, *The Politics of Nature: How to Bring the Sciences into Democracy* (Harvard University Press, 2004); Sheila Jasanoff, *States of Knowledge: The Co-Production of Science and the Social Order* (Routledge, 2004); and Isabelle Stengers, *Cosmopolitics I* (University of Minnesota Press, 2010).

[129] For works that make similar claims, see Gregory T Cushman, *Guano and the Opening of the Pacific World: A Global Ecological History* (Cambridge University Press, 2013); and Katerina Martina Teaiwa, *Consuming Ocean Island: Stories of People and Phosphate from Banaba* (Indiana University Press, 2014). See also Richard Grove, *Green Imperialism: Colonial Expansion, Tropical Island Edens and the Origins of Environmentalism, 1600–1860* (Cambridge University Press, 1996).

[130] See section 7, 'The Pacific Phosphate Company and its Agreement with the *Jaluit Gesellschaft*' in Chapter 3, 'From Protectorate to Mandate, 1920'.

[131] On the persistence of the North-South divide in the neoliberal development project, see Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011); Sumudu Atapattu and Carmen C Gonzalez, 'The North-South Divide in International Environmental Law: Framing the Issues' in Shawkat Alam et al. (eds), *International Environmental Law and the Global South* (Cambridge University Press, 2015), 1.

through the restructuring of public and private relations at the local level have tended to reveal just how heavily conditioned the exercise of postcolonial sovereignty is.[132]

A fourth insight relates to the question of how to historicise the state form at a time when statehood appears variously in retreat and resurgence. It may seem untimely to reconsider the universalisation of the state as the form of administration to which territorial sovereignty attaches, when the direction of interest in international law has been toward the ways in which the state has been displaced as the primary subject of international law.[133] Since the end of the Cold War, much literature has argued that state sovereignty is steadily being undermined: both from without, with the rise of regional institutions including courts;[134] and from within, with the rise of the city, the company and the person as international legal subjects.[135] Setting aside the question of whether state sovereignty has ever been as integral or absolute as these theses can presuppose, it is precisely because the universalisation of the state as the teleological endpoint to 'the' history of international law is squarely in doubt that now is an opportune moment to reconsider the state as an administrative form in a series of forms. The triumphalist narrative of the universalisation of the nation-state in the post-Cold War era may well itself be historicised as a period in the development of what we now call international law. My argument in this thesis suggests that the postcolonial state might be periodised as a stage in a longer process of the bureaucratisation of imperial administration, rather than a departure from that process.

There are also inherent limitations in the approach adopted in this project which require acknowledgment. The first is the historical period considered. The focus on transitions in status in international law means that this story ends with Nauruan independence in 1968. This is now half a century ago. It would be trite to summarise the immense significance of what has occurred for Nauru environmentally, financially, and politically in the intervening period.[136] Whilst certain of those developments are relevant to the concerns of this thesis –

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[132] See Pahuja and Storr, above n 20.

[133] See generally Cassese, above n 103; and Simpson, above n 103.

[134] See for example Karen J Alter, James T Gathii and Laurence R Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 *European Journal of International Law* 293; Ed Bates, 'British Sovereignty and the European Court of Human Rights' (2012) 128(3) *Law Quarterly Review* 382.

[135] See for example on the city, Helmut Philipp Aust, 'Shining Cities on the Hill: The Global City, Climate Change, and International Law' (2015) 26 *European Journal of International Law* 255; and on the corporation, Johns, above n 117, 635–654.

[136] For an indicative account of the constitutional conflict that characterises contemporary Nauruan politics, see Katy Le Roy, 'Nauru's Parliament in Crisis' (2010) 91(3) *The Parliamentarian* 240. See also Steven Ratuva, 'The Gap Between Global Thinking and Local Living: Dilemmas of Constitutional Reform in Nauru' (2011)

most notably the dysfunction in practice of the administrative form entrenched in the 1968 Constitution, which is discussed in the Prologue - that form has not substantively changed since. The 2009 referendum proposed structural changes to power relations in the administrative form of the Nauruan state that would have fallen squarely within the scope of this project - for example, relations between the executive and the legislature, and between the executive and the Nauru Phosphate Royalties Trust.[137] However, as covered in the Prologue, the referendum failed. The second limitation is a matter of language. In its treatment of German materials, this thesis relies heavily on extant English translations of German legal instruments and correspondence. This is a clear limitation on the analysis offered in this thesis, which I can defend only by observing that translation is a significant methodological problem for international lawyers in general, and I understand this chapter to be the one of the few treatments of German imperial administration in the Pacific produced within the genre of histories of international law.[138] Much more remains to be done, and better than I have managed in this project.

The third limitation, which is the most profound, is the absence of the Nauruan people from much of this story. This is not a history of the island of *Naoero* and the Nauruan people and is not offered as such. It is a story about 'Nauru' as an object of international law, as reflected in a particular set of imperial sources, as constructed by an Australian international lawyer. There are other versions of the story of Nauru as an object of international law, told through other sources, to be constructed by other voices. Whilst this has been one of the hardest limitations to reckon with, there are pragmatic and political reasons why the project has been constructed this way. On a pragmatic level, I have not been able to return to the island since 2009. When I conceived of this project, I intended to visit Nauru to work with the archive of the pre-independence period that remains, undigitised, on the island. The Australian government's decision in August 2012 to recommence offshore detention on Nauru and on Manus Island in Papua New Guinea of asylum seekers that arrive by sea in Australian waters

120(3) *Journal of Polynesian Society* 3. For a recent case in the High Court of Australia related to the Republic of Nauru's debt crisis, see *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 326 ALR 396. On Nauru's environmental precarity, see Government of Nauru, 'National Assessment Report for the Third International Conference on Small Island Developing States' (17 May 2013) 8–16.

[137] Nauru Constitutional Review Commission, "Naoero Ituga': Report' (28 February 2007) <http://www.paclii.org/nr/other/Nauru_Constitutional_Review_Commission_Report_28Feb07.pdf>.

[138] Koskeniemmi briefly considers German imperial law in Martti Koskeniemmi, 'Colonial Laws: Sources, Strategies and Lessons?' (2016) 18 *Journal of the History of International Law* 248, 275–276; Nuzzo offers a helpful overview of German imperial law in the African protectorates; see Luigi Nuzzo, 'Colonial Law' (16 April 2012) European History Online <http://ieg-ego.eu/en/threads/europe-and-the-world/european-overseas-rule/luigi-nuzzo-colonial-law>. Neither have occasion to consider the Pacific.

precipitated a series a policy decisions in Nauru that rendered it politically impossible to carry out that research.[139] Many of those with whom I worked in 2009 have since left the island, either voluntarily or under duress of the current executive.[140]

However the political reason why I have constructed the project this way is far more important. The simple fact is that a Nauruan story is not mine to tell. I do not presume that I can represent Nauruan experiences of imperialism or of sovereignty, and have carefully sought to avoid doing so. What I can do is reconsider - as an Australian international lawyer of German and British lineage – the actions of Europeans who presumed themselves to be justified in imposing administrative control on Nauru, and the ways in which law was used as a means of authorising that imposition. Stated another way, the gesture of representation I have chosen to engage in here is not a representation of Nauruan experiences of - or resistance to - imperialism, but a representation of how Europeans have understood their imperialism to be authorised by law. To that end, the project is offered as a way those of us who inherit both Eurocentric narratives of international law and the responsibility of colonial lineage in a postcolonial place might provincialise ourselves, in order to make room for others.

7. The chapter outline

Each of the chapters that follow redescribes a shift in the international status of Nauru and the accretions of administrative form that accompany that shift. **Chapter 2**, 'From Trading Post to Protectorate, 1888', traces the appearance of 'Nauru' on the plane of European imperial administration, first as a point in the Pacific trading network of the Hanseatic firm, *Goddefroy & Sohn*, and then as a German protectorate under the administration of the *Jaluit Gesellschaft* company. A brief history of the Hansa is offered as a means of redescribing the contemporaneous formation of the German Reich under Bismarck, the regime of protectorates that proliferated after the Berlin Conference on the Congo in 1884, and

[139] See Australian Broadcasting Corporation, 'Nauru Media Visa Fee Hike to 'Cover up Harsh Conditions at Australian Tax-payer Funded Detention Centre', *ABC* (online), 9 January 2014 <http://www.abc.net.au/news/2014-01-09/nauru-visa-fee-increase-censorship/5191108>.

[140] See Australian Broadcasting Corporation, 'Nauru Gives Reasons for Sacking Magistrate', *ABC* (online) 21 January 2014, <http://www.abc.net.au/pm/content/2013/s3929597.htm>; Cameron Atfield, 'Former TV and Radio Host Rod Henshaw Deported from Nauru', *Brisbane Times* (online) 29 January 2014 < http://www.brisbanetimes.com.au/queensland/former-tv-and-radio-host-rod-henshaw-deported-from-nauru-20140129-31n6w.html>; Daniel Flitton, 'Escape from Nauru: How Ex-MP Roland Kun Slipped the Net to New Zealand', *Sydney Morning Herald* (online) 15 July 2016 <http://www.smh.com.au/world/escape-from-nauru-how-exmp-roland-kun-slipped-the-net-to-new-zealand-20160715-gq6i60.html>.

'international law' as a discipline. The administrative formation of the German protectorate of the Marshall Islands, and the incorporation of Nauru into that protectorate as a means of protecting German trading interests in the Pacific, are considered against the attempts of British and German jurists to conceptually define the legal basis of the protectorate form. The chapter concludes that the divergences between the protectorate as instantiated by the Reich as a form of company administration in Nauru and the attempts at juridical clarification of the protectorate as a matter of international law were significant, and institutionalised in the administrative structure imposed on the island.

Chapter 3, 'From Protectorate to Colony to Mandate, 1920', opens with an account of the administrative development of Nauru as an office of the Marshall Islands protectorate, and its subsequent subsumption into direct colonial administration as part of the colony of German New Guinea in 1906. The chapter diverts to consider the relationship between the commodification of phosphate, the industrialisation of agricultural production, and imperial competition in the Pacific, as a means of providing context to the sale in 1900 of the *Jaluit Gesellschaft*'s phosphate exploitation rights to a British firm, the Pacific Phosphate Company. The development of the Company's Nauru operation under the joint administration of the *Jaluit Gesellschaft* and the Reich Colonial Office is redescribed in relation to the militarisation of the Reich under Wilhelm I, the influence of German activity in the Pacific on Australian federation, and the development of 'Dominion' status in the British Empire.

The chapter moves to consider the effects on Nauru of the war of 1914 to 1918 and the subsequent formation of the League of Nations. The Australian occupation of Nauru on British request was one of the first taken by Australia in the war, and an action which Australian Prime Minister Billy Hughes subsequently argued during the Versailles negotiations grounded a claim to territorial annexation. Although Hughes failed in this gambit and Nauru was placed under the international oversight of the League – as was South West Africa - the creation of the C Class Mandate was directly related to the 'sub-imperial' policies of Australia and South Africa as British Dominions as prosecuted by Hughes and Smuts at Versailles. The chapter argues that the shift from protectorate to mandate status was accompanied at the local level by an accretion in administrative form. Under the Nauru Island Agreement, Britain, Australia and New Zealand agreed to establish a tripartite monopoly over Nauruan phosphate. The Pacific Phosphate Company's assets vested in the new British Phosphate Commission with exclusive power over phosphate operations; and

administrative control vested in an Australian Administrator, responsible for meeting mandatory obligations. The chapter concludes that in the transition from protectorate of the Reich to mandate of the British empire, the basic administrative form established in the protectorate period remained intact.

Chapter 4, 'From Mandate to Trust Territory, 1947', opens with an account of the bureaucratisation of Nauru as a C Mandate under Australian Administration, as reflected in Reports of the Administration to the Permanent Mandates Commission of the new League of Nations. The ambivalent status of the C Mandate as codified in Article 22 of the Covenant of the League of Nations is considered, as argued by jurists, avoided by the PMC, and practised in Nauru; and the Australian claim to satisfy mandatory obligations via payment of royalties and the implementation of a secondary education program for Nauruan men is assessed. The development of the Nauruan phosphate industry under the British Phosphate Commission and the impact of Nauruan phosphate on Australian agriculture is traced in context of international debates on population growth and food security prompted by the global depression of the late 1920s and early 1930s. In Australia, these debates were framed racially as risks to the white Australia policy that required proactive response to prevent Asian immigration.

Growing tension between Australia and Japan over economic access in the C Mandates is considered in context of the failing legitimacy of the League of Nations over the 1930s; and the war of 1939 to 1945 is redescribed against the occupation of Nauru and New Guinea by Japan from 1942. The reconstitution of the League as the United Nations is considered with a focus on the expansion of Article 22 of the Covenant into three Chapters of the Charter of the United Nations at the San Francisco Conference of 1945. The finalisation of the Trusteeship Agreement for Nauru is considered in context of the reconstitution of the Permanent Mandates Commission as the Trusteeship Council, with significantly increased powers of review. The chapter concludes that although the transition from mandate to trust status significantly recast the conceptual framing of international administration, and sharpened the legal obligations owed by the Administration in the shift from C Mandate to trust territory, the shift in status was met with accretions in form at the local level.

Chapter 5, 'From Trust Territory to State, 1968', opens with an account of the re-establishment of Australian administration of Nauru as a trust territory. The increased obligations of trusteeship and the increased powers of the Trusteeship Council provide in

the Charter, and the presence on the Council of Soviet and post-colonial states is redescribed through the formalisation of Nauruan protest over Australian administration, particularly with respect to the issues of royalty calculations and land disposition. The creation in 1951 of the Nauru Local Government Council in response to criticisms of the lack of provision for 'political advancement' proved a significant administrative development; even though the NLGC lacked any substantive power, under Head Chief Hammer DeRoburt it came to function as vehicle for prosecution of the Nauruan case for self-government in the Trusteeship Council and the UN General Assembly.

The chapter diverts to consider the effects of the South West Africa cases in the International Court of Justice on the United Nations General Assembly's position on independence for all trust territories. The UN's subsequent embrace of the cause of Nauruan independence forced a series of protracted negotiations between the NLGC and the Australian Department of Territories in the 1960s over political independence and control of BPC operations, in which the Department of Territories proved intransigent on the issues of ownership of Nauruan phosphate and assets, and liability for rehabilitation of the island's central plateau. In the rapidly negotiated transition to independence over 1966-1967, the latter issue remained unresolved. The chapter closes with a consideration of the drafting of the Nauruan Constitution, and concludes that although sovereign independence of the Republic of Nauru in January 1968 was a significant achievement of the Nauruan people as represented by Hammer DeRoburt and the NLGC, the Constitution introduced further accretions in an administrative form that remained essentially continuous with the imperial iterations that had preceded it.

Chapter 6 is the Conclusion of the thesis. It summarises the research question and the argument, and concludes that the now notorious dysfunctionality of the contemporary Nauruan state should be understood as continuous with imperial administrative practices of the pre-independence era. It reiterates the particularity of the account of international legal formation produced by the methodology adopted in this project, and concludes with reflections on the analytical and political significance of focusing on practice in marginalised places for histories of imperialism and international law.

8. Conclusion

This thesis is an historical account of how the island of *Naoero* became the Republic of Nauru. Drawing together primary legal instruments that effected changes in the status of Nauru in international law, and contemporaneous sources that illuminate how and why those instruments were created, this thesis develops a method of critical redescription that brings to bear jurisdictional thinking and a Weberian sensibility to construct a narrative of four key shifts in the legal history of Nauru: the shift into German administration as a protectorate in 1888, into international administration as a C Class Mandate in 1920, then as a Trust Territory in 1947, and finally into sovereign territorial administration in as the Republic of Nauru in 1968. Whilst each shift was retrospectively justified according to international legal concepts of protection, mandate, trust, and then self-determination, each was preceded by commercial, political and geographic instabilities in the maintenance of imperial control over the island. Throughout this series of shifts in status, the administrative form applied to the island has not radically changed structure so much as undergone a process of internal bureaucratisation and external restatement according to the prevailing concepts of the period. The implication is that the shift in the international status of Nauru from trust territory to state was accompanied at the local level not by a departure from but an accretion of an imperial administrative form instantiated in the late nineteenth century.

This thesis is a contribution to the genre of histories of imperialism and international law, and asserts that the method deployed in this project offers insight not only into the Nauruan case, but into the relationship between 'the' history of international law as the development of an ideal conceptual framework for governing the world, and the *histories* of international law as actually practised in place. This is not a history of the island of *Naoero* and the Nauruan people and is not offered as such. It is a story about the formation of 'Nauru' as an object of international law, as reflected in a particular set of imperial sources, as constructed by an Australian international lawyer of German and British lineage. The history that follows is in parts unfamiliar for the 'international' events it reveals, and in others contestable for the interpretation of 'international' events it produces. The point is precisely to demonstrate that presumptions of the centrality of certain places over others prefigures the narrative construction of histories of imperialism and international law; and that it is possible, even within the confines of disciplinary practice, to see the international legal order from other perspectives.

Chapter 2

From Trading Post to Protectorate, 1888

1. Introduction

This chapter redescribes the declaration of protectorate status over Nauru as part of the German protectorate of the Marshall Islands in the Western Pacific in 1888, and the adoption of an administrative form to govern the island. Commencing with an account of the commercial activity of Hanseatic trading firms in the Pacific and in Africa, the chapter redescribes the commercial, political and geographic pressures on the new German Reich under Chancellor Otto von Bismarck that led to the declaration of 'protectorate' status over regions not already claimed by other European powers. German protectorates included South West Africa, East Africa, German New Guinea, and the Marshall Islands in the Western Pacific. The chapter moves to consider the classical conceptualisation in the law of nations of protectorate status as deriving from an agreement between unequal sovereigns for 'protection' of the weaker party, and argues that the German protectorate form as envisaged by the Bismarckian Reich differed significantly from existing concepts of protection; not only was contemplation of local sovereignty absent, the German protectorate was explicitly intended to 'protect' German trading interests in regions outside German sovereign territory, whilst minimising the expenditure of direct administration by the Reich. As such, administrative control of the German protectorates was in most cases vested in German companies, with minimal subsidisation or legislative oversight by the Reichstag.

The island of *Naoero*, known then in English as 'Pleasant Island', was incorporated into the German protectorate of the Marshall Islands as 'Nauru' on the request of Hamburg firm *Goddefroy & Sohn*, in order to quell Nauruan 'civil' war which interfered with the company's copra trade. The conquering of Nauru was achieved with a show of German naval force, without any pretence of agreement or consideration of the legal status of the Nauruan people. At the same time, disquiet in the Australian colonies at British diplomatic acquiescence in the formalisation of German commercial imperialism in the Pacific amplified the political momentum toward federation and assumption of the external affairs power. The chapter concludes that whilst juridical attempts to define the 'protectorate' in the 1880s and 1890s failed to produce a settled definition, the pragmatic arrangement decided upon by agreement between the Reich and the *Jaluit Gesellschaft*, the company created by *Goddefroy & Sohn* with

German capital to take on the administration of the Marshall Islands protectorate, laid the foundations of the administrative form of Nauru. That form worked to structure property relations, phosphate exploitation rights, and jurisdictional delineations between private and public authority.

2. 1884: the DHPG pays its first dividend

In the context of German imperial history, 1884 was a significant year. For the new German Reich, confederated in 1871 with Minister-President of Prussia, Otto von Bismarck, as its first Chancellor, 1884 was arguably the debut of its notoriously late entry into the imperial arena of the late nineteenth century. German intervention in Africa was formally consolidated in April 1884. The German imperial flag was hoisted in the port of Angra Pequeña north of the Cape Colony on the request of the Bremen tobacco merchant and adventurer F.A.E. Lüderitz, making 'Lüderitzland', later South West Africa, the first protectorate of the German Reich.[1] In July 1884, the German protectorates of Togo and Cameroon were declared. The *Gesellschaft für Deutsche Kolonisation* or 'Company for German Colonisation' was founded in Berlin by Carl Peters, an organisation which became the German East Africa Company and in 1885 was granted an imperial charter with authority to administer a protectorate over those regions pursuant to which Carl Peters claimed treaties with local rulers – a region that eventually took in contemporary Rwanda, Burundi and areas of Tanzania.[2] On the other side of the earth in the Pacific, New Guinea was declared a German protectorate in November 1884. The Berlin Conference on the Congo was held between the 'Powers' of Germany, Britain, France, Italy, Belgium, Spain, Denmark, the Netherlands, the Ottoman Empire and the United States from November 1884 to February 1885. The culmination of the Conference in the *General Act* of 1885 purported to provide a legal framework for further imperial expansion of European states in Africa, whilst at the same time recognising the Congo Free State as the private property of Leopold's Congo Society.[3]

However, the reason 1884 is chosen as the point of entry into this account of Nauru's formation as an object of international law is less obvious. In 1884, a Hamburg trading firm

[1] William Osgood Aydelotte, *Bismarck and British Colonial Policy: The Problem of South West Africa 1883–1885* (Russell and Russell, 2nd ed, 1970).
[2] Woodruff D Smith, *The German Colonial Empire* (University of Carolina Press, 1978), 92–99.
[3] *General Act of the Conference of Berlin Concerning the Congo* (entered into force 26 February 1885) reproduced in *The American Journal of International Law* (1909) 3(1) 7.

operating in Samoa and the Marshall Islands chains in the Western Pacific paid out its first dividend of 4% to holders of preference shares, five years after its establishment.[4] The firm, the *Deutsche Handels- und Plantagen-Gesellschaft der Südsee-Inseln*, or 'German Trading and Plantation Company of the South Sea Islands' ('DHPG') had been established to take over the Pacific interests of Godeffroy & Sohn, the largest of a group of Hamburg trading firms that had been operating in the Pacific since the mid-nineteenth century.[5] This chapter argues that the commercial activity of the DHPG in the western Pacific region was instrumental in the inclusion of Nauru in the German 'sphere of influence' in the Pacific. Historians of the period have observed that were it not for the established presence of the DHPG and other Hanseatic firms in the western Pacific, the region would have been of little to no interest to the new German confederation at all.[6] The financial success or otherwise of the Hamburg firms in the region is therefore taken as the key condition of possibility of the establishment of the German protectorate of the Marshall Islands in 1885, in which Nauru was included in 1888.

As this choice of entry indicates, the intention of this chapter is not to rehearse an account of European imperial expansion as a coherent project informed by international legal reasoning, but rather to redescribe the events that led to the incorporation of Nauru into the German Protectorate of the Marshall Islands, and thus into the nascent international order. By resisting a narrative of the colonisation of Nauru that assumes the inevitability of European imperial expansion into the Pacific and attending to the material contingencies that influenced the decisions taken by the Reich as to how to protect commercial enterprise outside the geographical bounds of the new German state, a sense emerges of the dynamic interplay of commercial, political and geographical pressures that shaped the administrative formation of Nauru as an object of international law – a process in which, it is argued, international legal thought played a minor role.

[4] Stewart Firth, 'German Firms in the Western Pacific Islands 1857 – 1914' (1973) *Journal of Pacific History* 8, 10–28.
[5] Stewart Firth, *New Guinea under the Germans* (Melbourne University Press, 1983); and A E Bollard, 'The Financial Adventures of J C Godeffroy and Son in the Pacific' (1981) *16 Journal of Pacific History* 1, 3–19.
[6] See for example Florence Mann Spoehr, *White Falcon: The House of Godeffroy and its Commercial and Scientific Role in the Pacific* (Pacific Books, 1963), vi–vii.

3. The reticence of the new Reich

On account of its ponderous title, the DHPG was mocked by Robert Louis Stevenson as 'the Long Handle Firm'.[7] Stevenson's weak jest in *A Footnote to History: Eight Years of Trouble in Samoa* is not without insight. The firm's name is an intriguing historical artefact. The 'German Trading and Plantation Company of the South Sea Islands' was not a public enterprise but a private company, hastily recapitalised in March 1878 by Hamburg banker Adolph von Hansemann.[8] The company had formed solely for the purpose of taking over the Pacific interests of flailing Hamburg trading firm *Godeffroy & Sohn*.[9] *Godeffroy*, a merchant company of longstanding repute, had been instrumental in inscribing a maritime network of European trading posts across the western Pacific, having set out west from Valparaiso in Chile to install their first Pacific agent in Apia Bay, Samoa, in 1857.[10]

It is tempting to seize on this shift in company identity from 'Godeffroy & Sohn' to the 'German Trading and Plantation Company of the South Sea Islands' as representative of the consolidation of the German confederated state in 1871. Stevenson at least seems to have regarded the DHPG as a German nationalist enterprise, describing Hansemann's acquisition of the Godeffroy interests as a move to prevent those interests falling into the hands of London finance house, Baring Brothers.[11] Notwithstanding Stevenson's opinion, the political power Hansemann sought to protect by taking over *Godeffroy*'s Pacific interests in this way was not necessarily that of the new German confederation. The family bank he managed after inheriting the role from his father was a Hamburg institution that predated German confederation. The *Disconto-Gesellschaft* was comfortable in involvement with high politics. Hansemann's father David was not only its director but had served as the Prussian Minister for Foreign Affairs prior to confederation in 1871; Karl Marx had written of David Hansemann in 1858 that '(a)t a time when the joint-stock company was still a *rara avis* in Germany, he had the ambition of becoming a German Hudson, and proved perfectly adept in that sort of jobbery…'.[12] Under the 'German Hudson', the *Disconto-Gesellschaft* assisted

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[7] Robert Louis Stevenson, *A Footnote to History: Eight Years of Trouble in Samoa* (Charles Scribner's Sons, 1895), 29.
[8] Firth, above n 5, 11–13.
[9] W O Henderson, *The German Colonial Empire 1884–1919* (Frank Cass & Co. Ltd., 1993), 24–25.
[10] Firth, above n 5, 11; Henderson, 'The German Colonial Empire', above n 9, 22.
[11] Stevenson, above n 7, 14; Henderson, 'The German Colonial Empire', above n 9, 68.
[12] Karl Marx, 'The New Ministry', *The New York Tribune* (New York), 27 November 1858, reprinted in Karl Marx and Frederick Engels, *Collected Works: Volume 16, 1858–1860* (Richard Dixon, Henry Mins and Salo Ryazanskaya trans, Lawrence and Wishart, 2010) 102.

Bismarck in financing the French indemnity after the Franco-Prussian War of 1868 – 1870.[13] Hansemann's bank was also involved in financing colonial entrepreneurs, German and otherwise in their fledging colonial turns in Africa - including Lüderitz in Angra Pequeña.[14] In 1929, the *Disconto-Gesellschaft* merged with the *Deutsche Bank*.[15]

Yet when Adolph Hansemann approached Bismarck in 1880 with a plan to save the Godeffroy interests in the Pacific that included modest state funding, the proposal was voted down by the Reichstag.[16] In 1880, the prospect of official support of commercial activity outside sovereign territory was politically unpalatable to the new Reich. With his Hanseatic pedigree, Hansemann proceeded to raise equity privately to establish the DHPG, only later managing to secure a modest shipping subsidy for the company's Pacific activity via direct representations to Bismarck.[17] Despite its title, then, the interests of the DHPG were thus not clearly or necessarily aligned with those of the new German state.[18] It is more accurate to surmise that Hansemann and the DHPG were continuing to further the shared interests of the community of Hamburg investors, traders, bankers and entrepreneurs to which both the *Disconto-Gesellschaft* and *Goddefroy & Sohn* belonged, a community whose collective conduct was informed not by the new German confederation but by five centuries of organisation under the Hansa.

4. Hamburg trading firms and the legacy of the Hansa

The word 'Hansa' has Gothic origins, with instances of usage indicating a dual meaning of a troop or company, and a tax on commodities.[19] As a proper noun, it refers to the medieval organisation of northern German towns which began to record itself as the *Hansa Theutonicorum* or 'Teutonic Hansa' in the thirteenth century, waxing and waning over a lifespan that officially ended with its final council in Lübeck in 1669, twenty years after the

[13] See John Martin Kleeberg, *The* Disconto-Gesellschaft *and German Industrialization: A Critical Examination of the Career of a German Universal Bank 1851–1914* (Doctoral thesis, University of Oxford, 1988) 195.
[14] The South West Africa Company was part-financed by the *Disconto-Gesellschaft*. Richard A Voeltz, *German Colonialism and the South West Africa Company, 1894–1914* (Ohio University Center for International Studies, 1988), 1, 83.
[15] Both banks' annual reports for this period are available in German via the Historical Association of the Deutsche Bank: http://www.bankgeschichte.de/en/content/2448.html.
[16] Henderson, 'The German Colonial Empire', above n 9, 68.
[17] Mary Henderson, *Origins of Modern German Colonialism* (Howard Fertig, 1974), 115–6.
[18] As Mary Henderson notes, '(i)t was of course to be expected that the German bankers, already much interested in South Sea enterprises, would intervene and come to the rescue; but that they would do so purely on patriotic and national grounds was unlikely'. Ibid 115.
[19] E Gee Nash, *The Hansa: Its History and Romance* (Bodley Head, 1929), 1; Rolf Hammel-Kiesow, 'The Early Hanses' in Donald J Harreld (ed), *Companion to the Hanseatic League* (Brill, 2015), 15–63.

peace of Westphalia.[20] The history of the Hansa and its status and function in medieval Europe is underexplored in English historical texts – a curiosity in itself, as noted by those historians who have written on it, given the organisation's longevity and importance to the commercial development of a significant swathe of the northern hemisphere.[21]

As a mode of medieval European political authority, the Hansa was unique. Its institutional specificity has been so eclipsed by the subsequent rise of the modern nation-state that historical accounts tend to fall prey to one of two historiographical risks – either to narrate the Hansa's development as a precursor to modern federalism, or to characterise its function as a merely economic concern.[22] In broad scope, the Hansa was a self-selecting organisation of towns across northern Germany that spread into Scandinavia, Belgium, central Europe, and at its furthest reaches, to England and Russia. German sailors and merchants from the towns of Lübeck, Cologne, Bremen and Hamburg had long engaged in North Sea and Baltic trade, facilitated by their location around the Rhine, Weser and Elbe riverine region around the isthmus of Schleswig between the two seas.[23] Over the twelfth and thirteenth centuries, these German merchants' trade consisted largely of the import and export of low-value-added products. Wine and cloth was exported to England and northern Europe in exchange for wool and salt, which was in turn traded to eastern Europe in exchange for including wax and furs, and occasionally luxury goods from East Asia.[24] In Marx's figuring, this form of merchant or commercial capitalism preceded capitalist modes of production, defined by the creation of surplus value in commodity production via exploitative labour relations.[25] The Hansa did not engage in the regulation of labour relations at all, or in production. Hanseatic business was commodity circulation.

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[20] For the seminal history of the Hansa in English, see Phillipe Dollinger, *The German Hansa* (Routledge, 1999), see esp. Chapter 3 'Towards the Hansa of the Towns (c.1250 – c.1350)' and Chapter 14 'Renewal and Eclipse (1550–1669)'. See also Justyna Wubs-Mrozewicz, 'The Hanse in Medieval and Early Modern Europe: An Introduction' in Stuart Jenks and Justyna Wubs-Mrozewicz (eds) *The Hanse in Medieval and Early Modern Europe* (Brill, 2012), 1.

[21] Dollinger, above n 20, xvii–xxii; and Donald J Harreld, 'Introduction' in Donald J Harreld (ed), *Companion to the Hanseatic League* (Brill, 2015), 1–5.

[22] For an early history that celebrates the Hansa as an 'early representative of that federal spirit…best understood and most thoroughly carried out' in the United States, see Helen Zimmern, *The Hansa Towns* (T Fisher Unwin, 1891). For a recent treatment of historiographical issues, see Stuart Jenks, 'Conclusion' in Stuart Jenks and Justyna Wubs-Mrozewicz (eds) *The Hanse in Medieval and Early Modern Europe* (Brill, 2012), 255–281.

[23] Carsten Jahnke, 'The Baltic Trade' in Donald J Harreld (ed), *Companion to the Hanseatic League* (Brill, 2015), 194–240.

[24] Dollinger, above n 20, 5–7; Johannes Schildhauer, *The Hansa: History and Culture* (Edition Leipzig, 1985), 42.

[25] Karl Marx, *Capital: A Critical Analysis of Capitalist Production* (Frederick Engels ed) (Samuel Moore and Edward Aveling trans, Appleton & Co., 1889), 166–174; also Lars Maischak, *German Merchants in the Nineteenth Century Atlantic* (Cambridge University Press, 2013), xix.

The Hansa's internal authority co-existed seemingly without overt conflict with both the Holy Roman Empire and the feudal system of kings and lords.[26] Yet the nature of the organisation's authority is not easily reducible to a mere mercantile function, supplementary or subject to political rule from elsewhere.[27] At its peak in the fourteenth century, the Hansa was an institution regulating the internal affairs and external relations of an estimated two hundred towns across Northern Europe. Spruyt thus argues that the Hansa was not simply an economic association but an institutional competitor to the mode of state sovereignty that developed, in his schema at least, in Capetian France over a similar historical period.[28] The Hansa was not a territorial form of authority in the modern jurisdictional sense, yet regulated the relations of towns from Dinant in contemporary Belgium to Dorpat in contemporary Estonia, with stations from London to Moscow.[29] Nor was it a sovereign power, in either a pre-territorial or territorial sense. Its authority was not regarded as mutually exclusive with the authority of the Holy Roman Empire, and many of its member towns continued to owe allegiance to local lords (which, as Spruyt argues, formed jurisdictional entities that were far stronger than the kings).[30]

From the legal perspective, then, the logic of Hanseatic authority was juridically unique.[31] The essential nature of the Hansa was its radical plurality; Hanseatic law consisted of dispensations that 'were in a position to create or did create a joint, uniform system for the economic activity of the Hansa, complementary to, mediating between or superior to the individual charters of Hanseatic towns'.[32] What is certain about the Hansa is that it created and maintained a detailed culture of regulations concerning commercial practice, communal trade protections, and common modes of measure and comparative statistics.[33] The

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[26] Henrik Spruyt, *The Sovereign State and Its Competitors: An Analysis of Systems Change* (Princeton University Press, 1994), 123–124.
[27] Ulf Christian Ewert and Stephan Selzer, 'Social Networks' in Donald J Harreld (ed), *Companion to the Hanseatic League* (Brill, 2015), 162–193.
[28] See generally Spruyt, above n 26, 109–129.
[29] Schildhauer, above n 24, 10–11. On the Hansa in England, see Ian D Colvin, *The Germans in England 1066–1598* (The National Review, 1915). On the development of the concept of territory in European thought, see Stuart Elden, *The Birth of Territory* (Chicago University Press, 2013).
[30] Spruyt, above n 26, 123–124.
[31] Dollinger describes the Hansa as 'an anomalous institution which puzzled contemporary jurists', including the English Privy Council. Dollinger, above n 20, xvii, 88.
[32] W Ebel, *Hansisches Recht. Begriffe und Probleme* (Güttingen, 1949), 3, as translated in Schildhauer, above n 24, 214.
[33] Ibid 206–209; also Mike Burkhardt, 'Business as Usual? A Critical Investigation of the Hanseatic Pound Toll Lists' in Stuart Jenks and Justyna Wubs-Mrozewicz (eds) *The Hanse in Medieval and Early Modern Europe* (Brill, 2012), 215–238. From a Foucauldian perspective, the standardisation of measures was a key achievement of the Hansa. See Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Vintage Books, 1994), 196–200.

Hanseatic community sustained a continuous existence into the seventeenth century, albeit with a gradually shrinking constituency. By 1603, member towns numbered only fifty.[34] Its functional demise is usually attributed to the interruption to trade during the Thirty Years War from 1618.[35] By the time of the peace of Westphalia in 1648, the Hanseatic community had shrunk back to its three core towns of Lübeck, Bremen and Hamburg. The last *Diet* was held in Lübeck in 1669, and delegates of other towns and cities attended primarily to give official notification of their withdrawal from the Hansa.[36] Its demise seems to have been met with indifference by the Westphalian states, but the Hansa was not without its mourners. In 1670, Leibnitz counselled the imperial authorities to foster its revival in order to bolster German trade, which was recovering only slowly after the War.[37]

The relevant historical point for this discussion is that despite the demise of the Hansa as a functioning collective in the mid-seventeenth century, certain Hanseatic towns managed to maintain almost unbroken independence well into the nineteenth century, against a series of imperial and confederate advances. After the dissolution of the Holy Roman Empire in 1806 by Napoleon, Lübeck, Bremen and Hamburg were briefly annexed into the Napoleonic Empire.[38] After his defeat, the three towns officially regained independence in the Congress of Vienna in 1815. Hamburg, Bremen and Lübeck achieved recognition among the thirty-five German states and one additional free city, Frankfurt, that formed the first German confederation or *Deutscher Bund*, enshrined in the *German Federal Act* of 8 June 1815.[39] The 1815 confederation echoed key elements of the Hanseatic structure: it had no head of state or parliament, only a *Diet* which wielded no power over the sovereign rulers of each state.[40]

Between the decline of the Holy Roman Empire in the early nineteenth century and the Franco-Prussian War of 1870-1871, partisan efforts to unite German-speaking states, provinces and towns in a stronger body politic had gained political momentum. Between 1867 and 1871, Prussia under Kaiser Wilhelm I established a smaller union of northern

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[34] Zimmern, above n 22, 354; Marie-Louise Pelus Kaplan, 'Mobility and Business Enterprise in the Hanseatic World: Trade Networks and Entrepreneurial Techniques: Sixteenth and Seventeenth Centuries' in Stuart Jenks and Justyna Wubs-Mrozewicz (eds) *The Hanse in Medieval and Early Modern Europe* (Brill, 2012), 239–294.
[35] Michael North, 'The Hanseatic League in the Early Modern Period' in Donald J Harreld (ed), *Companion to the Hanseatic League* (Brill, 2015), 101.
[36] Zimmern, above n 22, 368; ibid 117.
[37] Zimmern, above n 22, 369.
[38] Mark Jarrett, *The Congress of Vienna and its Legacy: War and Great Power Diplomacy after Napoleon* (IB Tauris & Co, 2013), 32.
[39] *Deutsche Bundesakte* [German Federal Act] 8 June 1815 <http://ghdi.ghi-dc.org/pdf/eng/1_C_NS2_Federal_Act.pdf>.
[40] Lynn Abrams, *Bismarck and the German Empire 1871–1918* (Routledge, 2nd ed, 2006), 9.

German provinces than had been attempted in the 1815 *Deutscher Bund*, excluding Austria-Hungary altogether.[41] In 1871, Minister-President of Prussia Otto von Bismarck was installed as Prime Minister and Chancellor of the new Confederation.[42] In the new Imperial Constitution, the last three Hanseatic cities of Hamburg, Bremen and Lübeck were recognised as distinct political entities, and were each given a single representative seat in the new Bundesrat.[43] These were the only cities to be so recognised among the collection of Prussian and states and districts that comprised the new lower house of the legislature.[44] Article 34 of the Imperial Constitution provided that '(t)he Hanseatic towns of Bremen and Hamburg, with so much of their own or of the adjacent territory as may be needful for the purpose, remain as free ports outside the common customs area until they apply to be admitted therein'.[45] Hamburg and Bremen did not cede control of their economic affairs to the German federation until 1888 – four years after the DHPG paid its first dividend – and indeed maintained their Hanseatic identity despite this final annexation. As Zimmern wrote in 1891, 'to this day, though despoiled and shorn of their honour, the cities call themselves proudly the Hanseatic towns'.[46] Despite Stevenson's mockery, then, the interests of the DHPG cannot be said to be entirely continuous with the new German imperial state. The company that Hansemann bought had a far deeper knowledge and experience of foreign trade through its Hanseatic inheritance than through the hesitant imperialist projects of the German confederation.

5. Hanseatic firms in the Pacific

The key point for this chapter is that the incursion of Hamburg firms into the western Pacific are better understood not as a minor frontier in the rapid expansion of 'the German empire' in the late nineteenth century, but as a late episode in a longer history of the shift from a Hanseatic, non-centralised trade network toward the establishment of the German state itself. Bismarck himself noted in a speech to the Reichstag that Hanseatic enterprise had prompted German imperial expansion: '(w)e were first induced, owing to the enterprise of the Hanseatic people – beginning with land purchases and leading to requests for imperial

[41] Theodore S Hamerow, *Social Foundations of German Unification 1858–1871, Volume I: Ideas and Institutions* (Princeton University Press, 1969).
[42] Abrams, above n 40, 26–28; and Jonathan Steinberg, *Bismarck: A Life* (Oxford University Press, 309–311).
[43] *Bismarcksche Reichsverfassung* [*Imperial Constitution of 1871*] arts 1 and 6 ('*Imperial Constitution of 1871*') <http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=1826>.
[44] *Imperial Constitution of 1871*.
[45] *Imperial Constitution of 1871*, art 34.
[46] Zimmern, above n 22, 366.

protection – to consider whether we could promise protection to the extent desired'.[47] As Giordani stated in 1916, 'the origins of German colonial expansion are undoubtedly to be sought in the *Hanse* or *Hanseatic League*',[48] an observation moderated by Smith in 1978: 'when colonial acquisition did occur after 1883, the locations of Hanseatic trading interests often provided guides to the territories to be claimed'.[49]

Hanseatic companies had established trade networks reaching far beyond the Hansa's European purview well before unification in 1871. By 1866, Hamburg firms alone maintained a web of 279 trading outposts around the world.[50] *Godeffroy & Sohn* entered the Pacific westward from Valparaiso in 1857, although the scope of its network was such that it could also have come east from South East Asia. By the mid-nineteenth century, the firm had travelled from the Hanseatic ports westward around the Horn of Africa to South America, and eastward to Cochin China (now Vietnam), leaving only the Pacific to traverse latitudinally.[51] In 1857, Johann Cesar Godeffroy IV, figurehead of the company, instructed its representative in Valparaiso to begin making preparations to set up a factor in Samoa.[52] The new trade Godeffroy had set his sights upon was copra, the dried meat of the coconut, a raw material which yielded two products of increasing value in mid-nineteenth century trade - coconut oil and coconut meal.[53] Both products were of particular value in the context of agricultural industrialisation in the later nineteenth century. Coconut oil, used primarily in cooking, is slow to rancidify, making it an ideal export-import product; and copra meal found a market as high-energy feed for livestock.

The *Godeffroy* agent first installed at Apia Bay in Samoa, experienced trader August Unshelm, set up a network in which the company installed as many agents as possible across the smaller islands of the western Pacific, including islands that already had a European presence.[54] In this manner, *Godeffroy* agents spread thinly but widely across the islands of the Pacific, including Samoa, Tonga, Wallis and Futuna, Niue, the British Gilbert and Ellice groups, the Spanish Carolines, and the Marshall Islands.[55] Whereas initial trade was in coconut oil pressed

[47] Theodore S Hamerow (ed), *The Age of Bismarck: Documents and Interpretations* (Harper & Row, 1973), 305.
[48] Paolo Giordani, *The German Colonial Empire: Its Beginning and Ending* (Gustavus W Hamilton trans, G Bell and Sons, 1916), 1.
[49] Smith, above n 2, 8.
[50] Sebastian Conrad, *German Colonialism: A Short History* (Cambridge University Press, 2012), 25.
[51] Bollard, above n 5, 3–4.
[52] Firth, above n 5, 11–12.
[53] Firth, above n 5, 12.
[54] See Bollard, above n 5, 1, 3–19 at 3–4.
[55] Ibid 4.

by local islanders and barrelled by the company, *Godeffroy & Sohn* quickly shifted to exporting copra itself in sacks, as the dried copra price was commensurate to that of oil.[56] The firm's Pacific agents built lines of supply by demonstrating a kiln-based drying technique to local islanders, and offering to trade arms and alcohol for the dried copra produced.[57] Where local stores had not been established by other companies, *Godeffroy* set up stores that offered credit to islanders in exchange for future copra yields, and for securities over copra-producing land.[58] Exports were sent out in three directions: to Hamburg, to Valparaiso, and to Sydney.[59]

The initial decade of *Godeffroy*'s copra trade in the western Pacific thus relied on the ability of local islanders to produce copra surplus to their own needs, as well as their willingness to trade that copra for *Godeffroy*-imported goods, namely arms and alcohol.[60] The absence of any initial attempts by *Godeffroy* agents to secure local labour, or to engage in plantation, is most likely a reflection of the firm's Hanseatic inheritance: the Hansa had never engaged in labour control or regulation of production, operating almost exclusively in practices of circulation.[61] The Godeffroys regarded the purchase of property and infrastructure 'beyond what was absolutely necessary' as undesirable, as it impinged on the flow of the company's capital, which needed to be liquid enough to exploit trading opportunities where and when they arose.[62]

Yet the firm's practices began to change in the Pacific over the 1860s and 1870s. The firm established its first plantation in Samoa in 1865, not just in copra but in cotton, the price of which had increased sharply due to the drop in American production during the Civil War.[63] Coconut palms, which take around a decade to mature, were planted between the cotton rows. Samoans were recruited as plantation labourers, yet their apparent 'reluctance to work' frustrated *Godeffroy*'s agents, and a practice of shipping labour from the eastern islands of New Guinea developed.[64] Indentured labour practices in the Pacific, which came to be

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[56] Ibid 5–6.
[57] Ibid 6.
[58] Ibid 5. In Nauru, the small German firm A Capelle & Co had established a store prior to the arrival of Godeffroy; see Firth, above n 5, 13. The Capelle store is still the major retailer on Nauru.
[59] Jean Ingram Brookes, *International Rivalry in the Pacific Islands 1800–1875* (University of California Press 1941), 290.
[60] Bollard, above n 5, 5.
[61] Smith, above n 2, 38.
[62] Spoehr, above n 6, 25.
[63] Firth, above n 5, 14.
[64] Peter J Hempenstall, *Pacific Islanders under German Rule: A Study in the Meaning of Colonial Resistance* (ANU Press, 1978), 18.

known as 'blackbirding', persisted as late as the 1940s.[65] By 1877, *Godeffroy*'s trade dominated import and export on Samoa and Tonga, making it the strongest German firm in the Pacific region.[66] The firm's success in the Pacific is attributed in some historical accounts to its decentralised mode of operations and its ingenuity in raising the end value of copra, yet most note its comparatively easy access via Hanseatic banks - like Hansemann's *Disconto-Gesellschaft* - to the investment finance required to set up those operations.[67]

The firm's outlook took a turn for the worse under the management of Johann Cesar Godeffroy VI, who took a more bullish approach to the family business than had his predecessors.[68] Goddefroy VI's change in commercial approach was a matter of desperation: the firm had simply invested too heavily and too late in Pacific trade.[69] The British had colonised Australia over 70 years previous to *Godeffroy*'s entrée into the Pacific, following with New Zealand in 1840, and Fiji in 1874. The French were established in Tahiti to the east of Samoa and New Caledonia to the west, the Spanish in the Philippines and the Caroline Islands to the northwest, and the North Americans in Samoa and the Sandwich Islands (later Hawai'i) to the north. Each imperial power had developed not only trading links but also plantations, infrastructure and even protectorates by the time German firms arrived.[70]

In 1878, Goddefroy VI invested heavily in the European speculative mining market. At the same time, the firm's Pacific interests were consolidated into a single company, the *Deutsche Handels- und Plantagen-Gesellschaft der Südsee-Inseln*, and a public share offer was made. Interest, however, was weak, even in Hamburg.[71] Unable to secure the private capital, Godeffroy VI sought support from the Imperial Foreign Office in the form of a mid-term guarantee on the DHPG share price. Bismarck supported the idea enough to allow a Bill to go before the Bundesrat, where it was defeated.[72] Staring down insolvency, Godeffroy accepted a loan offer

[65] See E V Stevens, 'Blackbirding: A Brief History of South Sea Islands Labour Traffic and the Vessels Engaged in It' (1950) 4(3) *Historical Society Journal*, 361. See section 5 'Agriculture, labour and phosphate in the Pacific' in Chapter 3, 'From Protectorate to Mandate, 1920'.
[66] Firth, above n 5, 14.
[67] Bollard praises the firm's unconventionality as key to its success: Bollard, above n 5, 4–5. Firth, on the other hand, emphasises the Hamburg firm's access to capital: Firth, above n 5, 11–12. Also Spoehr, above n 6, 24.
[68] Spoehr, above n 6, 3.
[69] Hempenstall, above n 64, 17; see also Firth, above n 5, 15.
[70] For a survey of colonial presence in the Pacific in the earlier nineteenth century, see Brookes, above n 59.
[71] Spoehr writes that not a single share was sold on the open market. Spoehr, above n 6, 47.
[72] James Wycliffe Headlam, *Bismarck and the Foundation of the German Empire* (G P Putnam's Sons, 1899), 427; Henderson, 'Modern German Colonialism', above n 17, 113; Henderson, 'The German Colonial Empire', above n 9, 25.

from Barings London, secured against DHPG shares.[73] Only at the point of collapse was the DHPG rescued by Hansemann, who fronted the 5 million marks required to buy Barings out of the DHPG.[74]

It took the DHPG the five years to 1884 to pay a dividend on its shares, still owned primarily by Hansemann, his Hamburg banking associates and members of the Godeffroy family.[75] That the DHPG was able to phoenix out of the ruins of *Godeffroy & Sohn* and survive to turn around a profit, at a time when Godeffroy's Pacific interests were already on the wane, was a notable achievement. The company managed to reinvigorate itself not simply as a result of the financial cunning of Hansemann, son of the 'German Hudson', but of a significant change in direction in German foreign policy over these years. Whereas political support for German enterprise in the Pacific had proven difficult for Godeffroy VI to secure in 1878, the attitude of both Bismarck and the Reichstag toward the function of German presence outside the Reich had shifted in tone by 1884.

6. The Reich, imperial expansion and the Berlin Conference of 1884

That it was Bismarck, famously underwhelmed by the prospect of German imperial expansion outside of Europe, who convened the Berlin West Africa Conference in November 1884, indicates at the very least the significance of the debate over the law of acquisition of territory for European *realpolitik*. In August 1884, Bismarck had capitulated to Lüderitz's request for official recognition of his interests in Angra Pequeña, issuing a declaration designating the areas around Angra Pequeña that Lüderitz claimed on the basis of 'treaties' obtained from local 'chiefs' as under the 'protection' of the German Reich.[76] The legal content of the 'protection' provided for in the declaration was unclear, due both to the novelty of the protectorate form in German administrative practice, and a lack of clarity in the European law of nations as to the legal basis, mode of establishment and rights and obligations pertaining to protectorate status. The Berlin Conference was convened primarily to settle by diplomatic means the legitimacy or otherwise of the European powers' various

[73] Henderson, 'Modern German Colonialism', above n 17, 113–114.
[74] Henderson, 'The German Colonial Empire', above n 9, 24–25, 68.
[75] Ibid 25.
[76] Aydelotte, above n 1, 121; Smith, above n 2, 28.

imperial claims in Africa, which variously took the form of colonial occupation, and declarations of protection.[77]

As Craven has observed, the historical and legal significance of the Berlin Conference is a matter of ongoing debate.[78] The *General Act* with which it concluded, however, provided one of the only collective European agreements on the legal concept of the protectorate.[79] Whilst the agenda of the Conference dealt only with questions of free trade in the Congo basin, and freedom of navigation on the Congo and Niger Rivers, the question of the legal distinction between the categories of occupation and protection was an issue of common concern. In the context of the Conference, the debate centred primarily on the formal means by which 'new occupations on the African coasts' were to be deemed 'effective'[80]; however, the rights and obligations pertaining to declarations of protection became the comparator against which those of occupation were defined.

Similarly to the German Reich, the British were loath to extend formal colonial status to company-driven concerns in Africa, demonstrating a preference for consular jurisdiction as a means of protecting chartered companies.[81] In effect, the British sought to prolong the practices of 'informal' or economic empire that had long facilitated British imperial expansion, formalised under the *Foreign Jurisdiction Act* of 1843.[82] However, consular jurisdiction was commonly recognised as insufficient to claim rights over foreign territory sufficient to exclude other European powers, a position insisted upon by Bismarck in negotiations with Britain over Southern Africa.[83] This difference of approach placed highly leveraged commercial enterprises in Africa and the Pacific in a position of uncertainty regarding competition from other European companies, an added commercial risk of which they increasingly complained.[84]

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[77] See generally Stig Förster, Wolfgang J Mommsen and Ronald Robinson (eds), *Bismarck, Europe, and Africa: The Berlin Africa Conference 1884–1885 and the Onset of Partition* (Oxford University Press, 1988).
[78] Matthew Craven, 'Between Law and History: The Berlin Conference of 1884–1885 and the Logic of Free Trade' (2015) 3 *London Review of International Law* 31.
[79] Ibid 32–33.
[80] Ibid 37.
[81] W Ross Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (Duke University Press, 1973), 167–172.
[82] Craven, above n 78, 46. Koskeniemmi cites Macaulay's judgment of Indian rule in 1833: '(t)o trade with civilized men is infinitely more profitable than to govern savages'. Koskeniemmi, *Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2004), 111.
[83] Craven, above n 78, 46.
[84] M F Lindley, *Acquisition and Government of Backward Territory in International Law* (Longmans Green, 1926), 143–144.

The *General Act* of 1885 only indirectly addressed the question of the legal distinction between occupation and protection. Article 34 provided that notification was to be given to the other Signatory Powers of any new claims of possession or protectorate on the African coasts. Article 35 provided that Powers claiming occupation recognized an obligation to 'insure the establishment of authority' in occupied areas 'sufficient to protect existing rights'.[85] The exclusion of protectorates from the obligation of 'effective occupation', as it came to be known, agreed upon in Article 35 was the extent of agreement on the distinction between colony and protectorate in the *General Act*.[86] This was sufficient to prompt the proliferation of the protectorate model not only across Africa but across the Pacific and Asia from 1884 onward.

7. The concept of the protectorate

The protectorate was not a novel creation of the late nineteenth century. As Lindley noted in 1926, '(t)he assumption by a comparatively powerful State of the duty of protecting a weaker State is an institution of considerable antiquity'.[87] Twiss located the origin of treaties of protection with the agreement entered into by the Numidians with the Romans, by which they regarded themselves to have maintained their independence whilst placing themselves under a relation of Roman patronage.[88] In the classical law of nations, a treaty of protection was a treaty of unequal alliance.[89] However, the concept seems to have been re-enlivened in the context of high imperialism in the legal space between consular and colonial jurisdiction. The former protected the rights of sovereign subjects in foreign territory which remained under the sovereignty of another state; and the latter purported to extend sovereignty over colonial territory, and was thus exclusive both to claims of local sovereignty and of annexation by other powers.

Over the 1880s and 1890s, the European powers executed a wave of treaties of protection in Africa, the Pacific and parts of Asia. However, the legal content of the concept remained poorly defined.[90] The basic characteristic of the protectorate was the assumption by the

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[85] *General Act of the Conference of Berlin Concerning the Congo* (entered into force 26 February 1885) reproduced in *The American Journal of International Law* (1909) 3(1) 7.
[86] Craven, above n 78, 44.
[87] Lindley, above n 84, 181.
[88] Travers Twiss, *Law of Nations Considered as Independent Political Communities — On the Rights and Duties of States in Time of Peace* (Clarendon Press, 2nd ed, 1884), 427.
[89] For a more recent treatment of treaties of unequal alliance, see Matthew Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire' (2005) 74 *Nordic Journal of International Law* 335.
[90] Craven, above n 78, 37.

'protecting' power of the conduct of the 'protected' region's foreign relations – or of what was termed the 'external sovereignty' of the protected region.[91] By implication, the protected region maintained notional control of its internal affairs, but was prevented from engaging in diplomatic or other relations with other European states.[92] Jenkyns described the division as a matter of sources of law: the 'external sovereignty' of a state, meaning 'the independence of one political society in respect to all other political societies', derived from the law of nations; whereas 'internal sovereignty' denoted that power 'inherent in the people of any state or vested in its ruler by its municipal constitution'.[93]

Despite the simplicity of the classical definition, the term came to be used over the late nineteenth century to label a spectrum of legal relationships, from the classical protectorate at one end to effective colonial rule at the other. The argument made here is that in this period, the ways in which the protectorate concept was deployed as grounds of an administrative form exceeded the logic of treaty of unequal alliance in the European law of nations from which it was derived. Late nineteenth century protectorates thus blurred two distinctions now assumed to be self-evident. The first is the distinction between cession and conquest as legal justifications for acquisition of foreign territory. The second is the distinction between European commercial activity in non-European areas and the imposition of formal administrative rule on non-European peoples. As European powers sought to divide the economic resources of Africa and the Pacific amongst themselves by 'peaceable' means after the wars of the nineteenth century, they innovated the concept of protection to ground modes of extra-territorial jurisdiction that sought to exert political and economic control over non-European regions whilst eschewing the legal responsibility and cost of direct colonial administration.

Protectorates were declared on differing bases. Some assertions of protectorate status conformed to the classical model in that they were justified on the basis of treaty agreements with local 'rulers', however obtained. In others – including in Nauru – protectorate status was simply imposed, whether unilaterally by a European state on request of national traders in the region, or by agreement with other European states.[94] That protectorates could be

[91] Lindley, above n 84, 181. Also Sir Henry Jenkyns, *British Rule and Jurisdiction Beyond the Seas* (Clarendon Press, 1902), 166.
[92] Jenkyns, above n 91, 165.
[93] Ibid 166.
[94] Charles G Fenwick, *Wardship in International Law* (Government Printers Office, 1919), 29.

imposed in the absence of a treaty, or expanded across regions pursuant to which no treaties had been obtained, was sometimes justified on the basis of the absence of sovereignty in the local populations on whom such impositions were made. In this sense, the protectorate without treaty was the legal means of expanding *res nullius* as a basis of territorial acquisition to include *territorium nullius*, a canon law concept repurposed by Twiss and Martitz in the 1880s to denote areas over which independent tribes were capable of holding rights in private property, but which were without sovereign due to the incapacity of such tribes to possess sovereignty themselves.[95] On this reasoning, protectorates declared in the absence of treaty were thus predicated not on agreement with but on the inferior legal capacity of the peoples over whom they were declared. Such peoples were capable of occupation in the sense required to ground private rights in property, but not in the sense required to ground sovereign rights.[96] This ambivalence in the legal basis of protectorate status is reflected in the susceptibility of the term itself to multiple interpretations. In the later nineteenth century, British political discourse tended to refer to the operative relation of protection as a political agreement between the stronger and the weaker region even where sovereignty of local peoples was not recognised, reflecting the legal lineage of the treaty of unequal alliance.[97] German discourse, on the other hand, tended to frame the relation of protection as one of commercial protectionism between the Reich and German traders, with the local population rendered almost an irrelevance; the operative agreement was between the trading firm and the Reich.[98]

Whilst declarations of protectorate status most reliably entailed the assumption of exclusive conduct of the 'protected' region's foreign relations, beyond this the extent of jurisdiction assumed by the 'protecting' state varied considerably.[99] At one end of the spectrum were protectorates that simply expanded upon consular jurisdiction to the extent of assuming the 'external sovereignty' or exercise of foreign relations of the protected territory, leaving local political authority to administer the affairs of the local population.[100] An example here is the

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[95] Fitzmaurice has recently asserted that *territorium nullius* was the 'legal expression of the protectorate'. Andrew Fitzmaurice, *Sovereignty, Property and Empire 1500–2000* (Cambridge University Press, 2014), 282–286.
[96] Lindley, above n 84, 173–174.
[97] Johnston, above n 81, 27–28.
[98] See Alpheus Henry Snow, *The Question of Aborigines in the Law and Practice of Nations* (Putnam and Sons, 1921), 90; and Friedrich Fabri, 'Does Germany Need Colonies?' in E C M Breuning and Muriel Evelyn Chamberlain, *Studies in German Thought and History* (Edwin Mellin Press, 3rd ed, 1998) [trans of: *Bedarf Deutschland der colonien?* (first published 1868)].
[99] Snow, above n 98, 87; Fenwick, above n 94, 29–30.
[100] Lindley, above n 84, 181; Jenkyns, above n 91, 165.

British protectorate established on the Somali coast in 1886 by treaty with the 'Elders of the Habr Toljaala', the two provisions of which extended the 'gracious favour and protection of Her Majesty the Queen-Empress' in exchange for an undertaking 'to refrain from entering into any correspondence, Agreement, or Treaty with any foreign nation or Power, except with the knowledge and sanction of Her Majesty's Government'.[101] At the other end of the spectrum were protectorates which functioned as effective colonies, with the protecting state assuming both the 'external' sovereignty and local administration of the protected region. Whilst the protected region would maintain nominal international personality, the protecting State assumed the rights and obligations of administration of the local as well as the foreign population.[102] Examples include the British protectorate of Bechuanaland, declared in March 1885, and of the Gilbert and Ellice Islands, declared in 1892.[103]

8. The 'colonial protectorate'

The latter extreme blurred the distinction between the protectorate and the colony such that the concept of the 'colonial protectorate' arose: such entities were established by treaty and therefore logically reliant on the sovereign capacity of the local authority, yet in practice assertive of direct administration that evacuated putative local sovereignty of legal substance.[104] Later interpretations of the escalation of protection by company administration toward occupation by public administration rendered the movement as intentional, however it is not at all clear that any such foresight was at work. Writing in 1919 in the United States, Snow regarded the colonial protectorate as a cynical device used by the European powers to establish colonial rule: 'these 'protectorates' were legally nothing more than colonies in which the native organization was temporarily utilized as a mean of administration until the growth of a body of colonists and the development of ways of communication made possible the direct administration of the aborigines by the colonizing State'.[105] However, in 1902 French economist Paul Leroy-Beaulieu had seen the expansion of jurisdiction occasioned by the protectorate model as the undesired but inevitable consequence of attempting to protect

[101] Lindley, above n 84, 183–184; Jenkyns, above n 91, 165.
[102] Snow, above n 98, 87: Lindley, above n 84, 182.
[103] On British Bechaunaland, see Lindley, above n 84, 187–188; on the Gilbert and Ellice Islands, see Doug Munro and Stewart Firth, 'Towards Colonial Protectorates: The Case of the Gilbert and Ellice Islands' (1986) 32 *Australian Journal of Politics and History* 63.
[104] Munro and Firth, above n 103, 69.
[105] Snow, above n 98, 87. Lindley too asserted that the colonial protectorate functioned as a step toward full colonial administration, although he is equivocal on whether the European powers were working toward that outcome with intent. Lindley, above n 84, 182.

commercial activity in foreign territory without assuming administrative control. In his criticism of Bismarck's distinction between the German model of the 'pacific' commercial protectorate and the 'French' model of the militaristic administrative colony, Leroy-Beaulieu suggests that such assessments of the protectorate model as motivated by colonial intent wrongly attributed design to expansions of jurisdiction that happened in *ad hoc* response to the impracticability of the model itself:

> 'when citizens of a great civilized State are dispersed in the midst of savage or barbarous populations which have no fixed governments and no exact idea of the power of the European peoples, it is inevitable that sooner or later incidents will occur which make it necessary for the colonizing State to intervene in the internal affairs of the aboriginal population in order to impose upon them a reign of law and an orderly administration…It is therefore, to be expected, - doubtless not within the next few years but at some later time – that the German will do more or less as the French have done, and following out to its logical consequences the colonizing policy will end by administering more or less directly and completely the barbarous peoples in the midst of whom they have established their flag'.[106]

9. The establishment of German protectorates

The financial viability of the DHPG was thus directly related to the formalisation of empire in the Western Pacific region in which it operated. In 1881, Goddefroy's Pacific network was in danger of collapse, and had been refused official support. Bismarck's early stance against colonial enterprise has been well documented.[107] His view that foreign presence was of little use to the project of German nation-building, in that it benefited only 'a handful of merchants and manufacturers',[108] had been established before Confederation in 1871.[109] With Hansemann's assistance, the DHPG phoenixed out of the assets of *Goddefroy & Sohn* long

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[106] Paul Leroy-Beaulieu, *De la Colonisation chez les Peuples Modernes* [On the Colonisation of Modern People] (Guillaumin et Cie, 5th ed, 1902) quoted in Snow, above n 98, 105–106.

[107] See for example Bruce Waller, *Bismarck at the Crossroads: The Reorientation of German Foreign Policy after the Congress of Berlin 1878–1880* (Athlone Press, 1974).

[108] In a letter to Prussian Minister of War Albrecht von Roon in 1868, Bismarck wrote that as 'Germany had no navy with which to protect the colonies and it would be wrong to expect the taxpayer to foot the bill for maintaining territories which would benefit only a handful of merchants and manufacturers'. Taken from Alfred Zimmerman, *Geschichte der deutschen Kolonialpolitik* [History of German Colonial Policy] (Mittler, 1914), 6–7, quoted in Henderson, 'The German Colonial Empire', above n 9, 32.

[109] As his confidant and diarist, Moritz Busch, recorded Bismarck to have said that year, 'I do not want any colonies at all. Their only use is to provide sinecures. That is all England at present gets out of her colonies, and Spain too. And as for us Germans, colonies would be exactly like the silks and sables of the Polish nobleman who had no shirt to wear under them'. Moritz Busch, *Bismarck: Some Secret Pages of his History being a Diary kept by Dr. Moritz Busch during Twenty Five Years' Official and Private Intercourse with the Great Chancellor* (Macmillan, 1898), vol 1, 552. This quote appears in Busch's entry for 9 February 1871.

enough to exist until 1884, when Bismarck's attitude to German imperial expansion in the Pacific warmed. Yet the firm's position in the ostensibly *laissez faire* trading environment of the imperial Pacific was weak enough to require support from the Reich to secure the trade network it had established.

Due to its late adoption of formal imperial expansion outside of Europe, the German Reich was in a position to assess the respective merits of the colonial policies adopted by France, Britain, Spain and Holland. The Franco-Prussian War had occurred during a depression that had only deepened for Germany, and the Chancellor of the new Reich was primarily concerned with consolidating political power in Europe to shore up its expanded French borders.[110] This early distaste for expenditure on colonial enterprise was demonstrated in Bismarck's initially negative responses to requests for official recognition and financial assistance from German entrepreneurs including, in the Pacific, from Goddefroy in Samoa, and Hansemann in New Guinea;[111] and in Africa, from Gustav Nachtigal in Togo and the Cameroons, Carl Peters in East Africa, and Lüderitz in the port of Angra Pequeña.[112] The initial response to Lüderitz, who sought declarations of protection as early as 1882, was that he would be afforded protection only 'in the manner and in the degree in which the empire generally allows protection to extend to the interests of its citizens living abroad'[113] – in effect, that he would be protected to no greater extent than what was provided by consular jurisdiction.

By the early 1880s, however, Bismarck's rhetoric toward German imperial expansion outside of Europe had begun to shift. On the international front, the German government seems to have reconsidered participation in ongoing diplomatic debates over the rules of acquisition and occupation of foreign territory not as a distraction from European high politics but as a means of consolidating the diplomatic strength of the new German state.[114] On the domestic front, the prospect of German imperial expansion had attracted champions in the form of Carl Peters' *Gesellschaft für Deutsche Kolonisation*, and Friedrich Fabri's *Deutsche Kolonialverein* or 'German Colonial Society'.[115] The colonial societies framed German imperial expansion as in the interests not only of the 'handful of merchants and manufacturers' that Bismarck had

[110] A J P Taylor, *Germany's First Bid for Colonies 1884–1885* (Macmillan, 1938), 17–18.
[111] Smith, above n 2, 28.
[112] Giordani, above n 48, 18; Taylor, above n 110, 32; Aydelotte, above n 1, 27.
[113] Aydelotte, above n 1, 29, quoting from the German White Book on Angra Pequeña.
[114] See Taylor, above n 110, 59.
[115] Conrad, above n 50, 23–27.

dismissed a decade previous, but also of the working classes displaced by the industrialisation of agriculture and the long depression that followed the Franco-Prussian War.[116] The growing popularity of the colonial movement as a vehicle for nascent German nationalism offered Bismarck an opportunity to consolidate his position in domestic politics amid tension with the Reichstag; Bismarck went so far as to state in 1885 that 'public opinion in Germany so strongly emphasizes colonial policy that the position of the German government essentially depends on its success'.[117]

Both Bismarck's changing attitude to the formalisation of German empire and the experimental nature of the juridification of colonialism were evident in comments made in correspondence with German ambassador in London Count Georg Herbert zu Münster in December 1883. In deciding on a response to Lüderitz's repeated request that the Reich take steps to protect his interests in Angra Pequeña from annexation by Britain, in extension of the Cape Colony, Bismarck wrote to Münster, 'for that we must either take possession, or recognise Lüderitz as sovereign'.[118] The latter alternative was of course what was in fact decided upon at the Berlin Conference in recognition of the claims of King Leopold II over the Congo basin; Leopold's *Association internationale du Congo* or 'International Association of the Congo' was recognised as sovereign on the basis of over 450 treaties obtained by Henry Morton Stanley with local rulers, and became known as the Congo Free State in May 1885.[119]

By late May 1884, however, the German prevarication over Lüderitz' requests was forced to an unexpected conclusion by the self-governing Cape Colony's declaration of its intention to annex the entire region of South West Africa, a declaration that Germany refused to recognise.[120] On 4 June 1884, Germany communicated to the British government that it would be extending protectorate status over the area claimed by Lüderitz, a declaration that seems to have surprised the British government, whom Münster had assured up until early June of Germany's lack of interest in formal colonial expansion.[121] The diplomatic dispute

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[116] Felix Hanschmann, 'The Suspension of Constitutionalism in the Heart of Darkness' in Kelly L Grotke and Markus J Prutsch, *Constitutionalism, Legitimacy and Power: Nineteenth Century Experiences* (Oxford University Press, 2014), 243, 246; Hamerow, *Social Foundations of German Unification*, above n 41, 40–41.
[117] Smith, above n 2, 30, translating from Johannes Lepsius, Albrecht Mendelssohn-Bartholdy, and Friedrich Thimme (eds) *Politik der europäischen Kabinette 1871–1914* ['*Policy of the European Cabinet 1871–1914*'] (Deutsche Verlagsgesellschaft für Politik und Geschichte, 1926) vol 4, 96. Also Taylor, above n 110, 4–5.
[118] Aydelotte, above n 1, 54.
[119] Lindley, above n 84, 112–113; Craven, above n 78, 41–42.
[120] Aydelotte, above n 1, 54.
[121] Aydelotte provides a detailed reading of the primary sources of the Anglo-German communications over Angra Pequeña; see ibid, 73–78.

over Angra Pequeña stemmed in part from Bismarck's equivocal use of the term 'protectorate' at different times over the preceding year in his communications with British Secretary of State Lord Granville: at times, the implication of 'protection' was of a classical protectorate; and at others, of effective colonial rule.[122]

By 26 June 1884, the German government had consolidated its position such that Bismarck was able to speak in detail to the Reichstag on its new stance. In this speech, Bismarck was at pains to distinguish between a colony and a protectorate, and to make his preference for the latter clear:

> 'I repeat that I am opposed to colonies – I will say rather to the colonial system, as most of the States have carried it on during the last century…against colonies which have as their basis a piece of land, then the seeking to draw immigrants thither, to establish there officials and to erect fortified places…Entirely different is the question, first, as to whether it is judicious, and second, as to whether it is the duty of the German Empire, as respects those of its citizens who have entered such undertakings in reliance on the protection (*schutz*) of the Empire, so that those structures that have grown out of the superabundance of the whole German body, in foreign lands, may be granted our trusteeship and protection…'[123]

Bismarck's 1884 framing of the protectorate concept, with its echoes of Locke's labour-based justification of property rights,[124] gestures toward the competing influences on the development of the German concept of the protectorate as *Schutzgebiet*: on the one hand were economic considerations regarding whom should be expected to bear the cost of imperial expansion occasioned by private enterprise, and on the other, political considerations of how to respond to the problem of mass German emigration following the prolonged economic depression. On the matter of finance, the new federal government was constitutionally unable levy direct taxes.[125] It was thus inherently limited in the funds it could commit to colonial enterprise without the approval of the Reichstag, which was not politically inclined to support the Chancellor.[126] The limitation of governmental responsibility for cost was thus central to the German adoption of the protectorate model, as Bismarck sought to emphasise:

> '(o)ur intention is not first to create provinces to be administered, but so take under our protection colonial enterprises and to aid them during their development…In so doing,

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[122] Aydelotte, above n 1, 59.
[123] Giordani, above n 48, 18.
[124] John Locke, *Two Treatises of Government* (Peter Laslett ed, Cambridge University Press, 17th ed, 2005) (first published 1690), 101.
[125] *Verfassung des Deutschen Bundes 1871* [Constitution of the German Confederation 1871].
[126] Smith, above n 2, 43.

> where such creations are unsuccessful, the Empire will not lose much and the expense will not have been considerable'.[127]

According to Bismarck, the only aid to be provided to protectorates so created was official recognition by the Reich of the relevant company's trading rights within the region in question, and the threat of enforcement via German warship should such declarations be ignored by other Europeans.[128] Companies were expected to fund and perform any necessary administrative functions over the claimed area themselves, including the protection of already acquired private rights of German and other European citizens, and to fund the costs of stationing a governmental official for the resolution of disputes.[129]

On the matter of German population growth and emigration, management of the growing population of rural unemployed had quickly become an urgent political issue for the newly confederated Reich.[130] The discourse of emigrationist colonialism had taken shape throughout the 1870s. Proponents of emigrationist colonialism advocated the reservation of areas of Africa and the Pacific for the German working classes to practice the 'traditional' German rural lifestyle that had been decimated by the industrialisation of agriculture in Europe.[131] Fabri's 1879 pamphlet *Bedarf Deutschland der Kolonien*? ('Does Germany Need Colonies?') sought to appeal to German nationalist sentiment, declaring that 'only a mother country which is able to produce a continuous supply of superfluous labour is qualified to found agrarian colonies; and that therefore it is today only for the Germanic race to engage in this more modern form of colonial creation…'.[132] Despite its political significance as a multivalent policy response to economic recession and the perceived threat of socialism, the rhetoric of emigrationist colonialism translated only weakly into practice. German emigration to the protectorates was scant.[133] Despite its failure in practice, the popular discourse of

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[127] Letter from Bismarck to the Reichstag, 26 June 1884, quoted in Giordani, above n 48, 19.
[128] Smith, above n 2, 43.
[129] Wilhelm Fabricius, *Nauru 1888–1900: An Account in German and English based on Official Records of the Colonial Section of the German Foreign Office held by the Deutsches Zentralarchiv in Potsdam* (Clark and Stewart Firth trans, Research School of Pacific Studies, Australian National University, 1992) 166.
[130] Aydelotte, above n 1, 21.
[131] Smith, above n 2, 11–12; Conrad, above n 50, 27–28.
[132] Fabri, above n 98, 85. Conrad, above n 50, 27–28. Hanschmann notes that this nationalist rhetoric in favour of colonialism was neatly consonant with the anti-socialist conservatism of the German ruling class, which regarded the economic displacement of the agricultural class as a 'breeding ground of the social democratic agitation'. Hanschmann, above n 116, 247.
[133] The singular exception was South West Africa. By the mid-1890s, over 70 per cent of land within the protectorate had been claimed by the Reich and offered to German farmers, who numbered around than 12,000 by the First World War. Conrad, above n 50, 39–40. The Herero and Nama rebellion against German rule from 1904 to 1907 was met with the state policy of genocide presaged in Fabri's ominous indifference to the effects

emigrationist colonialism contributed significantly to the Reichstag's approval of the extension of protectorate status to existing trade networks.[134]

The German government's abrupt turnaround on colonial policy in 1884 had a direct effect on the formalisation of empire in the Western Pacific. After the Reichstag voted down banker Hansemann's proposal to save *Godeffroy & Sohn*'s Pacific interests with state funds in 1880, head of the Foreign Office Count von Limburg-Stirum advised Hansemann that the Reich would not consider anything more than consular assistance for German commercial enterprise in the Pacific, or more specifically, 'protection, naval and consular, to property in land acquired by private adventurers'.[135] Like Lüderitz in Angra Pequeña, and Carl Peters in East Africa, Hansemann persisted in his requests for protection of his Pacific interests, and his more modest entreaties to the German Foreign Office in relation to his investments in New Guinea resulted in a quite different outcome. By August 1884, the official position on the Western Pacific had been reversed, as illustrated in a memo sent by Secretary of State Count Hatzfeld to German Ambassador to London, Count Münster: '(o)ur experience in other respects makes it desirable that all territories in which German commerce preponderates, or which have become the goal of costly expeditions, the legitimacy of which no one can question, should be placed under the direct protection of the Empire'.[136]

10. Concern in Australian colonies over German imperial expansion

The expansion of the Hamburg firms in the Western Pacific was a matter of great consternation in the Australian colonies. By the 1880s, New South Wales, Victoria, South Australia, Queensland and Tasmania had been granted self-governing status and had together developed a policy on external affairs self-consciously distinct to that of the British Imperial government. The colonies regarded Hanseatic commercial activity in the Western Pacific, and particularly in New Guinea, as a subterfuge for German imperial aspirations in the

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of German settlement on local populations. L H Gann and Peter Duignan, *The Rulers of German Africa 1884–1914* (Stanford University Press, 1977), 122–125; and Horst Dreschsler, 'South West Africa 1885–1907' in Helmuth Stoecker (ed) *German Imperialism in Africa: From the Beginnings until the Second World War* (C Hurst and Company, 1986), 39–61.

[134] Smith, above n 2, 22.

[135] Count von Limburg-Sturm on a Conversation with Herr von Hansemann on February 15, 1881: Parliament of Victoria, *German Interests in the South Sea: Abstracts of White Books Presented to the Reichstag, December 1884 and February 1885*, Parl Paper No 36 (1885) 25 ('*German Interests in the South Sea*').

[136] Memorandum sent by German Secretary of State Count Hatzfeld to German Ambassador to London Count Münster, Berlin, 2 August 1884: ibid, 40.

region, and thus as a direct threat to Australian ascendancy.[137] The colony of Queensland had in 1882 entreated the British Colonial Secretary, Lord Derby, to allow the colony to annex to its territory the entire eastern part of the island of New Guinea, Holland having long claimed the western part.[138] Lord Derby refused on the basis that the added expense was unnecessary, given Germany's express lack of interest in acquiring territory in the region; in Lord Derby's opinion there was 'no reason for supposing that the German Government contemplates any scheme of colonisation'.[139]

In response to the Imperial Government's refusal to acquiesce to Queensland's request, the colonies planned the 'Australasian Convention on the Annexation of Adjacent Islands and the Federation of Australasia', which was held in Sydney in November and December 1883.[140] The other colonies expressly supported Queensland's position, and expressed unrest at the Imperial Government's lack of interest in protecting Australian regional interests.[141] The Premier of Queensland Thomas McIlwraith's memorandum of July 1883 to the other colonies on the matter draws unambiguous connection between the perceived German threat and the need to federate:

> 'there can be no doubt that the [British] refusal to annex New Guinea, together with the possible acquisition by foreign Powers of some of the Pacific Islands contiguous to Australia, does raise very serious questions intimately connected with the future interests of the Australasian Colonies...The circumstances of the present seem to point to a necessity for combination among the Australian Colonies – a combination for both legislative and executive purposes. Australian interests are involved in securing the peaceful and progressive supremacy of Australian influences in the adjoining seas. In order to effect this, it is necessary that there should not only be sentiments held in common, but that a form of government should be provided capable of giving expression to these sentiments. The federation of the Australian colonies may thus be forwarded'.[142]

The German government was aware of Australian unrest at German commercial activity in the area, and of the tension between the colonies and the Imperial Government. As late as

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[137] *The Melbourne Argus*, 29 December 1884, cited in J L Whittaker et al (eds), *Documents and Readings in New Guinea History: Pre-History to 1899* (Jacaranda Press, 1975), 479.
[138] Ibid 475–477.
[139] Ibid 478.
[140] Parliament of Victoria, *Australasian Convention on the Annexation of Adjacent Islands and the Federation of Australasia,* Parl Paper 48 (1883) ('*Australasian Convention*').
[141] Parliament of New Zealand, *Intercolonial Convention 1883: Report of the Proceedings of the Intercolonial Convention held in Sydney, in November and December 1883*, Parl Paper A–3 (1883).
[142] Parliament of Victoria, *Australasian Convention*, above n 140, 6.

January 1884, Moritz Busch of the German Foreign Office expressed frustration to German Ambassador Count Münster over coverage of German activity in Australian newspapers, explicitly disavowing any imperial aspirations: 'on the one hand, the existence of German commercial interests is wilfully denied, and on the other non-existent projects of German annexation are asserted to exist, in order to further the desires of Australia to annex the independent islands of the South Sea'.[143]

Busch's disavowal of official annexation plans took place as Hansemann campaigned for protection of his interests in New Guinea. Following negotiations with the British Foreign Office, it was decided in August 1884 – four months after the declaration of the protectorate of German South West Africa - that Germany would extend protection over the northeast of New Guinea, leaving the southeast to the British. Bismarck notified Hansemann of the decision in a telegram: '(t)he acquisitions made by you will be placed under the protection of the Empire, on the same conditions as in south-western Africa, subject to the condition that they are not made in territories to which other nations have legitimate claims'.[144] The areas claimed were subsequently named 'Kaiser Wilhelmsland' and the 'Bismarck Archipelago'.[145] The response in the Australian colonies was to decry the Imperial Government's suspected duplicitousness over its complicity in German expansion.[146] The British response, in turn, was the hasty declaration of a protectorate over the southwestern part of New Guinea in October 1884 - a month before the Berlin Conference.[147] While the substance of the Berlin Conference dealt with the regulation of European imperial expansion in Africa, the diplomatic context that prompted Bismarck to call the Conference seems to have clearly included the regulation of German and British commercial expansion in the Pacific.

11. German and British consular jurisdiction in the Western Pacific

Prior to the consolidation of the protectorate regime, a patchy network of German consular jurisdiction extended over parts of the Western Pacific. In 1879, the Reich had passed the *Gesetz über die Konsulargerichtsbarkeit* or 'Law on Consular Jurisdiction', which established

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[143] Parliament of Victoria, *German Interests in the South Sea*, above n 135, 33.
[144] Ibid, 42.
[145] Firth, *New Guinea under the Germans*, above n 5, 21–22.
[146] J L Whitaker et al (eds), *Documents and Readings in New Guinea History: Prehistory to 1899* (Jacaranda Press, 1975), 474–476.
[147] See Charles Lyne, *New Guinea: An Account of the Establishment of the British Protectorate over the Southern Shores of New Guinea* (Sampson Low, 1885); Johnston, above n 81, 141.

extraterritorial jurisdiction over 'subjects of the Reich' and 'other protected persons', where exercisable by 'tradition or treaty'.[148] By 1884, both the DHPG and another Hanseatic firm, Hernsheim & Company, had headquartered their regional operations on the island of Jaluit in the Ralick chain of islands, around halfway between New Guinea and Hawai'i. Together with the Radack chain, the Ralicks had become known in English as the 'Marshall Islands' a century earlier, after the visit of the British barque *Scarborough* under Captain Thomas Marshall in 1788.[149] Marshall and the *Scarborough* were on their way to Canton, having carried English convicts to Botany Bay as part of the First Fleet under Captain James Cook earlier that year.[150] One hundred years later, the Marshall Islands had become a major source of copra, and a key trade port in the Western Pacific. Together, the two Hamburg firms controlled around two thirds of the copra trade moving through Jaluit.[151] Hernsheim & Company had been established in the Marshalls from the mid-1870s, and like Hansemann on behalf of the DHPG, had lobbied for official protection of their commercial interests in the region from the late 1870s.[152] Echoing the Reich's response to Hansemann at the same time, the Hernsheims were successful only in prompting the creation of the new imperial consulate of Jaluit in 1880. As reward for lobbying for official resources for the protection of trade, the Franz Hernsheim was himself appointed consular agent of an expansive region that from 1880 to 1885 took in the better part of the Western Pacific, including Hansemann's interests in New Guinea.[153] During this period, the boundaries of the consular jurisdiction of Jaluit were indeterminate, following Hanseatic commercial enterprise from New Guinea in the west, to the Caroline Islands in the north, and to the Gilbert and Ellice Islands in the east.[154]

Britain's consular jurisdiction of the Western Pacific was more clearly defined, building as it did on the legislative basis of the *Foreign Jurisdiction Act* of 1843.[155] The specificities of the Pacific context, including the geographical limits of the jurisdiction and the procedures for

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[148] *Gesetz über die Konsulargerichtsbarkeit* [Law on Consular Jurisdiction] (Germany) 7 April 1900, DRB 1900, 213.
[149] Francis X Hezel, *Strangers in Their Own Land: A Century of Colonial Rule in the Caroline and Marshall Islands* (University of Hawaii Press, 1995).
[150] Charles Bateson, *The Convict Ships 1787–1868* (Brown, Son and Ferguson, 2nd ed, 1969), 82.
[151] Hezel, above n 149, 46.
[152] Ibid 47.
[153] See Peter Sack and Dymphna Clark (eds), *South Sea Merchant: Eduard Hernsheim* (Peter Sack and Dymphna Clark trans, Institute of Papua New Guinea Studies, 1983).
[154] Parliament of Victoria (1885), above n 135, 15.
[155] Johnston, above n 81, 36–37.

enforcement, were detailed in the Western Pacific Orders in Council, issued in 1877.[156] The extent of British consular jurisdiction in the region was typical: 'the jurisdiction of the High Commissioner extends over all British subjects, but over British subjects exclusively'[157]. In the absence of a treaty with another sovereign Power, the British empire was understood by its jurists to have no basis on which to assert jurisdiction over foreign subjects, according to the principle of *extra territorium ius dicenti haud pareteur* long established in the European law of nations.[158] In contrast to the Reich, Britain's principal concern in administering its consular jurisdiction in the Western Pacific seems not to have been the protection of trade, but rather the punishment of its subjects caught perpetrating the trade in indentured labour that had developed in the region.[159] The inability of the High Commissioner of the Western Pacific to punish either non-British subjects for their perpetration of 'blackbirding' in the region, or Pacific Islanders who retaliated with violence against all Europeans for the actions of some, again drew the ire of the Australian colonies, where it was widely held that prosecution of British subjects only was unfair.[160]

As such, it was not only Britain's French and German competitors in Africa and the Pacific but British imperialists themselves who were irritated by Britain's reliance on the frugality of consular jurisdiction to manage its informal empire. In light of repeated refusals to expand the basis of British jurisdiction in the Western Pacific, the Australian colonies found additional reason to meet to debate a basis on which they themselves could officially annex the region.[161] Despite the comparative conceptual clarity of British consular jurisdiction in this period, then, the practical and political difficulty of maintaining this position in the context of European imperial competition created pressure to devise a basis of jurisdiction over foreign subjects.[162] The matter of whether Pacific Islanders and Africans possessed sovereignty pursuant to which a treaty could be established therefore became an openly considered issue in the English jurisprudence on extraterritorial jurisdiction.[163]

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156 Parliament of Victoria, *Western Pacific Orders in Council: Report of a Royal Commission appointed by the Imperial Government to Inquire into the Working of the Western Pacific Orders in Council and the Nature of the Measures Requisite to Secure the Attainment of the Objects for which those Orders in Council Were Issued,* Parl Paper 42 (1884) ('*Western Pacific Orders in Council*').
157 Ibid 4.
158 Johnston, above n 81, 13.
159 Johnston, above n 81, 119.
160 Parliament of Victoria, *Western Pacific Orders in Council*, above n 156, 4–5.
161 Ibid 13–14.
162 Johnston, above n 81, 119–120.
163 Ibid 29.

In contrast, the jurisprudential basis of jurisdiction over foreign subjects was a matter yet to be ventilated in the context of German imperial expansion, if indeed it ever seriously was. With the shift in official policy in 1884 and the declaration of the protectorates of South West Africa, the Cameroons, Togoland and New Guinea, Bismarck's initial intention in relation to administration was to emulate the British model of the chartered company. Whereas the area of the Protectorate of South West Africa was delimited on the basis of Lüderitz' treaties with local rulers, as was the developing practice in Africa, in the case of New Guinea it is not clear that cession of indigenous sovereignty as such was ever contemplated. Indeed it is not entirely clear what concept of sovereignty operated in the *Schutzbrief* or 'Letter of Protection' granted to Hansemann in respect of his New Guinea interests, other than that it was of a divisible and delegable nature, as the instrument itself makes plain:

> 'Having in August 1884 promised our protection to a society of German subjects and citizens who have since then adopted the name of 'New Guinea Company' in a colonial scheme initiated by them and directed to island groups in the Western Pacific not yet under the protection of another power…we therefore grant to the New Guinea Company this Letter of Protection, and confirm herewith that we have assumed the sovereignty over the territories in question…We likewise grant to said Company (subject to the obligation of its introducing and maintain the political institutions agreed to, as well as of defraying the expenses of a sufficient administration of justice) rights of sovereignty corresponding thereto…Our Government also reserves to itself the regulation of the administration of justice, as well as the management of the relations between the protected territories and foreign governments'.[164]

In the absence of any consideration of indigenous sovereignty, Hansemann's *Neuguinea-Kompagnie* thus appears to have been cast in the position of the weaker party in the classic protectorate model. In the *Schutzbrief*, the Reich purports to assume the external sovereignty of the territory, leaving the internal sovereignty to the *Neuguinea-Kompagnie*. There appears to have been no reckoning with the legal impediment of local sovereignty which had so preoccupied the British law officers in their insistence on consular jurisdiction in the Western Pacific. Hansemann himself was appointed judicial officer of the new protectorate, in addition to his role of 'Commercial Councillor'. [165] A colleague subsequently remarked that

[164] 'Charter of the German New Guinea Company', *The Argus* (Melbourne) 24 July 1885, 10.
[165] Ibid 10; also Firth, above n 5, 23–24. The Annual Reports of the New Guinea Company are available in translation in Dymphna Clark and Peter Sack (eds), *German New Guinea: The Annual Reports* (ANU Press, 1979).

Hansemann 'governed New Guinea in the morning hours before he came into the bank'.[166] After New Guinea followed East Africa: on 27 February 1885, the Protectorate of German East Africa was declared, and the *Deutsch-Ostafrikanische Gesellschaft* or 'German East Africa Company' was formed by Carl Peters to take on its administration.[167]

12. The establishment of the Marshall Islands Protectorate

The Marshall Islands were to follow in August 1885. The established presence of more than one German firm in the area seems to have affected the mode of creation of the protectorate. Neither Hernsheim & Company nor the DHPG predominated in such a way that they could simply be ordained with the official administrative responsibilities of an imperial charter as had been the case in South West Africa, New Guinea, and East Africa. An unusual process of establishing a protectorate took place. In contrast to New Guinea but in keeping with the African model, the mechanism of the treaty was employed, ostensibly as a means of establishing jurisdiction. However, the protectorate was declared in August 1885, months before any treaties had been entered into; and when treaties were completed, they were entered into not by the DHPG or Hernsheim, but by the Reich itself. In October 1885, the captain of a German corvette, the *Nautilus*, was given the mission by the Foreign Office of visiting the Marshall Islands with drawn-up treaty documents in order to obtain the signatures of local Marshallese rulers on behalf of the Reich.[168] Marshall Islands Consul Franz Hernsheim accompanied *Nautilus* Captain Rötger on this mission, which began in Jaluit on 15 October 1885, and proceeded on a tour of the islands in the chains on which European settlements had been established. Ultimately the signatures or marks of eighteen *iroij* or Marshallese 'chiefs' were gathered on the original text.[169]

Typical of island regions, political authority in the Ralik and Radack chains prior to European intervention was neither unitary nor centralised. Many *iroij* or chiefs were spread across the atoll chains that Europeans had together labelled the Marshalls after an English captain of

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[166] Firth, above n 5, 23.
[167] Henderson, 'The German Colonial Empire', above n 9, 57. Henderson notes that Peters' requests were denied in November 1884, only to be granted two months later.
[168] 'The Annexation of the Marshall Islands by Germany', *The Brisbane Courier* (Brisbane), 17 February 1886, 3. Also Hezel, above n 149, 45.
[169] *Treaty of Friendship between the Marshallese Chiefs and the German Empire*, Germany–Marshall Islands, signed 1 November 1885 (Dirk Spennemann trans) ('*Treaty of Friendship between the Marshallese Chiefs and the German Empire*') <http://marshall.csu.edu.au/Marshalls/html/history/Treaty1885.html>. Also, 'The Annexation of the Marshall Islands by Germany', above n 168, 3.

the First Fleet.[170] The *iroij* approached to sign these documents were simply those known to Hernsheim as having some amenity either in the English language or in the copra trade, the most prominent being Kabua of Jaluit, the *iroij* with whom European traders preferred to deal.[171] The treaty-signing tour undertaken by Rötger and Hernsheim seems to have appeared a sham undertaking even at the time; as a member of the *Nautilus* crew was reported to have written,

> '(t)he treaty was written both in German and in the Marshall Islands language, which for this purpose had to be Romanised, as the islanders have no written language of their own. The document was signed by King Kabua and four other principal chiefs, all of whom, with the exception of one, managed to affix their names to the paper in English letters, though their handwritings were but sorry specimens of calligraphy… This having been done, preparations were made to hoist the German flag on the islands…'.[172]

The manner in which the *iroij* understood the treaty document presented to them by Rötger and Hernsheim is, at least in the context of this discussion, effectively unknowable.

Ultimately dated 1 November 1885 after the *Nautilus* returned to Jaluit, the *Treaty between the Marshallese Chiefs and the Reich* invokes the concept of protection in multiple and contradictory ways.[173] It is not clear that a cohesive legal rationale informed its drafting. The agreement is framed as being prompted by the chiefs' request for the protection of Kaiser Wilhelm I, a request which in turn is framed as motivated by the chiefs' desire both to maintain independence from colonisation by other European powers, and to protect German trade.[174] The Kaiser offers his protection to the chiefs, and the chiefs undertake to protect 'all German subjects and protected persons' in their lands.[175] In consonance with the classical protectorate model, the chiefs undertake to not provide land or enter into agreements with other foreign powers without the permission of the Kaiser; and in protection of German trade, the chiefs

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[170] Hezel, above n 149, 47.
[171] Ibid 47.
[172] The Brisbane Courier printed an entire account of the mission, which it claimed was the work of a Nautilus crew member. 'The Annexation of the Marshall Islands by Germany', above n 168, 3.
[173] *Treaty between the Marshallese Chiefs and the German Empire*, above n 169.
[174] Clause 1 of the treaty provides that 'King Kabua, as well as the chiefs Lagajimi, Nelu, Loiak and Launa, guided by the desire to protect the legal trade, which is predominantly in German hands, and to provide the German traders with full security, request the protection of His Majesty, the German Emperor, so that they may be enabled to maintain the independence of the area. His Majesty, the German Emperor affords His Protection subject to all legal rights of third parties'. Ibid.
[175] Ibid clauses 1 and 3.

also undertake to not 'pass any legislation' that would affect German companies without permission.[176]

13. The legal establishment of the German protectorate regime

Over the subsequent year of 1886, the legal framework of the German protectorate regime was rapidly defined. Whereas only two years previous, Bismarck had refused to extend anything beyond consular assistance to German commercial interests outside of Europe, the Reich now had the protectorates of South West Africa, Togo, Cameroon, New Guinea, German East Africa and the Marshall Islands to manage according to a largely undefined and untested model of extraterritorial administration. The Imperial Constitution of 1871 did not contemplate colonial expansion and was silent on the structure of extraterritorial administration.[177] In the absence of a constitutional or private law basis for establishing the legitimacy of the protectorate regime, in April 1886 the Reichstag passed the *Gesetz, betreffend die Rechtsverhältnisse der deutschen Schutzgebiete* or 'Law Governing the Legal Status of the German Protectorates' ('Protectorate Law').[178] The Protectorate Law became the domestic legal foundation of the German protectorate regime. In Section 1, the Law provided that the power to make laws for the protectorates was exercised by the Kaiser on behalf of the Reich, which circumvented the need for legislative governance of the regime by the Reichstag.[179] In a seeming attempt to mirror the operation of British Orders in Council as the primary means by which extraterritorial governance was to be effected, the Protectorate Law then delegated the power to the Kaiser or his representative to issue regulations or ordinances (*Verordnungen*) for each protectorate.[180] In this respect, however, the Protectorate Law departed from the British model in that it effectively suspended the principles of constitutional rule in the

[176] 'King Kabua, as well as the chiefs Lagajimi, Nelu, Loiak and Launa, will not provide any part of their land to any foreign power without permission by His Majesty, the German Emperor, nor will they enter into treaties with foreign powers without prior permission by His Majesty, the German Emperor'. Ibid, clauses 2 and 4.
[177] *Imperial Constitution of 1871*; also Wolfram Hartmann, 'Making South West Africa German? Attempting Imperial, Juridical, Colonial, Conjugal and Moral Order' (2007) 2 *Journal of Namibian Studies* 51, 53–54. Thanks to Sara Dehm for this reference.
[178] *Gesetz, betreffend die Rechtsverhältnisse der deutschen Schutzgebiete* [Law Governing the Legal Status of the German Protectorates] (Germany) 17 April 1886, RGBI 1886, 75 ('*Protectorate Law*'). Thanks to Sara Dehm and Nahed Samour for their assistance with the interpretation of this Law.
[179] *Protectorate Law*, s 1.
[180] *Protectorate Law* s 4. On the function of Orders in Council in the British colonial regime, see Johnston, above n 81, 36–37.

protectorates. Executive and legislative power were centralised within a single office and there was no provision for legislative review.[181]

In Section 2 of the Protectorate Law, the provisions of the Law on Consular Jurisdiction were stipulated to apply in protectorates in respect of all matters of private law, criminal law and procedural law, enforceable not by the consular agent but by the official placed in charge of the protectorate by the Chancellor.[182] In this way, consular law – and not German domestic law - became the basic content of law in the German protectorates. As Nuzzo points out, this shift was paradigmatic; it purported to convert the consular jurisdiction from a personal into a territorial one.[183] Whereas the Law on Consular Jurisdiction described a personal jurisdiction for subjects of the Reich and other Europeans, limited in its territorial application to those countries in which German consular jurisdiction was exercisable by 'tradition or treaty', the protectorate jurisdiction was territorial, and could be imposed simply via declaration by the Kaiser of a given region as a protectorate.[184]

In the crucial matter of the extension of protectorate jurisdiction over non-Europeans, the Protectorate Law was effectively silent. The imperial power to issue decrees included the power to subject additional categories of persons to the protectorate jurisdiction than were already subject by virtue of the application of the Law on Consular Jurisdiction to 'subjects of the Reich' and 'other protected persons'.[185] Other than this general and unlimited provision, the Protectorate Law leaves unspoken the matter of the governance of indigenous populations. In fact, the Protectorate Law does not expressly refer at all to indigenous populations (*Eingeborene* or 'Natives'), other than to stipulate that the waiver of the right to legal representation does not apply to Natives named as defendants or accused in cases before the court of the protectorate.[186] As Hanschmann notes, this silence effectively created a dual legal order in the protectorates: on the one hand was the regime of existing consular law applicable to Europeans and subject to such legislative and judicial review as provided

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[181] Hanschmann, above n 116, 250–251.
[182] *Protectorate Law*, s 2; *Gesetz über die Konsulargerichtsbarkeit* [Law on Consular Jurisdiction] (Germany) 7 April 1900, DRB 1900, 213.
[183] Luigi Nuzzo, 'Colonial Law' (16 April 2012) *European History Online*, <http://ieg-ego.eu/en/threads/europe-and-the-world/european-overseas-rule/luigi-nuzzo-colonial-law> 10.
[184] *Gesetz über die Konsulargerichtsbarkeit*, DRB 1900, 213 s 1.
[185] *Protectorate Law*, s 4(1); *Gesetz über die Konsulargerichtsbarkeit*, DRB 1900, 213. s 1. Also Jakob Zollmann, 'German Colonial Law and Comparative Law 1884–1919' in Thomas Duve (ed) *Entanglements in Legal History: Conceptual Approaches* (Max Planck Institute for European Legal History, 2014), 261.
[186] *Protectorate Law*, s 4(4).

for in the Constitution, and on the other, a *tabula rasa* regime of protectorate law by imperial decree applicable to indigenous populations, exempt from review entirely.[187]

This silence was only barely addressed in the founding imperial Ordinance (*Verordnung*) on the Marshall Islands Protectorate, issued in September 1886.[188] The Ordinance decreed that consular law applied in the Marshall Islands to all resident in the jurisdiction, including natives but only to the degree expressly provided by the Chancellor.[189] Most importantly, the Ordinance then delegated to the Chancellor the power to determine firstly, who was a native (*Eingeborene*) for the purposes of the Ordinance, and secondly, whether the legal relationships of natives thus defined were to be governed under consular law or under the regulations of the Marshall Islands Protectorate.[190]

14. The Agreement between the *Jaluit Gesellschaft* and the Reich

The Marshall Islands Protectorate thus established by treaty and by imperial decree, the DHPG and Hernsheim & Company agreed to amalgamate their interests in the Marshalls region into one company that could take on the administration of the protectorate. In December 1887, the *Jaluit Gesellschaft* was incorporated in Hamburg, marking the amalgamation of the erstwhile Hanseatic networks of Goddefroy and Hernsheim in the Pacific. In January 1888, the new company entered into an Agreement with the Reich with respect to administration of the Marshall Islands Protectorate.[191] The Agreement provided *inter alia* as follows:

> 'Whereas the Marshall Islands…have been placed under the protection of His Majesty the Kaiser; and whereas, on 21 December 1887, the Jaluit-Gesellschaft was incorporated in Hamburg on the basis of the Articles of Association appended under A, and this Company has undertaken to meet the cost of the administration of the Protectorate, subject to His Majesty's assent the following agreement has been concluded between the Foreign Office and the Jaluit-Gesellschaft;
>
> 1. The Jaluit-Gesellschaft is granted the following exclusive rights and privileges within the domain of the aforesaid Protectorate:

[187] Hanschmann, above n 116, 252– 253. Also Nuzzo, above n 183, 34.
[188] *Verordnung, betreffend die Rechtsverhältnisse in dem Schutzgebiete der Marschall-, Brown- und Providence-Inseln* [Law Governing Legal Relations in the Marshall, Brown and Providence Islands Protectorates], (Germany) 17 September 1886, RGBI, 1886, 291 ('*Verordnung*').
[189] *Verordnung*, s 1.
[190] *Verordnung*, s 2.
[191] Fabricius, above n 129, 201–204.

a. the right to take possession of ownerless land,
b. the right to engage in fishing for pearlshell, insofar as this is not carried on by the natives in accordance with tradition,
c. the right to mine guano deposits, without prejudice to the duly acquired rights of third parties.

2. The administration of the Protectorate will be conducted by an Imperial Commissioner assisted by a Secretary, to be appointed.

3. The Imperial Commissioner will appoint the requisite officials for the local administration of the Protectorate as proposed by the agents of the Company in Jaluit, subject to the assent of the German Chancellor.

4. A budget for the administration of the Protectorate will be drawn up annually, to be agreed upon between the Foreign Office and the Jaluit-Gesellschaft. …

5. The Jaluit-Gesellschaft undertakes to meet the costs arising from the administration. …

6. Licence fees and head-taxes as specified in the budget are to be collected annually in the Protectorate. …

7. Laws and Ordinances affecting the administration of the Protectorate are to be introduced only after a hearing before the Jaluit-Gesellschaft.

8. In the promulgation of local administrative regulations, the Imperial Commissioner will, as far as possible, act in agreement with the agents of the Jaluit-Gesellschaft.

…

10. Voluntary liquidation of the Company may take place only after previous notice of severance of this agreement. …

12. Pleasant (Navoda) Island will be subject to the terms of this agreement as soon as the same is placed under the protection of the Reich.

…

Berlin, on the twenty-first day of January, eighteen hundred and eighty eight.

The *Jaluit Gesellschaft*
for the Board of Directors:
A. Weber Hernsheim

The Secretary of State
The German Foreign Office
Count von Bismarck'

The property and guano clauses of the Agreement warrant some consideration. As discussed, a central concern of European commercial interests in the consolidation of the protectorate regime was that land acquired in areas outside European sovereign territory be recognised as attracting the protections of real property within the meaning of European private law. Requests for some guarantee from the imperial powers that land acquired prior to the

extension of formal protection would be treated as property were made by Lüderitz in Angra Pequeña, by Hansemann in Papua New Guinea, and by Goddefroy in the Marshall Islands.[192] Indeed it is possible to read requests by private individuals and companies for official protection of commercial interests outside of Europe during this period as precisely a request that such 'interests' be recognised as proprietary in European law, a contention supported by Bismarck's comment to the Reichstag that the protectorate regime was prompted by Hanseatic enterprise 'beginning with land purchases and leading to requests for imperial protection'.[193]

The debate at the international level over legitimate means of territorial acquisition dealt squarely with the status of European property claims in Africa and the Pacific. The jurisprudential solution of *territorium nullius* proposed by Martitz and Twiss as the rationalisation of the protectorate regime was grounded in the logic of property: indigenous peoples were capable of owning land in the Lockean sense of possession gained via occupation and cultivation, but not of evincing sovereignty over it comparable to the sovereignty of civilized European nations.[194] The rationale of *territorium nullius*, however, left unanswered the question of who owned 'ownerless land' within a protectorate. Absent sovereignty over territory, indigenous peoples could not own more land than they directly occupied; and the purpose of claiming a protectorate as opposed to a colony was precisely to avoid the legal obligations that would attend territorial acquisition of lands. As discussed, the German Protectorate Law provided that consular law would apply in respect of private law matters; thus it was already settled that pre-existing claims to private property would be upheld within the Marshall Islands Protectorate. However, the question of which between the Reich and the *Gesellschaft* had a better claim to those areas of the Protectorate not already subject to private possession was not clear. The reference to 'ownerless land' contemplated in the Jaluit Agreement thus seems to have settled the question in favour of the company. The Marshall Islands Protectorate was not, at least on its establishment, understood as German territory; it was something like private territory of the company.

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[192] See for example Letter from Messrs. Goddefroy and Eberhard Schmid, Directors of the German Commercial and Plantation Company at Hamburg to Prince Bismarck, Hamburg, 30 January 1884, cited in Parliament of Victoria, above n 135, 35.
[193] Hamerow, *Social Foundations of German Unification*, above n 41, 305.
[194] Fitzmaurice, *Sovereignty, Property and Empire*, above n 95, 282–286; Lindley, above n 84, 173–174.

The guano clause appears to add a crucial caveat to this arrangement. The *Jaluit Gesellschaft* is granted the right to mine guano deposits, but not property in the deposits themselves. On a practical level, the clause was seemingly moot. Neither the DHPG nor Hernsheim had been involved in mining in the Pacific prior to amalgamation, in keeping with the Hanseatic tradition of commodity circulation. Given the ability to manipulate commercial regulation afforded the *Gesellschaft* in its agreement with the Reich, the firm had little incentive to alter its business practices, and made no moves toward either direct involvement in plantation agriculture or mining operations, as had British companies.[195] Nor had any 'guano' or phosphate deposits been discovered on the Ralick and Radack chains at that time. The reference to mining in the agreement therefore appears prospective, and with good cause. Commercial interest in 'guano islands' had been strong since at least the mid-nineteenth century.[196] By the mid-nineteenth century, phosphate was a boom industry, particularly in the Pacific.[197] In 1856, the United States passed the *Guano Islands Act*, which purported to claim all islands not already occupied upon which guano was discovered by a US citizen as 'appertaining to' the United States.[198] The United States proceeded to claim sixty-six islands across the Caribbean and the Pacific under the *Guano Islands Act*.[199] This included the Line Islands, the Phoenix Islands, Baker Island and Jarvis Island, all to the southeast of the Marshall Islands.[200] The United States Guano Company had commenced mining on the Pheonix Islands with the use of indigenous Hawai'ian labour in 1858, an industry underway at the time of the *Jaluit Gesellschaft*'s Agreement with the Reich regarding the Marshall Islands.

The guano provision in the Jaluit Agreement thus seems likely to have been the means by which the company and the Reich determined how prospective profits from the exploitation by third parties of any phosphate deposits found within the Marshall Islands Protectorate would be allocated. When read with the property clause, the guano clause seems to provide

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195 Firth, above n 5, 24–25.
196 Gregory T Cushman, *Guano and the Opening of the Pacific World: A Global Ecological History* (Cambridge University Press, 2013), 26–29.
197 Ibid 16–17.
198 The Act's first section provided as follows: '(w)henever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.' *Guano Islands Act of 1856*, 48 USC § 1411.
199 Cushman, above n 196, 82. At least eight islands and atolls claimed under the *Guano Islands Act* remain claimed as US territory; these are designated as the United States Minor Outlying Islands.
200 See section 5 'Agriculture, Labour and Phosphate in the Pacific' in Chapter 3, 'From Protectorate to Mandate, 1920'.

the *Gesellschaft* only with a transferable license to mine phosphate within the Protectorate, implying that the mReich claimed property in mineral deposits and therefore any royalty rights. This is in keeping with German mineral law operative at the time, and the arrangements made in the other German protectorates of South West Africa and German East Africa.[201] Read together, then, the property and guano clauses are contradictory: the Reich did not make a sovereign claim to acquire the protectorate as German territory, yet it purported to claim sovereign rights in all mineral resources within the protectorate.

15. The incorporation of Nauru into the Marshall Islands Protectorate

The Jaluit Agreement singled out only one island for special mention: 'Pleasant (Navoda) Island'. Following the declaration of the Marshall Islands Protectorate, the Jaluit consulate formerly officiated by Franz Hernsheim was abolished in January 1887, a full year before the amalgamation of the DHPG and Hernsheim & Company and the Agreement between the resulting *Jaluit Gesellschaft* and the Reich. This left the consulate in Apia, Samoa as the primary means of legal redress in the Pacific for German traders operating outside of the New Guinea and Marshall Islands Protectorates. For agents of DHPG and Hernsheim posted on the remote Pleasant Island, a coral atoll south of the Marshalls, this arrangement was highly unsatisfactory. According to the agents, the natives of Pleasant Island had for a decade been in a state of civil war, armed with the guns and ammunition used as trade for copra.[202] The consul in Apia, the DHPG traders complained, was too far away to be of timely assistance in case of emergency.[203] In correspondence with the Reich, the DHPG requested that Pleasant Island be included within the Marshall Islands Protectorate. Not only did the firm profess to 'regard the incorporation of Pleasant Island in the Protectorate of the Marshall Islands as highly desirable', but took the 'liberty of stressing that peace and order would be established on Pleasant Island with much greater ease and despatch if the flag-raising ceremony could be accompanied by a major show of force'.[204]

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[201] On German South West Africa and German East Africa, see Lindley, above n 84, 352. See also section 8 'The right passed from the *Gesellschaft* to the Pacific Phosphate Company' in Chapter 3, 'From Protectorate to Mandate, 1920'.

[202] Letter from Imperial Commissioner for the Marshall Islands Protectorate Wilhelm Knappe to Prince Herbert von Bismarck, 6 May 1887, reproduced in Fabricius, above n 129, 181.

[203] Ibid 181.

[204] Letter from the *Deutsche Handels- und Plantagen-Gesellschaft der Südsee-Inseln zu Hamburg* to Minister von Kusserow, 1 October 1887, reproduced in Fabricius, above n 129, 184–185.

Pleasant Island, so named in 1798 by the British captain John Fearn of the merchant ship *Hunter*, had been known as a source of food and water since at least the 1830s by whalers working the Line Islands in the central Pacific.[205] A small, single coral island lacking a harbour which could be easily approached, and over 300 kilometres from its nearest neighbour, Ocean Island in the Gilberts, European reports of the local population and landscape of Pleasant Island remained scant well into the 1870s.[206] Written records consisted of a scattering of reports of approach in ships' logs, and details in the Australian and New Zealand press filtered through dramatized accounts of runaway whalers and escaped convicts.[207] The island had become a minor source of copra for *Goddefroy & Sohn* in the mid-1870s. The old firm's agent was joined over the next decade by agents of Hernsheim and of two New Zealand trading companies, Tiernan Venture and Henderson & McFarlane. By 1887, as the German consul in Apia reported, there were 'ten white residents' on the island, being employees of the trading companies or independent traders, and consisting of two Germans, four British, two Norwegians, one American and one Dutchman.[208]

In correspondence with the German consul in Apia in 1884, Cesar Goddefroy VI - working now for the DHPG which had taken over his family firm's Pacific interests - reported that 'native' *Eingeborene* numbered between 1,000 and 3,000, and had been warring since 1878.[209] The situation had become dangerous for traders; a trader's house had been ransacked; one had been shot. On Godeffroy's reckoning, it would not be sufficient to have a German warship visit the island, or to pass an Ordinance preventing Germans and other Europeans within the consular jurisdiction from perpetuating the trade in arms and alcohol; the native population would need to be disarmed.[210] Goddefroy and the Hernsheim brothers assured the consul in Apia that the DHPG and Hernsheim & Company were willing to include Pleasant Island in their negotiations with the Reich as the new *Jaluit Gesellschaft* took shape. One resident official would be sufficient, Godeffroy wrote, and the firm would fund all costs of administration. All that was needed was the assent of the Reich.[211] A brief note in the files

[205] Nancy Viviani, *Nauru: Phosphate and Political Progress* (Australian National University Press, 1970), 9–11.
[206] Ibid 9–11; Fabricius, above n 129, 160–161.
[207] Viviani, above n 205, 10–13.
[208] Fabricius, above n 129, 181.
[209] Letter from Imperial Consul in Apia Dr Steubel to Prince Herbert von Bismarck, 2 September, 1884, reproduced in Fabricius, above n 129, 178–179.
[210] Letter from the *Deutsche Handels- und Plantagen-Gesellschaft* to Minister von Kusserow, 1 October 1887, reproduced in Fabricius, above n 129, 184–185.
[211] Ibid 184–185; also Memorandum, German Foreign Office, 20 October 1887, reproduced in Fabricius, above n 129, 187.

of the Foreign Office indicates that Bismarck agreed to the request on 21 October 1887.[212] Imperial assent to the incorporation of Pleasant Island within the Marshall Islands Protectorate was given by Kaiser Wilhelm on 24 October 1887.[213] An Imperial Proclamation followed on 16 April 1888. The Kaiser himself had died a month earlier; his grandson, Wilhelm II, was not crowned until June 1888.

In contrast to the treaty-signing tour of the Marshall Islands, the practical preoccupation of the German traders and administrators after the new Protectorate was declared to include Pleasant Island was not the securing of signatures of local chiefs, but their prompt disarmament. On the day of the Imperial Proclamation in April 1888, an Ordinance was issued under the Protectorate Law preventing the 'importation of firearms, ammunition and explosives' into Pleasant Island.[214] The records available in English translation reveal no contemplation of treaty arrangements, but rather strategising on how best to disarm the local population, given the absence of a harbour or anchorage for a warship, and the abundance of firearms on the island.[215] The German gunboat *SMS Eber* was ordered to attend the island, disarm the population and hoist the flag; more detailed instructions, it appears, were not given.[216] The plan adopted by the newly appointed Imperial Commissioner to the Marshall Islands, Franz Sonnenschein, and the Commander of the *Eber*, Sub-Lieutenant Emsmann, to obtain the compliance of the indigenous population was more in the nature of conquest by ambush than agreement. The *Eber* landing party would 'march around and across the island'; the native chiefs would be 'persuaded amicably to join in' and return to a German trading station close to the gunboat's mooring. The chiefs would then be 'kept in custody as hostages and the natives are to be informed that they have to hand in all firearms and ammunition within the next 24 hours, failing which the chiefs will then be taken away into captivity'.[217]

On 1 October 1888, the *Eber* moored off the southwest of Pleasant Island, and a party of thirty-six soldiers proceeded to enact this plan. In his subsequent report to Bismarck, Sonnenschein hailed the raid as a success. On his account, the chiefs were taken prisoner

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[212] Ibid 188.
[213] Imperial Assent, 24 October 1887, reproduced in Fabricius, above n 129, 188–189.
[214] *Verordnung betreffend das Verbot der Einfuhr von Feuerwaffen, Schießbedarf und Sprengstoffen in Pleasant Island*, 16 April 1888, reproduced in Fabricius, above n 129, 197.
[215] See Fabricius, above n 129, 190–195.
[216] Ibid 208.
[217] Resolution of the Imperial Commissioner and the Acting Commander of the Gunboat SMS Eber, 1 October 1888, reproduced in Fabricius, above n 129, 214–215.

overnight in a German copra house. By the following morning, the island's population had gathered there 'in a great crowd'. The German flag was hoisted and the Imperial Proclamation read out; and the local population was ordered to hand in their firearms and ammunition in exchange for the release of the chiefs.[218] By the time of the departure of the *Eber* on 3 October, Sonnenschein reported, 765 firearms had been handed in, including '1 revolver, 109 pistols and 655 rifles'.[219] The chiefs were released and the *Eber* departed on the same afternoon. Sonnenschein wrote a detailed report to the Foreign Office advising of the success of the mission. In his report, he substituted the English name of Pleasant Island for 'Nauru', a Germanic spelling of *Naoero* or *Nawodo*, the phonetic indigenous name for the island.[220]

16. Nauru's incorporation into the German protectorate as a matter of law

As discussed, the concept of the protectorate existed in the law of nations as a species of treaty arrangement between sovereign states, however the protectorate of the late nineteenth century was far removed from the simple reasoning of *pacta sunt servanda*. From the perspective of German imperial expansion in the Pacific, however, justifications for the protectorate concept offered within the framework of the law of nations – and more specifically, by the new *Institut de droit international* – seem if not incidental then at least *ex post facto* attempts to attribute the coherence of legal reason to a series of *ad hoc* administrative decisions prompted by private demands for commercial certainty. As a matter of law, then, the basis of Nauru's incorporation into the German protectorate of the Marshall Islands bears restatement. As a legal construction, the German protectorate regime was grounded in German public law as configured in the Imperial Constitution of 1871, and was not formally expressed as deriving from any international rule.[221] Whilst it is possible that the Berlin Conference was understood in Germany to have either confirmed or established a general principle permitting the establishment of protectorates in the absence of treaty, it is not clear

[218] Report of Imperial Commissioner of the Marshall Islands to Prince Herbert von Bismarck, 31 October 1888, reproduced in Fabricius, above n 129, 208–213. Also, 'Germans in the Pacific', *The Week* (Brisbane) 29 December 1888, 13.
[219] Ibid 211.
[220] Report of Imperial Commissioner of the Marshall Islands to Prince Herbert von Bismarck, 31 October 1888, reproduced in Fabricius, above n 129, 208–213.
[221] Hanschmann, above n 116, 248–249. Koskeniemmi makes a related observation: 'While German lawyers started to write about colonialism only after Bismarck's famous volte face in 1884, their treatment of it drew more upon the tradition of national public law than upon international law: the focus of German interest law in how the German *Schützgebiete* should be seen from the perspective of the imperial constitution.' Koskeniemmi, above n 82, 109.

from the records considered that a foundation in the law of nations for imperial expansion was understood by the German Reich over the years 1884 to 1888 to be necessary at all. The central preoccupation was not whether the law of nations sanctioned Germany's declarations in the Western Pacific, but whether other European powers in the region would tolerate those declarations.

In formal terms, the legal basis of the imposition of protectorate status on Nauru was as follows. Section 1 of the Protectorate Law purported to vest the power of the Reich to make laws for protectorates (the '*Schutzgewalt*') in the Kaiser. According to section 3, the power so vested was exercisable via imperial decree; and in September 1886, the imperial Ordinance establishing the Marshall Islands Protectorate was issued by Kaiser Wilhelm. Pursuant to the same section, Nauru was decreed a German protectorate on 16 April 1888 and incorporated into the administration of the Marshall Islands Protectorate by Sonnenschein, the Commissioner of the Marshall Islands, as the Kaiser's delegate.[222] This is the extent of legal foundation for the creation of Nauru as a German protectorate: a piece of legislation passed by the Reichstag, an ordinance issued by the Kaiser, and a proclamation issued by the Kaiser's delegate in the Marshall Islands.

In terms of the law of nations, the legal foundation of protectorates over non-European areas in the absence of treaty was not settled in 1888, and indeed never clearly was.[223] Recognised modes of territorial acquisition – namely conquest, cession, or occupation in case of *res nullius*, the civil law concept analogised into the law of nations as *terra nullius* – could not be directly invoked as justification for the creation of protectorates as legal entities; as argued, the precise purpose of the protectorate model was to *avoid* territorial acquisition of the area in question so as to limit administrative obligations. Articles 34 and 35 of the Treaty of the Berlin Conference had settled that any declared territorial acquisition obliged the administration of annexed territory sufficient to protect private rights and trade therein (although it should be noted that the *Institut* regarded this obligation, subsequently restated as the principle of effective occupation, as already settled in practice prior to the Conference, and indeed potentially limited by the Berlin treaty's confinement to the African coasts).[224] The Treaty however left unclear the legal obligations that attended protectorate status.

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[222] Imperial Proclamation extending the German Protectorate to include Pleasant Island, 16 April 1888, reproduced in Fabricius, above n 129, 196.
[223] Thanks to Matthew Craven for his time and generosity across a number of discussions on this topic.
[224] Koskeniemmi, above n 82, 149.

Subsequent to the Berlin Conference, the *Institut* commissioned German public lawyer Ferdinand de Martitz in September 1885 to chair a committee into the law of occupation, which prompted a consideration of whether and which non-European lands were subject to new occupation by European states.[225] Martitz proposed that lands considered *territorium nullius* were subject to such occupation, where *territorium nullius* denoted 'any region not actually under the sovereignty or protectorate of a member of the community of the law of nations, whether inhabited or not'.[226] Martitz' attribution of legal equivalence to uninhabited and inhabited lands was justified by his assessment of 'savage and 'semi-barbarian' peoples as incapable of possessing sovereignty recognisable in the law of nations.[227] Lands considered *territorium nullius* were open to occupation by European states, and effective occupation would ground a claim either of sovereignty or of protectorate over the area.[228] In case of protectorate over land considered *territorium nullius*, however, Martitz analogised from the classical formulation: there must be an agreement with the indigenous authority, who would retain political and administrative authority over local affairs, with the European state assuming authority *vis-a-vis* other European states.[229] With respect to protectorates declared over inhabited lands in the absence of treaty, however, Martitz' formulation with indigenous peoples was either equivocal, or relied implicitly on a division of indigenous peoples into those possessing recognisable local authority and those who did not.[230]

Martitz' formulation of *territorium nullius* was directly challenged by the French diplomat Edouard Engelhardt.[231] Engelhardt took exception on two grounds to the uncertainty in Martitz' use of the 'community of the law of nations' as the means of defining which political entities possessed sovereignty to an extent sufficient to render the land they inhabited as other than *territorium nullius*. Firstly, he cited the cases of Morocco, Abyssinia and Zanzibar as examples of the difficulty of determining which political entities fell within the 'community of nations'; and secondly, he noted that it was possible to hold that even in the case of land inhabited by 'savages' outside the community of nations, it would be 'exorbitant' to consider

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[225] Andrew Fitzmaurice, 'Discovery, Conquest and Occupation of Territory' in Bardo Fassbender and Anne Peters (eds) *The Oxford Handbook of the History of International Law* (Oxford University Press, 2015), 840, 857.
[226] Ferdinand de Martitz, 'Occupation des territoires — Rapport et projet de résolutions présentés à l'Institut de droit international' ['Occupation of Territories — Report and draft resolutions submitted to the Institute of International Law'] (1888) 9 *Annuaire de l'Institut de droit international* 243, 247.
[227] Ibid 247.
[228] Ibid 247–248.
[229] Ibid 249.
[230] Koskeniemmi, above n 82, 138–151.
[231] Institut de droit international, 'Sixième commission – Examen de la théorie de la conférence de Berlin sur l'occupation des territoires' (1889) 10 *Annuaire de l'Institut de droit international* 173.

such land *territorium nullius* for the purposes of occupation.[232] In any event, Martitz' proposed consolidation of the law of occupation was not adopted by the *Institut*. Although it was left open that inhabited lands could potentially be subject to occupation without treaty, ultimately no agreement was reached within the *Institut* as to how to define as a matter of law those indigenous peoples whose lands were legitimately subject to occupation by European states.[233]

The relevance of contemporaneous understandings of the law of nations, and in particular the debate within the *Institut* over *territorium nullius*, to the incorporation of Nauru into the Marshall Islands protectorate is therefore questionable.[234] Quite apart from the lack of agreement on both the positive and natural law of occupation within the *Institut*, its treatment of the question of protectorates does not seem to have figured in German administrative policy at all. Even for German jurists such as Robert Adam, Paul Heilborn and Paul Laband seeking to explain the protectorate regime after its establishment, the primary concern was with the coherence of German public law, and whether the protectorates fell within the scope of domestic law or outside law altogether. Adam insisted that treaties with indigenous authorities had no legal character; they were 'sham' agreements, functional in politics but not in law.[235] If the law of nations was considered, the emphasis was on the rules of engagement between imperial powers, not between imperial powers and the regions they occupied.[236] Heilborn in his treatment of the German protectorate regime seems to have considered that the law of nations was not applicable to relations between European states and indigenous peoples.[237] For Laband, the relation with indigenous peoples was a matter of morality, and

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[232] Engelhardt in ibid 177–178. Also Fitzmaurice, above n 225, 857.
[233] Koskeniemmi, above n 82, 150–151.
[234] This interpretation differs from that of Fitzmaurice, who argues that '*(t)erritorium nullius* was the legal rationalization of protectorates, a means of recognizing sovereignty and property in the territory being occupied and simultaneously subsuming it under a supposed higher form of sovereignty.' Fitzmaurice's conflation here of 'sovereignty and property' requires further explanation, as it is open and arguably more likely that *territorium nullius* recognised property in the absence of sovereignty. See Fitzmaurice, above n 225, 858.
[235] Jörg Fisch, 'Africa as *Terra Nullius*: The Berlin Conference and International Law' in Stig Förster, Wolfgang J Mommsen and Ronald Robinson (eds), *Bismarck, Europe and Africa: The Berlin Africa Conference 18841885 and the Onset of Partition* (Oxford University Press, 1988) 347, 367 citing Robert Adam, 'Völkerrechtliche Okkupation und deutsches Kolonialrecht' (1891) 4 *Archiv des öffentlichen Rechts* 193, 259; and Hanschmann, above n 116, 248, citing the same text at 251 and 259.
[236] 'Early commentators such as Paul Heilborn…, Karl Heimburger…, or Friedrich Geffcken…showed little awareness of the moral ambivalence of the civilizing mission and concentrated their energy on clarifying the meanings and limits of concepts such as 'protectorate' or 'territorial sovereignty' (*Gebietshoheit*) or defending Germany's right as a latecomer to the imperial game that would correspond to its role as a Great Power'. Koskeniemmi, above n 82, 109.
[237] Koskeniemmi, above n 82, 129 citing Paul Heilborn, *Das volkerrechtliche Protektorat* (Springer, 1891), 7–28.

not a matter for either domestic or international law; likewise for Bornhard, imperialism was principally a matter of economic policy, and not for law at all.[238]

In the absence of treaty agreement and in the use of force outside the scope of law, the manner in which Nauru was incorporated into the protectorate of the Marshall Islands is best characterised as an act - however small - of war. Given its success, that act could have been recognisable in the European law of nations as conquest sufficient to ground the acquisition of Nauru as German territory. However, the purpose of the invasion was not to assume sovereignty in the sense that would generate the administrative obligations of effective occupation, but to assert the exclusive authority to protect European commercial interests on the island as private rights to property and trade.[239]

In this assertion of the existence of property in the absence of sovereignty, the concept of the protectorate as practised in Nauru can be viewed as a flawed mirror. On one side, Europeans were to have their commercial interests recognised as private rights without any perceived need for an assertion of sovereignty to ground those rights. On the other, Nauruans were assumed to be without sovereignty but were recognised to hold rights in real property. In Sonnenschein's report back to Bismarck on the success of the *Eber*'s mission to Nauru, he included the following note under the heading 'Land Ownership': "(t)he white residents own little land as the natives, who need the land for their own livelihood, are reluctant to part with it'.[240] This statement suggests that indigenous property interests were understood to survive the invasion and thus, it is possible to infer, either to derive from an indigenous legal authority capable of creating recognisable private proprietary rights but incapable of qualification as sovereignty, or from a principle of occupation in the law of nations. The former view – that via the fact of occupation, indigenous peoples possessed property recognisable in private law, but not sovereignty recognisable in international law – was subsequently expressed by Adam and by Westlake.[241] The latter view – that indigenous occupation created property rights in international law via the principle of occupation derived

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[238] Hanschmann, above n 116, 254–255.

[239] Weeramantry discusses the question of whether sovereignty over Nauru was validly acquired in the European law of nations. See Christopher Weeramantry, *Nauru: Environmental Damage under International Trusteeship* (Oxford University Press, 1992), 8.

[240] Report of Imperial Commissioner of the Marshall Islands to Prince Herbert von Bismarck, 31 October 1888, reproduced in Fabricius, above n 129*,* 224.

[241] Koskeniemmi, above n 82, 127–128, quoting Westlake, 'Le conflit Anglo-Portugais' (1891) 18 *Revue de droit international et législation comparée* 247, 247 and 249; and also quoting Adam, 'Völkerrechtliche Okkupation und deutsches Kolonialrecht' (1891) 4 *Archiv des öffentlichen Rechts* 234.

from Roman civil law – was open to take. Both alternatives work within the sketchy logic of *territorium nullius* proposed by Martitz.

17. International status and imperial administrative form: the view from Nauru

However, to attempt to perfect the jurisprudential reasoning behind the incorporation of Nauru into the German protectorate of the Marshall Islands is to miss the point of this chapter. It is possible to describe the actions taken by the German Reich with respect to Nauru in 1888 as founded on an understanding of Nauruan land as *territorium nullius*, in order to fit the creation of the Nauruan protectorate into a taxonomy sensible to international law. As a matter of legal history, however, it is more accurate to describe those actions as *ad hoc* administrative responses to a series of commercial demands that had become significant to European diplomacy and to German domestic politics. In the reading offered here, the impetus to assume authority over the island of Nauru in 1888 ultimately had little if anything to do with legal arguments of *territorium nullius* offered by the *Institut* in the same year. If the actions taken by the German administration were characterised at the time within a jurisprudential framework at all, they were characterised within the public law of the German Imperial Constitution and the private law of property. The efforts of the *Institut* to define those actions as indicative of a coherent logic of sovereignty and territory followed the event.

The analytical implications of this observation bear some consideration. If it is accurate to posit that imperial expansion in the late nineteenth century was framed as a jurisprudential problem for the law of nations – an assessment that may be appropriate in other contexts, most probably the case of British imperialism - it is just as accurate to observe that it was also framed as a material problem of how to provide commercial ventures with a level of official administrative support that both satisfied their demands and minimised state expenditure. On this view, the lack of coherence in the protectorate as a legal concept resulted from the relatively quick failure of the protectorate model as a viable solution to that material problem, which obviated the need for jurisprudential coherence. As discussed in the following chapter, the protectorate waned not for want of jurisprudential justification, but for its unsustainability as an administrative form.

When viewed from Nauru, then, if the law of nations played a role in the appearance of Nauru on the plane of imperial administration, it was hardly as a coherent European project, but as *ex post facto* rationalisation of a series of administrative decisions reactive to private

commerce. Koskeniemmi has stated of the *Institut* that '(i)t was their failure to spell out the meaning of sovereignty in social and political terms, as applied in non-European territory, that in retrospect made international lawyers seems such hopeless apologists of empire'.[242] However this assessment implies that there was 'a' meaning of sovereignty to be spelled out. When viewed from the Western Pacific, what was attempted in the protectorate model was an administrative reconciliation of European claims to private property outside of the domain of European sovereignty - an endeavour that in practice, as Leroy-Beaulieau insisted, was doomed to fail. The view from Nauru therein offers a cautionary addendum to the impetus to tell the story of European imperial expansion as contemporaneously justified in the idiom of international law offered by the *Institut*. To marginalise certain experiences of imperial administration as peripheral to that story – and here the German protectorate of the Marshall Islands serves as but one instance - makes it easier to miss the respects in which sovereignty and territory as core concepts of international law developed subsequent to administrative practices of imperial expansion that, if contemporaneously informed by the logic of law at all, were informed by the private law of property on the one hand, and constitutionalism on the other.

18. Conclusion

The narrative of the Hanseatic inheritance of Goddefroy, Hansemann and Hernsheim thus serves as a crucial counterweight to narratives of international legal history that have developed subsequent to the period in question. The classical concept of the protectorate does not clearly explain the nature of authority asserted by the German Reich over Nauru in 1888, not least of all because the concepts of sovereignty and territory were not settled as matters of positive international law. The authority asserted over Nauru was more a reflection of practical concern with the balance of administrative authority and corporate financial responsibility to be struck between the Reich and the *Jaluit Gesellschaft*. The balance of company and state rule struck between the Reich and the *Jaluit Gesellschaft* in the Agreement of 1888 responded more directly to the pragmatic contingencies of German imperial expansion in the Pacific than to concepts of the law of nations. These contingencies included the political and commercial legacy of Hanseatic firms; the industrialisation of agriculture, and its effect on commodity prices and labour politics; the competing interests

[242] Koskeniemmi, above n 82, 169.

involved the German nationalist project, only just taking shape; the personalities and political priorities of the German imperial government; and the international commercial and diplomatic environment in which the firms and the Reich found themselves in the Pacific of the late nineteenth century. Only peripherally could the assertion of authority over Nauru be understood as informed by the intellectual project that was coming to know itself in Europe as international law.

Attention to this distinction between international status and administrative form generates its own historiographical momentum. As argued in the following chapters, the form of company administration established in Nauru in 1888 developed accretively as the international status of Nauru shifted from protectorate to colony to mandate over the following decades. The 1888 Agreement between the *Jaluit Gesellschaft* and the Reich was the legal condition on which the British-owned Pacific Phosphate Company came to be granted an exclusive license to mine phosphate on the island. In turn, the consolidation of the Pacific Phosphate Company's mining operation on Nauru was a key condition of possibility of the occupation of the island by Australian troops on behalf of the British empire in 1914. Australia's occupation of Nauru, and insistence on ownership of Nauruan phosphate, in turn prefaced not only the designation of Nauru as a C Class Mandate by the new League of Nations, but as will be argued in the followed chapter, the creation of the C Class Mandate itself. Focus on imperial administrative form as a phenomenon related but distinct from international status therefore establishes an alternative perspective from which to consider the attempt to establish a new international order following the war of 1914-1918.

Chapter 3

From Protectorate to Colony to Mandate, 1920

1. Introduction

This chapter redescribes the shifts in the international status of Nauru from German protectorate to German colony to British mandate, and the accretions of administrative form that accompanied each shift. It argues that as the status of Nauru shifted from German protectorate to British mandate at the international level, the structure of private and public relations instantiated by the Agreement between the *Jaluit Gesellschaft* and the Reich in 1888 was not dismantled, but persisted in the tripartite arrangement struck between Britain, Australia and New Zealand for joint administration of the island as a Mandate of the new League of Nations. The status of Nauru was determined by the Mandate conferred by the League of Nations on the British Empire in 1920; yet the administrative structure in which that mandate would be exercised was determined by the Nauru Island Agreement, settled in 1919 prior to the conferral of the Mandate. Under the sub-imperial Nauru Island Agreement, public authority previously exercised by the Nauru District Office was assumed by an Australian Administrator; and corporate authority previously exercised by the *Jaluit Gesellschaft* was transferred to a new tripartite Board of Commissioners, subsequently known as the British Phosphate Commission. The new status of C Class Mandate reflected tensions at the Paris Peace Conference over how to dispose of the occupied German and Ottoman territories after the war, striking an uneasy compromise between territorial annexation and international administration; and the assumption of administrative control by a tripartite body reflected tension within the British empire between the Imperial government and the Dominions over Dominion independence in external affairs. Yet the administrative form of Nauru established in 1888, with its particular configuration of public and private authority, remained intact.

The chapter begins with an account of the *ad hoc* development from 1888 of the jurisdiction of Nauru as a District Office of the German protectorate of the Marshall Islands under the administration of the *Jaluit Gesellschaft*. The arrangement proved less than successful for the *Gesellschaft*, as did similar arrangements of company rule across the German protectorates. In the early 1900s, the Reich assumed direct colonial administration of German New Guinea;

and the Marshall Islands protectorate was incorporated into German New Guinea on request of the ailing *Gesellschaft*. The chapter moves to redescribe the sale of the *Gesellschaft*'s phosphate exploitation rights to the British owned firm, the Pacific Islands Company, in context of the commodification of phosphate, the industrialisation of agricultural production, and the legal articulations of imperial expansion into the Pacific region. The development of the Pacific Islands Company's mining operation under German administration is described in context of growing anti-German sentiment in newly federated Australia, exacerbated by the tension between the new federal government's 'sub-imperial' posturing toward the Pacific region and the limitations on its external affairs power as a British Dominion. The chapter then moves to consider the relation between the occupation of the German territories in the Pacific and South West Africa by Australia and South Africa on the outbreak of war in 1914, the debates at the international level between internationalisation and territorial annexation of the occupied German and Ottoman territories, and the compromise arrangement of classed mandates reached in the Versailles negotiations and codified in Article 22 of the Covenant of the League of Nations. The chapter concludes that while the creation of C mandate status as ascribed to Nauru marked a significant shift, the administrative structure adopted by Britain, Australia, New Zealand to administer Nauru as a phosphate operation marked an accretion of the administrative form established under German rule.

2. Administration of Nauru under the Marshall Islands protectorate

As covered in Chapter 2, the imposition of protectorate status on Nauru occurred via a series of instruments of German law.[1] The Protectorate Law purported to vest the power of the Reich to make laws for protectorates in the Kaiser. The power so vested was exercisable via imperial decree; and in September 1886, the imperial Ordinance establishing the Marshall Islands Protectorate was issued by Kaiser Wilhelm I. Pursuant to the same section, Nauru was decreed a German protectorate on 16 April 1888 and incorporated into the administration of the Marshall Islands Protectorate by the Commissioner of the Marshall Islands, as the Kaiser's delegate.[2] Beyond this basic jurisdictional scaffolding, the content of

[1] See section 16, 'Nauru's incorporation into the German protectorate as a matter of law' in Chapter 2, 'From Trading Post to Protectorate'.

[2] *Bekanntmachung* [Proclamation], 16 April 1888, reproduced in Wilhelm Fabricius, *Nauru 1888–1900: An Account in German and English based on Official Records of the Colonial Section of the German Foreign Office held by the Deutsches Zentralarchiv in Potsdam* (Dymphna Clark and Stewart Firth trans, Research School of Pacific Studies, Australian National University, 1992) 196.

the law that applied in Nauru remained to be determined. The Protectorate Law of 1886 provided that German consular law applied in the protectorates with respect to private law, criminal law and related procedure, and any other matters covered by consular law.[3] The Reich's Consular Law itself provided for personal jurisdiction over German and other European subjects in regions to which it applied, and defaulted to German municipal law unless specifically provided.[4]

In effect, then, the default position within the territory of the German protectorates was that German municipal law applied to relations between Europeans; but jurisdiction over indigenous peoples was not expressly contemplated.[5] The attempt to territorialise the personal jurisdiction created in consular law effectively created a juridical vacuum with respect to the legal status of the indigenous populations of regions over which German protectorates were declared. However, the Protectorate Law provided that the general power to make laws in the protectorates was exercised by the Kaiser on behalf of the Reich, free from the legislative oversight of the Reichstag; and in practice, this power was delegated to the Imperial Commissioners on the creation of each protectorate.[6] Once this delegation occurred, the Imperial Commissioners were regarded under German law to have unlimited executive power in the protectorates where the Protectorate Law and the Consular Law were silent; and with respect to indigenous peoples, the Laws were almost entirely so.[7] Outside the scope of private and criminal law and procedure as applied to European subjects, the Commissioners governed by executive decree.[8] With respect to Bismarck's attempt to limit the scope of the Reich's administrative responsibilities in the protectorates, the irony of this structure is clear. As a legal form, the German protectorate was originally intended to minimise formal administrative intervention outside the bounds of territorial sovereignty; but in the absence of consideration of the legal status of indigenous peoples, the

[3] *Gesetz, betreffend die Rechtsverhältnisse der deutschen Schutzgebiete* [Law Governing the Legal Status of the German Protectorates] (Germany) 17 April 1886, RGBI, 1886, 75 ('*Protectorate Law*'), ss. 2.
[4] *Gesetz über die Konsulargerichtsbarkeit* [Law on Consular Jurisdiction] 10 July 1879, RGBI, 1879, 197 ss. 2, 3.
[5] Alpheus Henry Snow, *The Question of Aborigines in the Law and Practice of Nations* (Government Printers Office, 1919), 97. Luigi Nuzzo, 'Colonial Law' (16 April 2012) *European History Online* <http://ieg-ego.eu/en/threads/europe-and-the-world/european-overseas-rule/luigi-nuzzo-colonial-law> 10.
[6] Pr*otectorate Law* ss 1, 4.
[7] 'As respects the juridical situation of the aborigines and of all other colored people assimilated to them, the right of the Emperor to make ordinances by the delegation of the statute above mentioned [the Protectorate Law] is theoretically unlimited.' Snow, above n 5, 99–100.
[8] Felix Hanschmann, 'The Suspension of Constitutionalism in the Heart of Darkness' in Kelly L Grotke and Markus J Prutsch, *Constitutionalism, Legitimacy, and Power: Nineteenth-Century Experiences* (Oxford University Press, 2014), 252.

protectorates effectively subjected indigenous people – the majority in every case - to absolute executive rule.

For the Marshall Islands Protectorate, the Kaiser's power to make laws was delegated to the new office of Imperial Commissioner in September 1886.[9] Following the Agreement between the Reich and the *Jaluit Gesellschaft*, in which the *Gesellschaft* agreed to cover all costs of extending the protectorate to cover Nauru,[10] the island became a District Office by proclamation of the Imperial Commissioner of the Marshall Islands Protectorate in April 1888.[11] From that date – six months prior to the gunboat occupation of Nauru in October 1888 - ordinances issued by the Imperial Commissioner for the Marshall Islands protectorate were understood to apply in Nauru, ineffective only practically for want of enforcement, rather than legally for want of legitimate foundation. The preoccupation with establishing effective control as opposed to legitimacy of rule is evident in the fact that the first ordinances specific to Nauru were the 'Ordinance relating to the Prohibition of the Importation of Firearms, Ammunition and Explosives into Pleasant Island', issued the same day as the Proclamation declaring the incorporation of Nauru into the Marshall Islands Protectorate, and the 'Ordinance relating to the Declaration of Jaluit as the Port of Entry for Pleasant Island', issued the following day.[12]

From April 1888, then, the German understanding of the law applicable in Nauru was as follows: German consular law applied to the European traders in matters of private and criminal law and procedure, and in all else, ordinances specific to the Marshall Islands or Nauru issued under the Protectorate Law applied. The *ad hoc* development of legal content specific to the protectorates is evident from the order of ordinances issued for the Marshall Islands protectorate and for Nauru.[13] The *Jaluit Gesellschaft*'s original concern to monopolise

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[9] *Verordnung, betreffend die Rechtsverhältnisse in dem Schutzgebiete der Marschall-, Brown- und Providence-Inseln* [Law Governing Legal Relations in the Marshall, Brown and Providence Islands Protectorates], (Germany) 17 September 1886, RGBI, 1886, 291 ('*Verordnung*').

[10] 'Agreement between the Jaluit Gesellschaft and the Reich', 21 January 1888, reproduced in Fabricius, above n 2, 202–204.

[11] *Bekanntmachung* [Proclamation], Jaluit 16 April 1888, reproduced in Fabricius, above n 2, 196.

[12] *Verordnung betreffend das Verbot der Einfuhr von Feuerwaffen, Schiessbedarf und Sprengstoffen in Pleasant Island* [Prohibition of the Importation of Firearms, Ammunition and Explosives into Pleasant Island] (Germany), 16 April 1888, reproduced in Fabricius, above n 2, 197; and *Verordnung betreffend die Eklärung des Hafens von Jaluit zum Eingangshafen für Pleasant Island* [Ordinance relating to the Declaration of Jaluit as the Port of Entry for Pleasant Island] (Germany) 17 April 1888, reproduced in Fabricius, above n 2, 198–199.

[13] Dirk H R Spennemann, 'A Hand List of Imperial German Legislation regarding the Marshall Islands (1886–1914)' (2007) 3 *Studies in German Colonial Heritage* 1. On the ad hoc development of law in the German protectorates, see Snow, above n 5, 97; and Hanschmann, above n 8, 249.

trade in the islands and pacify the local population is reflected in the initial ordinances, which required non-German vessels to report first to the Imperial Commissioner in Jaluit, and prevented the sale of arms, ammunition and alcohol to indigenous peoples.[14] These were followed by ordinances establishing local judicial authorities and delineating a hierarchy for appeals;[15] and ordinances regulating the raising of personal and business taxes.[16] As the *Gesellschaft* and other copra traders on Nauru had already established trading relationship with locals prior to the articulation of this administrative regime, basic questions of contract and property soon presented themselves with respect to relations between Europeans and indigenous peoples. The content of ordinances thus moved on quickly to deal with credit arrangements and property dealings between European traders and locals.[17]

Criminal jurisdiction over indigenous peoples took a few years to be positively established. In July 1889, Imperial Commissioner Biermann, Sonnenschein's successor in the Marshall Islands, reported that although German law was effectively in operation, the situation required clarification; and that in the interim, some gesture toward the customary authority of Nauruan chiefs had been deemed symbolically necessary:

> '(i)n Nauru, as also here in the Marshall Islands, the people believe that the German government official automatically has the right in given circumstances to punish anyone, whether native or foreigner, chief or commoner, and that he has in fact to settle all disputes. As however the Commissioner has not thus far been formally vested with criminal jurisdiction over natives, hitherto such cases have always been tried and sentenced passed by calling in chiefs as judges.

[14] For example, *Verordnung, betreffend die Verpflichtung nichtdeutscher Schiffe zur Meldung bei dem Vertreter der kaiserlichen Regierung in Jaluit* [Ordinance regarding the Obligation of Non-German vessels to Notify the Representative of the Imperial Government at Jaluit] (Germany), 2 June 1886; and *Verordnung, betreffend den Verkauf von Waffen, Munition, Sprengstoffen und berauschenden Getränken and Eingeborene der Marshall Inseln oder andere auf denselben sich aufhaltende Farbige* [Ordinance regarding the Sale of Weapons, Munitions, Explosives and Intoxicating Beverages to the Indigenous Peoples of the Marshall Islands or Other Coloured Persons Present Thereon] (Germany), 3 June 1886, cited in Spennemann, above n 13, 4.

[15] Examples include *Dienstanweisung, betreffend die Ausübung der Gerichtsbarkeit in dem Schutzgebiet der Marshall-, Brown- und Providence-Inseln* [Directive regarding the Execution of Judicial Duties in the Protectorate of the Marshall, Brown and Providence Islands], 2 December 1886, cited in Spennemann, above n 13, 4.

[16] *Verordnung, betreffend die Erhebung von persönlichen Steuern* [Regulation, regarding the Levy of Personal Taxes] and *Verordnung, betreffend die Erhebung von persönlichen Steuern* [Regulation, regarding the Levy of Business Taxes in Jaluit], both passed on 28 June 1888, cited in Spennemann, above n 13, 4–5.

[17] *Verordnung, betreffend das Kreditgeben an Eingeborene und die Anmeldung alter Schulden derselben in den Marshall Inseln* [Ordinance regarding the Giving of Credit to the Indigenous Population and the Registration of Old Debts in the Marshall Islands], 25 January 1887; and *Verordnung, betreffend Verträge mit Eingeborenen über unbewegliche Sachen* [Regulation regarding Contracts with Indigenous Peoples regarding Immovable Properties], 28 June 1888, cited in Spennemann, above n 13, 4–5.

> On these occasions the chiefs are in fact only puppets, who concur automatically in every proposal put forward by the white official.'[18]

Clarification at the legislative level was not forthcoming from the Reichstag, an omission that aligned with broader German unconcern at the problem of legitimacy of jurisdiction over indigenous peoples. On 26 February 1890, Biermann filled the vacuum by simply issuing an executive ordinance declaring general jurisdiction over the indigenous peoples in the protectorate of the Marshall Islands.[19]

As discussed in Chapter 2, indigenous peoples in the Marshall Islands and in Nauru were understood by the Germans as possessing real and personal property rights under Nauruan customary law that were recognisable in German law.[20] Records indicate that the new imperial administration considered itself obligated not only to respect but to also enforce those proprietary rights where disputes arose. The Agreement between the *Gesellschaft* and the Reich purported to grant the *Gesellschaft* the right to 'take possession of all ownerless land', understood to exclude land owned by both traders and indigenous locals.[21] Following the establishment of the District Office of Nauru, in September 1889 the Imperial Commissioner entered into a contract with a local chief for the sale and purchase of land and buildings to house the new Office.[22] This contract between the Imperial Government and 'Chief Jim of Nauru' purported to pass ownership in an area of land and buildings, 'together with all the coconut palms growing thereon'.[23] The express reference to palms was included in recognition of local Nauruan property practices, which the German administration understood to separate absolute ownership of land from absolute ownership of trees growing on that land. According to a report written by Nauru District Officer Fritz Jung in 1897, ownership in land and trees could pass separately, and owners of trees could grant usufructuary rights to third parties, which land owners would be required to recognise.[24]

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[18] Letter from Imperial Commissioner Biermann to His Highness Prince Bismarck dated 29 July 1889, reproduced in Fabricius, above n 2, 240, 241.

[19] *Verordnung, betreffend die Gerichtsbarkeit über die Eingeborenen im Schutzgebiete der Marshall-Inseln*, [Ordinance regarding the Jurisdiction over the Indigenous Peoples in the Protectorate of the Marshall Islands] issued 26 February 1890, cited in Spennemann, above n 13, 6.

[20] See also Christopher Weeramantry, *Nauru: Environmental Damage under International Trusteeship* (Oxford University Press), 186–187.

[21] *Vereinbarung zwischen dem Auswärtigen Amt und der Jaluit-Gesellschaft* [Agreement between the Jaluit Gesellschaft and the Reich] cl 1(a), reproduced in Fabricius, above n 2, 202.

[22] *Vereinbarung zwischen der Kaiserliche Regierung und dem Häuptling Jim von Nauru* [Contract between the Imperial German Government and Chief Jim of Nauru], 29 September 1889, reproduced in Fabricius, above n 2, 250.

[23] Ibid.

[24] 'Property in land is of primary importance. Almost every native on Nauru owns land or palms, with the exception of the slaves. Every patch of ground and every palm, the reef surrounding the island and even the

Acting Secretary to the Imperial Commissioner Senftt reported on his inspection of the Nauru District Office in September 1895 – which he found to be in 'exemplary order', with District Officer Jung enjoying the 'due respect' of the Nauruans - that land disputes constituted the bulk of the Office's work, and were resolved by Jung according to Nauruan customary law.[25] In the vacuum created by the Protectorate Law with respect to the government of indigenous peoples, an *ad hoc* body of German law thus developed for Nauru, which combined executive ordinances with interpretations of Nauruan customary law.

3. The collapse of the German protectorates and the assertion of direct rule

As the Nauru District Office of the Marshall Islands protectorate developed its own law and procedure to govern the Nauruan population, the *Jaluit Gesellschaft* was required under the terms of the 1888 Agreement to meet the costs of administration.[26] As detailed in Chapter 2, in 1886 the *Gesellschaft* had requested the incorporation of Nauru into the Marshall Islands protectorate as a means of gaining official protection of its copra trade on the island, which the company complained was at risk due to civil violence, exacerbated by the European practice of trading arms and alcohol for local copra. In 1896 - barely eight years after the capturing of the chiefs and the raising of the German flag on Nauru at its behest in 1888 - the *Gesellschaft* attempted to abolish the administrative regime on financial grounds. Its primary complaint was that the trading tax payable to the Reich was fixed at an excessively high annual rate, and did not reflect changes in copra yield.[27] In addition to the trading tax, a head tax had been imposed on the Nauruans in the form of an annual copra quota. One third of the price obtained from taxed copra was returned to chiefs as incentive to facilitate its collection.[28] Where this combined tax revenue failed to meet the costs of administration – the highest of which were salary costs for the District Officer and secretary, including

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sea washing the coastline has its owner…Land is seldom sold, but different portions of land are frequently exchanged. It is worthy of mention that in many places the land itself and the palms growing thereon are owned by two different proprietors.' Fritz Jung, 'Aufzeichnungen uber die Rechtsanschauungen der Eingeborenen von Nauru' [Notes on the Legal Concepts of the Natives of Nauru] (1897) 10 *Mittheilungen aus den deutschen Schutgebieten* 64; cf Peter H McSporran, 'Land Ownership and Control in Nauru' (1995) 2 *Murdoch University Electronic Journal of Law* 1, 2.

[25] *Briefe von Sekretair a.i. der Kaiserlichen Landeshauptsmannschaft an den Kasierlichen Landeshauptmann Herrn Dr. Irmer* [Letter from Temporary Secretary to the Administrator Arno Senftt to Imperial Administrator Georg Irmer] 27 September 1895, reproduced in Fabricius, above n 2, 258–260.

[26] 'Agreement between the Jaluit Gesellschaft and the Reich', 21 January 1888, reproduced in Fabricius, above n 2, 202–204, cl 4.

[27] See Fabricius, above n 2, 248–249.

[28] Ibid.

pension contributions – the company accountants in Hamburg recorded a loss against its Agreement with the Reich.[29]

In January 1896, the *Gesellschaft* sent a letter directly from Hamburg to the Foreign Office in Berlin seeking to exercise its right under the Agreement to terminate the Nauru arrangement, bypassing both the Nauru District Officer and the Imperial Commissioner of the Marshall Islands.[30] In justifying its request, the *Gesellschaft* asserted the continuity between administrative and commercial rationales for the establishment of the Nauru Office:

> '(w)hen Nauru was incorporated in the Protectorate of the Marshall Islands, the main concern was to put an end to the totally lawless situation on this island, to disarm the natives, who were at the time in possession of a large number of firearms…The desired reforms have now been implemented for a number of years; the situation on Nauru as regards personal safety and security of property no longer falls short of that on the other islands…The returns from Nauru are relatively low…In these circumstances we take the liberty of proposing that, on expiry of the present contract with Herr Jung, the District Office on Nauru be abolished…'[31]

From the perspective of the *Jaluit Gesellschaft*, then, by 1896 the commercial potential on which it had lobbied the Reich to declare protectorate status over Nauru had failed to materialise, and it was no longer willing to cover administrative costs. The Foreign Office in Berlin consulted with the Imperial Commissioner of the Marshall Islands Protectorate, who roundly rejected the *Gesellschaft*'s claims.[32] According to the Commissioner, peace on Nauru was maintained only by the presence of the District Officer; and the *Gesellschaft* was either underreporting its returns on the copra trade, or directly responsible for its decline. [33] In his correspondence with the Chancellor regarding the matter, Commissioner Irmer contended that 'the only concrete argument in favour of abolishing the position in Nauru is the bad trading position of the *Jaluit-Gesellschaft*'.[34]

The *Gesellschaft*'s rapid disenchantment with its protectorate responsibilities once in practice reflected comparable developments across the German empire. Due to the Protectorate

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[29] Ibid 272.
[30] Letter from Jaluit Gesellschaft to the Political Section of the Foreign Office in Berlin dated 10 January 1896, reproduced in Fabricius, above n 2, 275–276.
[31] Ibid.
[32] Ibid 274–275.
[33] *Bericht No. 49 Kaiserliche Landeshauptsmann für das Shutzgebiet der Marschall-Inseln* [Report No. 49 of the Imperial Administrator of the Protectorate of the Marshall Islands], 15 June 1896, reproduced in Fabricius, above n 2, 275, 277.
[34] Ibid.

Law's device of delegating executive rule directly from the Kaiser to the Imperial Commissioners, many of whom then delegated that power by ordinance on to District Officers, the administrative structures of the protectorates were heterogeneous.[35] Yet on the whole, the German protectorates proved ineffective both at shoring up the commercial interests at whose behest they were created to protect, and at circumscribing the administrative and financial involvement of the Reich, as Bismarck had assured the Reichstag in 1884 that they would.[36] German East Africa was the first venture in the fledgling commercial empire to falter. By 1889, the *Deutsch-Ostafrikanische Gesellschaft* had effectively failed in its attempt to administer the region west of Zanzibar over which Carl Peters had so brazenly sought to claim control.[37] Only four years before in 1885, following Peters' securing of protection agreements with local rulers, his *Gesellschaft für Deutsche Kolonisation* had been granted the patronage of Kaiser Wilhelm I in an agreement that came the closest to an imperial charter of all the commercial interests supported by the Reich in the late nineteenth century.[38] Yet the *Deutsch-Ostafrikanische Gesellschaft*'s attempt to execute its charter under the direction of Peters failed. The company proved unable to finance the administration of the territory it sought to rule, and its aggressive conduct in pursuit of a trading monopoly from the mountains to the coast of Zanzibar prompted vigorous resistance from local peoples.[39]

Bismarck's response to Peters' request for military support to shore up the Company's position was characteristically ambivalent toward increased colonial commitment. As late as September 1888, he had stated that he 'would rather give up the whole East African endeavour than agree to imperial military undertakings in the interior'.[40] Nevertheless, in

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[35] Sebastian Conrad, *German Colonialism: A Short History* (Cambridge University Press, 2012) 72.

[36] See section 9, 'The establishment of German protectorates' in Chapter 2, 'From Trading Post to Protectorate'.

[37] Helmuth Stoecker, 'German East Africa 1885–1906' in Helmuth Stoecker (ed) *German Imperialism in Africa: From the Beginnings until the Second World War* (Bernd Zöllner trans, C Hurst & Company, 1986), 93–99; Constant Kpao Saré, 'Abuses of German Colonial History: The Character of Carl Peters as a Weapon for *Völkisch* and National Socialist Discourses: Anglophobia, Anti-Semitism, Aryanism' in Michael Perraudin and Juergen Zimmerer with Katy Heady (eds), *German Colonialism and National Identity* (Routledge, 2011), 161.

[38] The Kaiser's declaration explicitly referred to company sovereignty: '[A]s the said Dr. Carl Peters in November and December of last year concluded treaties with the rulers of Usagara, Mguru, Useguba, and Ukami, by which these territories were taken over by the Society for German Colonization with the right of sovereignty, and has petitioned me to place these territories under our authority; so do we confirm that we have taken over this authority and we have placed these territories…under our imperial protection.' *Kaiserlicher Schutzbrief für Carl Peters' Gesellschaftfür deutsche Kolonisation* [Royal Patent of Patronage for Carl Peters' Society for German Colonization], reproduced in Louis L Snyder (ed) *Documents of German History* (Rutgers University Press, 1958), 255.

[39] On the Abushiri rebellion, see Stoecker, above n 37, 93–99; and Arthur J Knoll and Hermann J Hiery, *The German Colonial Experience: Select Documents on German Rule in Africa, China and the Pacific 1884–1914* (University Press of America, 2010), 67.

[40] *Statement of Chancellor Bismarck*, 18 September 1888, reproduced in ibid 67.

January 1889 Bismarck issued orders for military intervention with the Reichstag's support, and the protectorate of German East Africa was placed under the direct administration of the Reich.[41] In German South West Africa too, the *Deutsche Kolonial Gesellschaft für Südwest-Afrika* created by Lüderitz to administer the protectorate was failing financially by mid-1889, unable to compete with Cecil Rhodes' consolidation of his corporate empire in Southern Africa.[42]

Bismarck himself was forced to resign from his double post as Chancellor and Prussian Foreign Minister in March 1890 by the new Kaiser Wilhelm II. Wilhelm II's rise to the throne is commonly treated as marking an epochal shift in modern German history.[43] Bismarck's retirement followed protracted parliamentary discord over the Chancellor's anti-socialist agenda, and his related failure to maintain a stable coalition of parties in the Reichstag.[44] On Bismarck's ousting from office, the young Wilhelm II appointed former Commanding General of the Army Corps, Leo von Caprivi, as Chancellor, and began to implement what has subsequently become known as the 'New Course' in German statecraft.[45] The new regime appointed under Wilhelm II departed at his behest from the essentially reactionary *realpolitik* that been practised under Wilhelm I and Chancellor Bismarck, and accommodated the Kaiser's increasingly autocratic, unpredictable and expansionary approach to foreign policy, subsequently narrativised as *Weltpolitik*.[46] The nature and significance of the Wilhelmian period of the German Reich remains a highly contested question in historiographical debates regarding the War of 1914-1918 and the origins of the National Socialist movement in Germany in the 1930s.[47]

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[41] Stoecker, above n 37, 99.

[42] Ibid 41–43. On Cecil Rhodes and the British South Africa Company, see John S Galbraith, *Crown and Charter: The Early Years of the British South Africa Company* (University of California Press, 1977) and Robert I Rotberg, *The Founder: Cecil Rhodes and the Pursuit of Power* (Oxford University Press, 1988).

[43] On competing historiographies, see for example Michael Perraudin and Juergen Zimmerer, 'Introduction: German Colonialism and National Identity' in Michael Perraudin and Juergen Zimmerer with Katy Heady (eds), *German Colonialism and National Identity* (Routledge, 2011), 1–8; John C G Röhl, 'Goodbye to All That (Again)? The Fischer Thesis, the New Revisionism and the Meaning of the First World War' (2015) 91 *International Affairs* 1, 153–166; and Lynn Abrams, *Bismarck and the German Empire 1871–1918* (Routledge, 2nd ed, 2006), 2–5.

[44] The circumstances of Bismarck's retirement and the animosity between Bismarck and Kaiser Wilhelm II are detailed in Edgar Feuchtwanger, *Bismarck: A Political History* (Routledge, 2nd ed, 2014), esp. 245–248.

[45] For an account of this transition, see John C G Röhl, *Wilhelm II: The Kaiser's Personal Monarchy, 1888–1900* (Cambridge University Press, 2004), 320–333.

[46] Ibid 343–344; also E Malcolm Carroll, *Germany and the Great Powers 1866–1914: A Study in Public Opinion and Foreign Policy* (Archon Books, 1966), 475–478.

[47] For differing historical accounts of this period, see Eric Hobsbawm, *The Age of Empire: 1875–1914* (Weidenfeld and Nicolson, 1987); and Hans-Ulrich Wehler, *The German Empire 1871–1918* (Berg Publishers, 1985). On historiographical debates regarding German history, see n 33 in Chapter 2, 'From Trading Post to Protectorate'.

Kaiser Wilhelm II's 'New Course' in German governance was reflected in the centralisation of colonial policy. In October 1890, Caprivi created the *Kolonialabteilung*, or 'Colonial Department', which sat within the Foreign Office. The Colonial Department took over the appointment of officials in the protectorates.[48] The shift toward direct colonial administration undertaken by the Wilhelmian Reich seems to have been motivated at least in part by an attempt to quell political discord within Germany via a unifying nationalist discourse of imperial strength.[49] In March 1891, the Reich passed a law providing military support to Peters' failing administration in German East Africa, and the new Imperial Commissioner Hermann Wissmann was authorised to recruit local mercenaries to quash local resistance under the command of German officers.[50] In March 1893, Caprivi declared South West Africa to be a German colony, and increased military support to Lüderitz' South West Africa Company.[51] Within Germany, the Social Democratic Party opposed the centralisation of colonial policy and the militarisation of colonial intervention in Africa as furthering the interests of the ruling elite at the expense of the German majority.[52] In 1896, the Reichstag passed a law aggregating the administration of the colonial armed forces or *Schutztruppen* of German East Africa, South West Africa and Cameroon, and formalising the conscription of indigenous Africans into the forces.[53] In 1907, the Colonial Department was separated from the Foreign Office and became its own Office, the *Reichskolonialamt*.[54] Over the course of twenty years, Bismarck's reluctant extension of official protection to disparate German commercial interests in Africa and the Pacific had developed into a ministry of government with its own armed force.

Yet even with the official protection they had sought in the 1880s, German commercial interests in the Pacific failed to thrive, as had their counterparts in Africa. In 1898,

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[48] L H Gann and Peter Duignan, *The Rulers of German Africa 1884–1914* (Stanford University Press, 1977), 46, 67; also Snow, above n 5, 101–102.

[49] Eminent German historian Hans-Ulrich Wehler refers to this discourse as 'social imperialism'; Wehler, above n 47, 174–179.

[50] *Gesetz, betreffend die Kaiserliche Schutztruppe für Deutsch-Ostafrika* [Law concerning the Imperial Colonial Force for German East Africa], 22 March 1891. Gann and Duignan, above n 48, 65; Stoecker, above n 37, 99.

[51] Stoecker, above n 37, 43.

[52] See Proceedings of the Reichstag, Berlin (stenographic reports), *Stenographische Berichte über die Verhandlungen des Reichstags* [Stenographic Reports on the Proceedings of the Reichstag], 7th legislative period, 4th sess 1888–1889, vol 1 (January 1889), 627–631 <http://germanhistorydocs.ghi-dc.org/docpage.cfm?docpage_id=2877>.

[53] *Gesetz wegen Abänderung des Gesetzes, betreffend die Kaiserliche Schutztruppe für Deutsch-Ostafrika und des Gesetzes, betreffend die Kaiserlichen Schutztruppen für Südwestafrika und für Kamerun* [Law amending the Laws on the Imperial Colonial Forces for German East Africa, South West Africa and Cameroon] (Germany) 17 July 1896, RGBI 1986, 53.

[54] *Allerhöchster Erlaß, betreffend die Errichtung des Reichs-Kolonialamts* [Decree on the Establishment of the Reich Colonial Office] (Germany) 17 May 1907, RGBI 1907, 239.

Hansemann's *Neuguinea Komagnie* was rescued from bankruptcy by an agreement with the Reich, in which the Reich paid out the ailing company and assumed direct administration of the region.[55] In the same year, the *ad hoc* regime of tripartite rule of Samoa by German, British and United States empires came to an end. The 'condominium' arrangement had been brokered by Bismarck in the Berlin Samoan Conference of 1889 on the basis of equality of their respective commercial interests in the Samoan islands.[56] Shared administration of Samoa had come to irritate the Wilhelmian Reich, at least in part due to the island's prominence in domestic political discourse as the idyllic exemplar of German empire: Herbert von Bismarck's replacement as Foreign Secretary in the new regime, Adolf Marschall, wrote of the 'Samoan question' that 'the reputation of the New Course depends upon it".[57] In the Samoan Tripartite Convention of 1899, negotiated in the context of civil war in the Samoan islands, the three powers agreed that Germany would exercise exclusive control of the western islands; the United States, the eastern islands; and Britain, exclusive control of the Solomon Islands to the west as compensation.[58] In this way, the Reich came to exercise colonial rule over the islands where Hanseatic firm *Godeffroy & Sohn* had established their first Pacific trading post in 1857.[59]

The *Jaluit Gesellschaft*'s request that the Nauru District Office be abolished came as the German experiment in company protectorates began to unravel. The Foreign Office's refusal of the *Gesellschaft*'s request was given as the Wilhelmian Reich consolidated its 'New Course' in foreign and in colonial policy, shifting toward the militarisation of the Reich's intervention in Africa, and the assumption of direct administrative control in the protectorates. Whilst the term *Schutzgebiet* continued to be used to refer to German imperial ventures in Africa and the Pacific, the substance of the arrangements to which the term referred altered greatly over the 1890s and 1900s, from a mode of protecting German commercial interests without assuming direct administrative control, to direct administrative control supported by military force. Ten years after the *Gesellschaft*'s failed attempt to exit its arrangement with the Reich, the

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[55] Stewart Firth, 'German Firms in the Western Pacific Islands, 1857–1918' (1973) 8 *Journal of Pacific History*, 10, 21; also Conrad, above n 35, 54.

[56] See generally Paul M Kennedy, 'Germany and the Samoan Tridominium, 1889–1898: A Study in Frustrated Imperialism' in John A Moses and Paul M Kennedy (eds), *Germany in the Pacific and the Far East, 1870–1914* (University of Queensland Press, 1977), 89–114. Also Great Britain Foreign and Commonwealth Office, *British and Foreign State Papers* (1898–1899), vol 91, 1272–1273.

[57] Kennedy, above n 56, 101.

[58] Ibid 109–110; also W M Roger Louis, *Great Britain and Germany's Lost Colonies 1914–1919* (Clarendon Press, 1967), 27.

[59] See section 5 'Hanseatic firms in the Pacific' in Chapter 2, 'From Trading Post to Protectorate'.

Marshall Islands Protectorate was incorporated into German New Guinea in April 1906.[60] Executive authority over the Nauru District Office shifted from the Imperial Commissioner at Jaluit to the Governor of New Guinea, Albert Hahl, who by 1907 answered directly to the head of the Colonial Office, Secretary of State for Colonial Affairs Bernhard Dernburg.[61]

By 1907, then, the status of Nauru had shifted from protectorate to colony. The 1888 Agreement between the *Jaluit Gesellschaft* and the Reich came to an end with respect to all terms except one: the *Gesellschaft*'s exclusive right to exploit phosphate deposits was renewed as a separate mining Concession, with a term of 94 years, and rights of assignment.[62] The Nauru District Office now answered to the Governor of New Guinea rather than the Imperial Commissioner of the Marshall Islands, and powers of appointment passed to the Reich's Colonial Office. Yet as the German *Schutzgebiete* became colonies in all but name, the legal framework set up by the Protectorate Law did not change. Colonial officers still wielded an executive authority unfettered by legislative and judicial review.[63] The administrative powers of the Nauru District Office did not change, and all laws established in the protectorate period continued on foot. In the shift from protectorate to colony, the power to appoint officials shifted from the *Jaluit Gesellschaft* to the new Colonial Office, but the administrative form over which those officials presided remained unchanged.

4. The federation of Australia and taxonomies of British imperial form

The Wilhelmian Reich's adoption of the 'New Course' and the transition from the protectorate to the colonial form was keenly followed in the Australian colonies. The British government's diplomatic acquiescence to the activities of the Hanseatic firms in the Pacific

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[60] *Verordnung betreffend die anderweitige Regelung der Verwaltung und der Rechtsverhältnisse im Schutzgebiet der Marshall-, Brown und Providence Inseln* [Ordinance regarding the Changed Execution of the Administration and the Jurisdiction in the Protectorate of the Marshall, Brown- and Providence-Islands] (Germany), 17 January 1906, RGBI 1906, 138.

[61] For Albert Hahl's memoirs of his role as Governor of the New Guinea Protectorate after the transfer of sovereignty from the company to the Reich, see Peter G Sack and Dymphna Clark (eds and trans), *Albert Hahl: Governor in New Guinea* (Australian National University Press, 1980), esp. 56.

[62] *Agreement between His Most Gracious Majesty King George V and Others and The Pacific Phosphate Company*, Westminster, 25th June 1920, First Schedule, 'Concession', available at <https://digital.library.adelaide.edu.au/dspace/bitstream/2440/80560/1/Agreement%20Pacific%20Phosphate%20Company.pdf>.

[63] Felix Hanschmann thus describes the unfolding of the German protectorate form and its collapse into direct colonial rule as a spatially expressed divergence from the constitutional principles that were coming to define 'modern' Europe: '(t)he further the distance from the political centre and its chain of delegation, the more autocratic the colonial system became and the less 'European' legal principles were brought into effect. Legislative, executive, and judicial powers were concentrated and personalized and so set free from normative commitments.' Felix Hanschmann, above n 8, 254.

in the 1870s and 1880s had been publicised as a primary reason for the federalist conventions that commenced in the early 1880s.[64] The unpopularity in the Australian colonies of the 1886 Demarcation Agreement between Britain and Germany, which divided the western Pacific including the eastern half of New Guinea into British and German 'spheres of influence', stemmed in part from the failure of Britain to consult with the colonial governments on matters which they considered to directly affect their regional interests, both in terms of commerce and security.[65] As the German empire shifted in form toward direct colonial administration, the legal structure of the British empire and the comparative status of its constituent parts came under increasing scrutiny from within. In 1887, the first Colonial Conference met in London, commencing a series of meetings between colonial governments that continued for over twenty years without resolving the basic question which had prompted it: namely, the international status of the colonies.[66]

Within the British empire of the late nineteenth century, administrative arrangements in place were so diverse as to be unified only by the identity of the imperial power under which they were contrived. Over two centuries, the British empire had through corporate, military, diplomatic and administrative means evolved into a legal entity of extraordinary internal diversity.[67] Following the Berlin Conference, the classical protectorate form of divided internal and external sovereignty was increasingly deployed by the British government for reasons similar to those given by Bismarck in 1884: it offered a means of protecting British commercial interests in a given region by keeping out other imperial powers, without creating the rights and obligations of territorial sovereignty.[68] However, the German and British iterations of the protectorate were to diverge over the 1890s and 1900s, in both theory and practice. As the German government moved away from the form toward direct colonial

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[64] Parliament of Victoria, *Australasian Convention on the Annexation of Adjacent Islands and the Federation of Australia*, Parl Paper No 42 (1883). See also section 10, 'Concern in Australian colonies over German imperial expansion' in Chapter 2, 'From Trading Post to Protectorate'.

[65] *Declaration between the Governments of Great Britain and the German Empire relating to the Demarcation of the British and German Spheres of Influence in the Western Pacific*, signed in Berlin (6 April 1886), reproduced in Fabricius, above n 2, 299–307. On unrest in the Australian colonies, see J L Whittaker et al (eds) *Documents and Readings in New Guinea History: Prehistory to 1899* (Jacaranda Press, 1975), 475.

[66] See 'The Imperial Conference 1887–1911 and the Development of Dominion Nationhood' in H Duncan Hall, *The British Commonwealth of Nations: A Study of its Past and Future Developments* (Methuen & Co Ltd, 1920), 94–121.

[67] On the formation of the British empire, see generally Sarah E Stockwell (ed.), *The British Empire: Themes and Perspectives* (Wiley-Blackwell, 2008); and Lauren Benton and Richard J Ross, 'Empires and Legal Pluralism' in Lauren Benton and Richard J Ross (eds), *Legal Pluralism and Empires, 1500–1850* (New York University Press, 2013), 1–17.

[68] See section 9 'The establishment of German protectorates' in Chapter 2, 'From Trading Post to Protectorate'.

administration in substance if not in name, German jurists concerned themselves with the status of the *Schutzgebiet* in German constitutional law, with only minor attention paid to the legitimacy of the protectorate form in the law of nations. In contrast, as the protectorate was increasingly deployed across the British empire, British jurists engaged in earnest with theoretical coherence of the practice across domestic law and the law of nations.[69]

A jurisprudential debate over the protectorate form ensued in Britain around the provisions of the Berlin Conference.[70] Of key concern in the British debate was whether a protectorate could be established via unilateral domestic action, legislative or otherwise, or whether it required an act of territorial acquisition effective in the law of nations. Parliamentary counsel Henry Jenkyns, who prepared the Foreign Jurisdiction Bill of 1888, advocated an understanding of the protectorate as a division of the sovereignty of the weaker entity.[71] Where the weaker entity was not recognised as sovereign, the protecting state could effectively assume the external sovereignty of the region via domestic legislation asserting the assumption of jurisdiction, much as the German government assumed.[72] Junior counsel to the Treasury, Robert Wright, countered Jenkyns' formulation on the basis of Austin's principle of the indivisibility of sovereignty.[73] Holding sovereignty to be territorial, Wright argued that assumption of sovereign powers over a foreign region could not occur via domestic legislation, and required an act of territorial acquisition effective in the law of nations. In weighing up the debate, Lord Chancellor Halsbury concluded that the protectorate form was an established legal convention which simply did not require explication in terms of sovereignty, as to do so would limit the flexibility of the form in practice:

> '(p)rotectorate furnishes a convenient middle state between annexation and mere alliance so long as it is allowed to remain mere convention, but if you assert a principle which practically annihilates any distinction between the rights and obligations of a protecting power and those of complete sovereignty, then the function of protectorate is at an end'.[74]

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[69] See W Ross Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (Duke University Press, 1973), 216 – 223.
[70] Matthew Craven, 'Between Law and History: The Berlin Conference of 1884–1885 and the Logic of Free Trade' (2015) 3 *London Review of International Law* 1, 31; ibid 216–223.
[71] Henry Jenkyns, *British Rule and Jurisdiction Beyond the Seas* (Clarendon Press, 1902), 165–167; and Johnston, above n 69, 214–217.
[72] Jenkyns, above n 71, 174–175.
[73] Johnston gives an account of this exchange. Johnston, above n 69, 217–220.
[74] Memorandum of Lord Chancellor Halsbury of 28 March 1890, FO 97/562 cited in Johnston, above n 69, 222.

The consolidation of the *Foreign Jurisdiction Acts* in 1890 adopted Halsbury's approach, remaining silent on the conception of sovereignty at play in assertions of protectorate status.[75] For the Imperial government, then, the utility of the protectorate was not in providing a conceptual justification for empire, but in providing status to existing administrative forms.

In contrast to the German context, however, the British protectorate was but one of a multiplicity of designations given to imperial administrative arrangements that from the sixteenth century had evolved across place and time, in the Americas, in Eurasia, in the Caribbean, Africa and the Pacific. These included 'Crown colony', 'self-governing colony', 'dependency', 'dominion', and 'condominium'.[76] As with the protectorate, these designations lacked consistent legal definition in the late nineteenth and early twentieth centuries. This mutability of terminology reflected the iterative nature of British imperialism in the nineteenth century. As Welsh lawyer and historian Charles Prestwood Lucas wrote in 1891, '(t)he British empire has grown of itself; it has owed little or nothing to the foresight of soldiers or statesmen; it is the result of circumstances, or private adventure, and of national character; it is not the result of any constructive power on the part of the government'.[77]

Retrospective attempts to rationalise as a matter of legal principle the diversity of administrative arrangements established in place were underway by the late nineteenth century. The *Interpretation Act* of 1889 offered a basic taxonomy in a section titled 'Geographical and Colonial Definitions in Future Acts', which defined all 'British possessions' as 'dominions', of which the 'colony' was a subset including all except British India, which the *Act* held as irreducible.[78] British jurists extrapolated on the theme. For Lucas, the operative label for the form of British imperial rule was not the geographically inflected 'dominion' given in the *Interpretation Act*, but the governmentally inflected 'dependency', where a 'dependency' was defined as 'part of an independent political community which is immediately subject to a subordinate government'.[79] In his account, the key distinction was between dependencies governed by Europeans, and dependencies both governed and

[75] Johnston, above n 69, 222 – 223.
[76] Jenkyns, above n 71, 1–8; for an historical survey of terminology used in the long transition from 'British empire' to 'British Commonwealth', see Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens & Sons, 1966), 1–73.
[77] Ibid lxiii.
[78] *Interpretation Act 1889* (UK) 52 & 53 Vict, c 63, s 18.
[79] Charles Prestwood Lucas (ed.) George Cornewall Lewis: An Essay on the Government of the Dependencies (Clarendon Press, 1891 [originally published 1841]), xlii. The definition of dependency was given by Lewis.

populated by Europeans, which he regarded 'colonies in the true sense of the word'.[80] In Lucas' schema, colonies were proper objects of self-government in all matters except 'the regulation of foreign relations' and the 'disposal of the public lands'.[81] For William Anson, the key categorical differences were between the 'Crown colonies', in which English people had settled, India, which the English ruled, and the 'miscellaneous possessions, dependencies and protectorates' that comprised the remainder of the empire.[82] For Charles James Tarring, the categorical distinction was between colonies formed by settlement of 'unoccupied or barbarous country', and colonies formed by conquest or cession.[83] In Tarring's schema, the common law established that in occupied colonies, English law and sovereignty was carried with English subjects, 'and therefore such countries are to be governed by the laws of England'.[84] In the case of conquered or ceded countries, on the other hand, existing law remained 'until altered by the conqueror', except in the case of laws 'contrary to the fundamental principles of the British constitution', which ceased at the moment of conquest.[85]

Attempts to attribute some legal coherence to the diversity of forms of imperial administration intensified as demands for increased levels of self-rule emerged from the subjects of empire. With respect to the Australasian, Southern African and Canadian colonies, those demands developed not so much as demands for independence from empire, so much as for greater autonomy within it; yet debates over the extent of autonomy that should be devolved to Lucas' 'colonies in the true sense of the word' proved to require definition of the juridical nature of empire itself. Self-government over internal affairs had been devolved progressively by subject matter to the Australasian, Southern African and Canadian colonies from the mid-nineteenth century. By the 1890s, jurisdiction over immigration and emigration, internal commerce and trade, and taxation and expenditure were all recognised as properly residing with colonial government.[86] Yet the matter of power over external affairs of the colonies remained contentious. The Imperial government regarded the retention of power over foreign policy as basic to imperial authority - including

[80] Ibid xix.
[81] Ibid xxxi. See also *British Settlements Act 1887* (UK) 50 & 51 Vict. c 54.
[82] Sir William Reynell Anson, *The Law and Custom of the Constitution, Vol. 11: The Crown* (Clarendon Press, 1st ed, 1886), 274, 288, 269.
[83] Charles James Tarring, *Chapters on the Law Relating to the Colonies* (Stevens and Haynes, 3rd ed, 1906), 3.
[84] Ibid 3.
[85] Ibid 16–20.
[86] W W Willoughby and C G Fenwick, *Types of Restricted Sovereignty and of Colonial Autonomy* (Government Printers Office, 1919), 16–17.

the power to enter into agreements concerning external commerce and trade, and to enter into agreements regarding war. In 1899, the Imperial government conceded the self-governing Colonies should have autonomy with respect to regional commercial treaties; yet power to enter into defence treaties remained with Britain.[87] Thus while the Imperial government passed statutes recognising the confederation of the Canadian colonies as the Dominion of Canada in 1867, of the Australasian colonies as the Commonwealth of Australia in 1901, and of the Southern African colonies as the Union of South Africa in 1910, treaties entered into by the Imperial government continued to bind each with respect to the conduct of foreign policy.[88]

As a result, the newly federated Australian Commonwealth continued to be bound by the 1886 Demarcation Agreement between Britain and the Reich, which had contributed directly to the federation movement.[89] The shift in German foreign policy under Wilhelm II was keenly followed in Australian public discourse, and the German assumption of colonial rule in New Guinea exacerbated disquiet in Australia at perceived British acquiescence to German imperialism in the Pacific.[90] The Reich had taken over the administration of German New Guinea from Hansemann's New Guinea Company in 1898; and in 1902, the Commonwealth government took over the administration of British New Guinea from the colony of Queensland, later renamed the Australian Territory of Papua.[91] From 1902, then, the Reich and the Commonwealth of Australia shared a land border between Papua and New Guinea, yet the Imperial government was not legally required to consult with Australia on matters of imperial defence. At the Colonial Conference of 1907, Australia and the other self-governing Colonies sought direct representation on the Committee of Imperial Defence established after the Boer War in 1902.[92] The Imperial government agreed that the Committee would consult with the self-governing Colonies on matters of local defence; however the Committee if Imperial Defence was 'purely a consultative body, having no executive powers

[87] Philip J Noel-Baker, *Present Juridical Status of the Dominions in International Law* (Longmans Green, 1929), 43–44.
[88] Ibid 44–47.
[89] See section 10, 'Concern in Australian colonies over German imperial expansion' in Chapter 2, 'From Trading Post to Protectorate'.
[90] See C E W Bean (ed), 'German Colonization in the Pacific: The Outbreak of War' in *Official History of Australia in the War 1914–1918* (Australian War Memorial, 1941 ed, vol x) 2.
[91] *Papua Act 1905* (Cth); Thomas Dunbabin, *The Making of Australasia: A Brief History of the Origin and Development of the British Dominions in the South Pacific* (A & C Black Ltd, 1922) 217.
[92] Commonwealth of Australia, 'Memorandum as to the Functions of the Committee of Imperial Defence', *Papers Laid before the Colonial Conference, 1907* (His Majesty's Stationery Office, 1907), 15–16.

or administrative functions'.[93] In the opinion of jurist Lassa Oppenheim, maintained up until the War, the position was clear: the inability of the 'Colonial States' of the British empire to conduct their own affairs with respect to defence meant that from the perspective of international law, they had 'no international position whatever'.[94]

5. Agriculture, labour and phosphate in the Pacific

As the expansionist German empire militarised and the British empire negotiated its internal tensions, imperial commerce in the Pacific required more and more labour. In the new Australian federation, the issue of imperial competition was intimately related to issues of labour, agricultural production and race. The Commonwealth Parliament is well known to have passed the *Immigration Restriction Act 1901* early in its first term, openly referred to then as now as the 'White Australia' policy.[95] Its preceding action was to pass the *Pacific Island Labourers Act 1901*.[96] The *Pacific Island Labourers Act* purported to end the use of Pacific islanders as labour on agricultural plantations in Australia, not because of the widespread use of forced indenture, but because of the perceived threat to white Australian labourers.[97] The *Labourers Act* of 1901 not only prohibited the importation of Pacific labourers without a licence, but provided for the forced removal of those already in Australia.[98] The practice of subjecting islanders to forced labour had become widespread in the second half of the nineteenth century among French and British trading firms in the Pacific.[99] As discussed in Chapter 2, the Hanseatic firms in the Pacific bought copra and other commodities from local growers, choosing not to invest in land for plantations or primary infrastructure.[100] In contrast to their German counterparts, British and French firms in the Pacific engaged directly in plantation agriculture. Not only did this require investment in land, roads, water and industrial plant. It required human labour.[101]

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[93] Noel-Baker, above n 87, 41–43, 47; ibid 15.
[94] Lassa Oppenheim, *International Law: A Treatise* (Longman Greens and Co, 2nd ed, 1905), 102.
[95] *Immigration Restriction Act* (Cth) no 17 of 1901. For a recent collection on the White Australia policy, see Jane Carey and Claire McLisky, *Creating White Australia* (University of Sydney Press, 2009).
[96] *Pacific Island Labourers Act* (Cth) no 16 of 1901.
[97] On the rhetoric deployed during the passage of the *Act*, see Peter Corris, "White Australia' in Action: The Repatriation of Pacific Islanders from Queensland' (1972) 15(58) *Historical Studies* 237.
[98] *Pacific Island Labourers Act 1901* (Cth) ss 4, 8.
[99] On the practice of indentured labour in the Pacific, see K R Howe, 'Tourists, Sailors and Labourers: A History of Early Labour Recruiting in Southern Melanesia' (1978) 13 *Journal of Pacific History* 1, 22–35.
[100] See section 5, 'Hanseatic firms in the Pacific' in Chapter 2, 'From Trading Post to Protectorate'.
[101] See generally Sally Engle Merry and Donald Brenneis, 'Introduction' in Sally Engle Merry and Donald Brenneis (eds), *Law and Empire in the Pacific: Fiji and Hawai'i* (School of American Research Press, 2003), for a comparative account of colonial practices in Fiji and Hawai'i.

From the 1850s, European companies began to force Pacific islanders into labour using violent practices that became known euphemistically as 'blackbirding'.[102] It was estimated at the time of Australian federation that around 10,000 Western Pacific islanders from New Guinea, the Solomon Islands, Fiji and Vanuatu were present in Queensland under varying degrees of forced labour; more recently, Banivanua Mar has put this figure at 60,000.[103] Although the British Imperial government sought to distinguish itself from other imperial powers in its distaste for slavery, its response to blackbirding in the Pacific was ironic: as an alternative to the blackbirding system, the Governor of Fiji, Sir Arthur Gordon, requested to be provided with labourers from India.[104] Prior to his Fiji appointment, Gordon - a family friend of British Prime Minister Gladstone - had been Governor of Trinidad and Mauritius, where plantations were reliant on Indian indentured labour.[105] Although the *Pacific Island Labourers Act* purported to end the practice, blackbirding persisted into the twentieth century on cane sugar plantations in Queensland.[106] The exploitation of Pacific Islanders contributed directly to the development of Australian agriculture. Whereas in the early nineteenth century, the Australian colonies depended economically on the pastoral industry, and from the 1840s, on gold and coal mining, at the time of federation in 1901 the sugar, wheat and dairy industries were emerging as the stalwarts of the colonial economy.[107]

This shift in Australian primary industry correlated not only with racialized labour exploitation, but with the rapid expansion of the use of phosphate as an agricultural fertiliser in the late nineteenth century. The top-dressing of soil with phosphate improves the root growth of young plants and therefore their ability to absorb nutrients from the soil, which increases their overall health and drought resistance.[108] The recycling of organic waste including manure, bones, and ash back to the soil was a technique common to pre-industrial

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[102] See Tracey Banivanua Mar, Violence and Colonial Dialogue: The Australian-Pacific Indentured Labour Trade (University of Hawai'i Press, 2007). See also Karin Speedy, 'The Sutton Case: The First Franco-Australian Foray into Blackbirding' (2015) 50 *Journal of Pacific History*, 344; and Peter Corris, "Blackbirding' in New Guinea Waters, 1883–84: An Episode in the Queensland Labour Trade' (1968) 3 *Journal of Pacific History*, 85–105.
[103] Dunbabin, above n 91, 211. Banivanua Mar, above n 1022, 1.
[104] John D Kelly, 'Gordon Was No Amateur: Imperial Legal Strategies in the Colonization of Fiji' in Sally Engle Merry and Donald Brenneis (eds), *Law and Empire in the Pacific: Fiji and Hawai'i* (School of American Research Press, 2003) 62–64.
[105] On the history of Indian labour in Fiji: Brij V Lal, *Girmitiyas: The Origins of the Fiji Indians* (Journal of Pacific History, 1983).
[106] Dunbabin, above n 91, 211; Banivanua Mar, above n 102.
[107] Dunbabin, above n 91, 177; Robert D Watt, *Romance of the Australian Land Industries* (Angus and Robertson, 1955), 126–170.
[108] On the effect of phosphate on the development of young plants, see Petra Marschner (ed), *Marschner's Mineral Nutrition of Higher Plants* (Elsevier Ltd, 3rd ed, 2012), 158–165.

agricultural traditions, used to replace phosphoric acid in soil depleted through continual cropping, or to treat soil otherwise lacking mineral composition suitable for agriculture. In the mid-nineteenth century, organic phosphate had become known as 'guano', a conquista-era Spanish adaptation of the Quechua word, *huanu*. Fossilised *huanu* was found in high concentrations on the Peruvian coastal islands, and local trade among the Quechua people of the region of contemporary Peru and Bolivia had existed for centuries, as observed by Alexander von Humboldt in 1803.[109] In 1840, the Peruvian Republic had passed a resolution granting the President of the Peruvian Chamber of Commerce, Don Francisco Quiros, exclusive rights to export Peruvian guano, with property in guano remaining with the Republic.[110] Quiros' main customers were British trading firms that were initially sceptical of the worth of the trade, as the primary sources of phosphate fertiliser in Britain, crushed bone and animal manure, were of low market value.[111]

Yet as Peruvian guano entered the British market, chemists soon reported that it contained higher concentrations of phosphate and nitrogen than any other form of organic fertiliser in use.[112] By the 1860s, Peruvian guano was the most significant South American import into Britain.[113] The term 'guano' thus became synonymous with the commodification of phosphate in the mid-nineteenth century. Yet Peruvian supply was limited and already waning by the early 1860s.[114] Increasing demand for Peruvian guano in Britain and the United States of America had prompted trading firms to seek new sources in other locations.

In the United States, members of Congress were repeatedly petitioned by American companies to introduce administrative measures to break the Peruvian monopoly.[115] In 1856, the Congress passed the *Guano Islands Act*. In heavily negotiated text, the *Act* purported to protect any guano claim made by a US citizen over any otherwise unclaimed island; yet it purported to do so without extending territorial sovereignty:

> 'Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such

[109] W M Mathew, *The House of Gibbs and the Peruvian Guano Monopoly* (Royal Historical Society, 1981), 22. Jimmy M Skaggs, *The Great Guano Rush: Entrepreneurs and American Overseas Expansion* (St Martins Press, 1994), 4.
[110] Mathew, above n 109, 23.
[111] Albert F Ellis, *Ocean Island and Nauru: Their Story* (Angus and Robertson, 1935), 279. Ibid 24.
[112] Mathew, above n 109, 27.
[113] Ibid 2, 94.
[114] Ibid 167.
[115] Skaggs, above n 109, 51.

> island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.'[116]

The US State Department itself acknowledged that the language of 'appurtenance' was intentionally ambiguous, leaving unclear the status in the law of nations of any islands so claimed: the purpose of the novel terminology was to 'lend itself readily to circumstances and the wishes of those using it'.[117] The *Act* provided that 'after the guano shall have been removed', the United States was not bound to retain possession of any island claimed under it.[118] Within a decade, fifty-nine islands, rocks and keys in the Pacific and the Caribbean had been claimed by US entrepreneurs and companies under the *Guano Islands Act.*[119]

The association of guano with small islands in the *Act* reflected the initial commodification of Peruvian deposits, more than scientific understanding of the origins of the substance itself. In the emerging field of agricultural chemistry, theories of the origin of guano developed as testing of potential sources was funded by firms seeking to meet growing demand, and then by states seeking to regulate the composition of guano on the market.[120] The popular belief that high concentration phosphate derives from bird manure was fixed early in the phosphate industry's development. But unmet commercial demand drove prospectors to identify larger and deeper deposits in continental and marine as well as insular sites, and before long agricultural chemists replaced the colloquial term 'guano', with its misleading avian connotations, for the geological term 'alluvial phosphate'.[121] In the later twentieth century, the concept of the phosphorus cycle developed. The geological accumulation of tricalcium phosphate in geologic matter is currently understood as a phase in a biogeochemical cycle that includes atmospheric precipitation, concentration in micro- and macro-organisms, accumulation in the ocean floor, and hydrothermal volcanic activity.[122]

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[116] *Guano Islands Act 1856* 48 USC 1411, s 1. See Christina Duffy Burnett, 'The Edges of Empire and the Limits of Sovereignty: American Guano Islands' (2005) 57 *American Quarterly* 3, 779–803.
[117] Skaggs, above n 10909, 57.
[118] *Guano Islands Act 1856* 48 USC 1411, s 4.
[119] Skaggs, above n 109, 71.
[120] The seminal text in agricultural chemistry was Justus Liebig, *Chemistry in its Application to Agriculture and Physiology* (John Owen, 1842). See also Gregory T Cushman, *Guano and the Opening of the Pacific World: A Global Ecological History* (Cambridge University Press, 2013), 51–53; Skaggs, above n 10909, 10.
[121] George Scott Robertson, *Basic Slags and Rock Phosphates* (Cambridge University Press, 1922); Cushman, above n 120, 117.
[122] On the phosphorus cycle, see P C M Boers, Th. E Cappenberg and W Raaphorst (eds), *Proceedings of the Third International Workshop on Phosphorus in Sediments* (Springer Netherlands, 1993). Also Göran Ågren and Folke Andersson, *Terrestrial Ecosystem Ecology: Principles and Applications* (Cambridge University Press, 2011), 169–171.

In the mid-nineteenth century, however, scientific interest in phosphate rock was largely directed by its commercial value. Agricultural chemists were hired by companies, including Gibbs & Sons in Britain and the American Guano Company in United States, to locate and test deposits, and maximise the value of phosphate rock as an agricultural fertiliser.[123] In the 1840s, Irish chemist James Murray patented the creation of 'superphosphate', mixing ground phosphate rock with sulphuric acid to produce high concentration phosphoric acid.[124] The commodification of superphosphate enabled the scaling up of agricultural production to industrial levels, making existing farmland more productive and converting areas naturally unsuitable for agriculture into arable land. Large inland deposits were identified in Algeria and Tunisia in the 1870s, and in Florida and South Carolina in the 1880s. Under the *Guano Islands Act*, more than seventy islands in the Pacific and Caribbean had been recognised as 'appertaining to the United States' by the turn of the century - even though the legal significance of 'appurtenance' still remained unclear, forty years after the passage of the *Act*.[125] World phosphate production increased from an estimated 505,000 tons in 1875 to 3,150,000 tons in 1900, and then to 8,800,000 tons in 1925.[126]

The commodification of phosphate rock from the mid-nineteenth century was thus a crucial yet often overlooked aspect of the industrial revolution. In ecological terms, Cushman has argued that '(h)uman intervention in the cycling of nitrogen and phosphorous represents one of the central manifestations of human domination of the earth's ecosystems'.[127] In terms of political economy, ready access to superphosphate brought a certainty to agricultural production that favoured market speculation and economic growth. In effect, the commodification of phosphate was central to the industrialisation of agricultural production, which in turn provided a response to Malthusian arguments of an arithmetical relationship between population and agricultural yield.[128] The economic effects of phosphate was particularly significant in the Australian colonies, as soil on the Australasian continent is low in naturally occurring phosphatic content. The increasing availability of commercial phosphate from the mid-nineteenth century not only increased yield of existing crops, but

[123] Skaggs, above n 109, 142–143.
[124] United States Agricultural Research Service, *Superphosphate: Its History, Chemistry and Manufacture* (Government Printers Office, 1964), 19–26.
[125] Duffy Burnett, above n 116, 787.
[126] Ellis, above n 111, appendix B.
[127] Cushman, above n 120, 13.
[128] See for example George Kettilby Rickards, *Population and Capital: A Course of Lectures delivered before the University of Oxford* (Longman, Brown, Green and Longmans, 1854).

enabled land otherwise unsuitable for agriculture to be farmed, and increased yield of grasses used as fodder for cattle on pastoral land.[129] The development of the sugar, wheat, cattle and sheep industries in Australia – in which Pacific Islanders were indentured to work - was to a determinative degree made possible by ready access to commercial phosphate.[130]

6. The Pacific Islands Company and its Agreement with the *Jaluit Gesellschaft*

Over the 1860s and 1870s, competition between British and American empires over phosphate claims in the Pacific intensified. In 1874, English trading entrepreneur John T. Arundel, associated with the London Missionary Society and former employee of London shipping company Houlder Brothers, established John T. Arundel and Company, with the intention of trading in Pacific phosphate.[131] With Houlder Brothers, Arundel had visited the Peruvian Chincha Islands in 1860, and investigated opportunities for Houlder to add guano lines to its shipping operations between Britain and the Pacific, which included emigrant transport from England to Australia and New Zealand.[132] The initial operations of John T. Arundel and Company were parasitic on the rush of American entrepreneurial activity incentivised by the *Guano Islands Act*. Arundel would seek leases from US entrepreneurs to dig phosphate on islands claimed by them under the US *Act* but left unexploited, and therefore at risk of forfeit.[133] Arundel supplemented his company's fledgling operations by planting copra plantations near phosphate diggings, leveraging early profits to buy exclusive rights to islands claimed by US companies under the *Guano Islands Act* and left unexploited in the rush.[134] In 1897, Arundel negotiated the merger of his company with Auckland firm Henderson & McFarlane - one of *Goddefroy & Sohn*'s early competitors in commodity circulation in the Pacific - under the name of the Pacific Islands Company.[135] Henderson & McFarlane had operated trading posts in the British protectorate of the Gilbert and Ellice Islands, and in the German protectorate of the Marshall Islands.[136] Sir Arthur Gordon – responsible for the import of Indian indentured labourers to Fiji, and later named as Baron

[129] Ellis, above n 111, 288.
[130] Ibid 288–290.
[131] Skaggs, above n 109, 135.
[132] Cushman, above n 120, 94. Maslyn Williams and Barrie Macdonald*, The Phosphateers: A History of the British Phosphate Commissioners* (Melbourne University Press, 1985), 6.
[133] Skaggs, above n 109, 135.
[134] Skaggs, above n 109, 135.
[135] 'Pacific Islands Company', *The Week* (Brisbane) 28 May 1897.
[136] Fabricius, above n 2, 278–279.

Stanmore by his friend Gladstone - was appointed by Arundel as Chair of the Company.[137] With the merger of the two companies, Arundel's Pacific Islands Company became the largest British-held commercial interest in the Pacific islands.[138]

One of the interests acquired by Arundel in the 1897 merger was Henderson & McFarlane's trading post on Nauru. As the *Jaluit Gesellschaft*'s interest in maintaining their company administration of Nauru waned, fewer *Gesellschaft* ships visited the island and the company's supplies dwindled.[139] The Nauruan known as 'Chief Jim' by the *Gesellschaft* was reported to be acting insubordinately to District Officer Jung, and land disputes formerly presided over by the District Officer were left to be resolved by the Imperial Administrator's Office in Jaluit.[140] As the *Jaluit Gesellschaft* increasingly left its administrative duties derelict, Nauruans began to take any copra left surplus to the German head tax to Henderson & McFarlane agents to trade for their superior supplies.[141] At the time of the formation of Arundel's Pacific Islands Company in 1897, Henderson & McFarlane's copra exports from Nauru were more than double those of the *Jaluit Gesellschaft*.[142] The intended advantage of incorporating Nauru into the German empire – namely the securing of the German copra trade on the island - had within a decade either failed to materialise, as the *Gesellschaft* complained, or had been squandered, as the German Imperial Commissioner retorted.[143] In its desire to extricate itself from its Agreement with the Reich, the *Gesellschaft* appeared uninterested either in the new Pacific Islands Company's takeover of the greatest share of the Nauruan copra trade, or in the Company's regional interest in phosphate.

The story of the identification of Nauruan phosphate in the Sydney office of the Pacific Islands Company by Australian employee Albert Ellis has become a platitude in popular accounts of the island's history.[144] Albert's father George Ellis, an agricultural chemist, had

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137 Williams and Macdonald, above n 132, 8.
138 Firth, 'German Firms in the Western Pacific Islands, 1857–1918', above n 55, 18. Ibid 9.
139 *Briefe von Kommando S M S Bussard an den kommandierenden Admiral* [Letter from Commander Alandt of the SMS Bussard to the Admiral in Command], Berlin, 1 January 1898, reproduced in Fabricius, above n 2, 281–282.
140 *Briefe von Kaiserliche Landeshauptmann für das Schutzgebiet der Marschall-Inseln an das Auswärtige Amt, Konial Abteilung, Berlin* [Letter from the Imperial Administrator of the Marshall Islands Senfft to the Colonial Section of the Foreign Office], 17 March 1898, reproduced in Fabricius, above n 2, 283.
141 Ibid 285.
142 Ibid.
143 'Report No 49 of the Imperial Administrator of the Protectorate of the Marshall Islands', 15 June 1896, reproduced in Fabricius, above n 2, 275–279.
144 See for example Paul L Montgomery, 'Tiny Nauru, a Colony No Longer, Sues Australia for Neglect', *New York Times* (New York) 5 June 1989; Tony Thomas, 'The Naughty Nation of Nauru', *Quadrant* (Melbourne) 1 January 2013.

been appointed by Arundel as a director of the Pacific Islands Company, and had his three sons employed by the company.[145] As told by Albert himself, in July 1899 he noted similarities between the 'office doorstop', a lump of geologic matter which had been picked up on Nauru in 1896 by a former agent of Henderson and McFarlane, and 'rock guano' dug on nearby Baker Island by Arundel and Company.[146] Ellis tested a sample of the Nauruan rock; according to his memoirs, 'it was phosphate rock of the highest quality, and from the structure of the material one could tell that it was a very old and probably extensive deposit'.[147] The Sydney office manager wrote to Arundel in London with a dramatic sense of the commercial-in-confidence that went so far as to refer to Nauru as 'Frezzant Island', lest the letter be intercepted by competitors in the Pacific phosphate trade:

> 'The whole island I firmly believe to be one huge mass of Rock Guano. How this is to be worked, I cannot suggest, as you are aware the island is under German jurisdiction and under German laws, the Gescell Scharft have sole right to work the deposits'.[148]

The letter prompted the Company's Board to seek exclusive rights to phosphate on all islands under the jurisdiction of the *Gesellschaft*, so as to not alert either the *Gesellschaft* or the German Foreign Office of the Nauruan find.[149]

The agreement struck in 1900 between the *Jaluit Gesellschaft* and the Pacific Islands Company reflected the different commercial orientations of the German and British imperial firms.[150] In a contract approved by the German Colonial Office, the *Gesellschaft*'s right to exploit guano deposits in the Marshall Islands Protectorate was licensed to the Pacific Islands Company, in exchange for all trading interests and copra plantations held by the Company within the Protectorate, and an immediate payment of 500,000 marks.[151] A new company was to be created to hold the mining right, in which the *Gesellschaft* would be gifted 10% share capital; and the *Gesellschaft* would receive an annual royalty of half a mark on each ton of phosphate mined above 50,000 tons.[152] The new Pacific Phosphate Company was formed in 1902 from the capital of the wound up Pacific Islands Company, and additional capital from Prussian

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145 Williams and Macdonald, above n 132, 10.
146 Ellis, above n 111, 52–53.
147 Ibid 53.
148 Williams and Macdonald, above n 132, 10.
149 Ibid 13.
150 Weeramantry, above n 20, 53.
151 Williams and Macdonald, above n 132, 52.
152 Stewart Firth, 'German Labour Policy in Nauru and Angaur 1906–1914' (1978) 13 *Journal of Pacific History* 36, 38.

fertiliser company *Die Union Fabrik Chemische Produkte*.[153] Together, the *Gesellschaft* and *Die Union Fabrik* held about one third of the share capital in the new British-registered Pacific Phosphate Company.[154]

Via the Pacific Islands Company, Arundel had also negotiated with the British Colonial Office for concession to mine phosphate on nearby Ocean Island, 300 km to the east of Nauru. A former Henderson & McFarlane employee had visited Ocean Island and noted the similarity of its single raised atoll formation to Nauru.[155] Although near to the British protectorate of the Gilbert and Ellice Islands, Ocean Island - or Banaba, its indigenous name – had not been claimed by Britain, the United States or the Reich.[156] With the support of the Commissioner of the Gilbert and Ellice Islands, Telfer Campbell, the British Colonial Office agreed to annex Ocean Island into the protectorate before knowledge of the unclaimed island's value reached commercial competitors.[157] A concession to mine Ocean Island phosphate was given by the British Colonial Office to the new Pacific Phosphate Company, subject to the Company's securing of an agreement with the local population, recognised as possessing proprietary rights.[158] In early 1900, Albert Ellis was sent on a Company ship, the *Archer*, to Banaba to secure this agreement.[159] On 3 May 1900, Ellis secured the 'signature' of a Banaban chief, Temate - referred to as the 'King of Ocean Island' – on a mining agreement. The agreement purported to pass for a period of 999 years the 'sole right to raise and ship all the alluvial and rock phosphate on Ocean Island', in exchange for a yearly payment to 'the said natives' of fifty pounds, and the maintenance of a company store on the island at which this income could be spent.[160] In September 1901, Ocean Island was incorporated in the Protectorate of the Gilbert and Ellice Islands.[161]

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[153] Weeramantry, above n 20, 53; ibid 25.
[154] Firth, 'German Labour Policy in Nauru and Angaur 1906–1914', above n 152, 25.
[155] Williams and Macdonald, above n 132, 14.
[156] Ibid 15.
[157] Ibid 26.
[158] Ibid 18.
[159] Ellis, above n 111, 55–58.
[160] The text of the Agreement is reproduced in Weeramantry, above n 20, 19; and Williams and Macdonald, above n 132, 31–32.
[161] Doug Munro and Stewart Firth, 'Towards Colonial Protectorates: The Case of the Gilbert and Ellice Islands' (1986) 32 *Australian Journal of Politics and History* 63.

7. The right passed from the *Gesellschaft* to the Pacific Phosphate Company

When formed in 1902, the Pacific Phosphate Company thus came to hold phosphate mining rights for two neighbouring Pacific islands: Nauru within the German protectorate of the Marshall Islands, and Ocean Island, within the British protectorate of the Gilbert and Ellice Islands. For Nauru, the Company acquired the mining right in an agreement with the *Jaluit Gesellschaft*, purportedly passing on a concessionary right originating with the Reich. For Banaba, the derivation of the mining right was an agreement between the British company and the local chief Temate, understood to hold indigenous proprietary rights recognisable in English law. Both Nauruan and Banaban populations were understood by the German and British empires respectively to hold proprietary rights in land, and both mining rights originated in a concessionary system that purported to respect existing proprietary rights. The difference in the chain of title of mining rights in respect of Nauru and Banaba was largely due to differing treatment of phosphate under German and British mining law in 1900. Under British mining law, phosphate was a designated mineral, and therefore phosphate mining in the protectorates was regulated by the logic of the concession, in that the state held the power to assign mining rights.

Under German mining law in 1900, however, phosphate was not a designated mineral. After the agreement between the *Gesellschaft* and the Pacific Phosphate Company, a proliferation of lawmaking purported to regularise the chain of title of Nauruan phosphate in German law. Less than ten years after the *Gesellschaft* had tried and failed to wind up its 1888 Agreement with the Reich with respect to Nauru, the guano concession created by that Agreement had become one of its greatest assets, and the most profitable German private interest in the Western Pacific.[162] In 1905, the *Gesellschaft* secured the renewal of its guano concession for Nauru from the Reich for a period of 94 years from 1 April 1906, the date on which administration of Nauru and the Marshall Islands protectorate would pass from the *Gesellschaft* to German New Guinea.[163] In February 1906, phosphate was designated under German mining law as a 'free' mineral, in which ownership vested in the state; and a Mining Regulation was issued with respect to the 'African and South Sea Protectorates', explicitly

[162] Firth, 'German Labour Policy in Nauru and Angaur 1906–1914', above n 152, 38.
[163] *Agreement between His Most Gracious Majesty King George V and Others and The Pacific Phosphate Company*, Westminster, 25th June 1920, First Schedule, 17 <https://digital.library.adelaide.edu.au/dspace/bitstream/2440/80560/1/Agreement%20Pacific%20Phosphate%20Company.pdf>.

importing German mining law into the protectorates and thereby claiming state title in phosphate.[164] In 1907, a supplement to the *Gesellschaft*'s 1905 concession retrospectively applied the Mining Regulation to the concession agreement, regularising the 1888 passage of title from Reich to company.[165] By 1907, then, the legal interests in Nauruan phosphate were as follows: the German and British financed, British-registered Pacific Phosphate Company held an exclusive right in German law to mine phosphate on Nauru, under license from a German company, within the colony of German New Guinea. Property in Nauruan phosphate purportedly vested in the Reich, whilst property in the land from which phosphate was to be mined was recognised as remaining with the Nauruans.

8. The commencement of phosphate operations on Nauru

Between 1902 and 1906, the Pacific Phosphate Company developed the commercial, administrative and industrial infrastructure required for exporting phosphate from Nauru. Staff houses, labourers' dormitories, and jetties were built on the coast at Yangor, near the contemporary Nauruan district of Aiwo.[166] Roads and cableways were built from the central elevation of the island down to Yangor.[167] Phosphate exports commenced in 1907. From the commencement of mining operations, the Company leased land from Nauruan landowners for nominal rent.[168] From 1907, in accordance with German mining law as applied to the concession, the Company also paid a royalty to Nauruan landowners.[169] The royalty was calculated at five pfennig a ton of phosphate removed from an owner's land, and was paid by the Pacific Phosphate Company directly to the German colonial administration, to be distributed to Nauruan landowners via the chiefs.[170] Paul Hambruch, a German anthropologist from the Ethnological Museum in Hamburg, estimated in his 1909 study of Nauru that five pfennig held a value of around half a box of matches.[171] At the same time, the German administration converted the Nauruan head tax formerly charged in copra into

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164 Weeramantry, above n 20, 184.
165 *Nachtrag zur Guano-Konzession der Jaluit Gesellschaft für die Marshall Inseln erteilt vom Reichskanzler am 21 November 1905* [Supplement to the Guano Concession of the Jaluit Gesellschaft for the Marshall Islands granted by the Imperial Chancellor on 21 November 1905] cited in Spennemann, above n 13. Weeramantry, above n 20, 188.
166 Ellis, above n 111, 128.
167 Ibid; also see the map included in the inside back cover of Ellis, ibid.
168 Weeramantry, above n 20, 192.
169 Ibid 391.
170 C E W Bean (ed), 'The Military Occupation of Nauru', in *Official History of Australia in the War 1914–1918*, (Australian War Memorial, 1941 ed, vol x), ch 9, 141. Nancy Viviani, *Nauru: Phosphate and Political Progress* (Australian National University Press, 1970), 35.
171 Paul Hambruch, *Nauru: Ergebnisse der Südsee-Expedition, 1908–1910* ['Nauru: Results of the South Sea Expedition, 1908–1910'] (L Friedaricksen, 1914), translated in Weeramantry, above n 20, 391.

a tax in German marks; in the words of Governor of German New Guinea Hahl, the payment of rent and royalties meant that 'the natives were now able to earn a good income in connection with the phosphate works', and were therefore able to pay their tax in money.[172]

Extraction of Nauruan phosphate required intensive manual labour due to the particular geologic structure of the island. Phosphorus had to be dug out from around hard limestone pillars that comprised the island's central elevation. The coral reef surrounding the coast prevented safe landing, and phosphate had to be unloaded from the cable bins onto surfboats, then rowed out to cargo ships waiting off the reef.[173] The Company found that the Nauruans were not amenable to providing labour for phosphate operations.[174] In 1906, the German Colonial Office approved the import of Chinese labourers from the German protectorate of Kiaochow in the region of contemporary Jiaozhou in mainland China, a bay leased by the Reich from the Chinese Imperial administration.[175] Around five hundred labourers were recruited from China, and another five hundred from the Marshall and Caroline Islands.[176] The process of labour recruitment was outsourced by the Company to sub-contractors in China and the Pacific, and labourers were induced into individual contracts for a fixed period of three years' labour, on the basis of pay and conditions represented in a second document.[177] On arrival, the labourers in Nauru were told by the Company that the second document was not legally binding.[178] Strikes and uprisings by labourers were met with the joint force of the Company and the German colonial administration.[179] By 1910, around 250 Chinese labourers had died on Nauru from dysentery or from protein deficiency due to punitive rations provided by the Company in response to strikes.[180] Labourers from the Truk Islands in the Marshalls and the Caroline Islands also died in numbers, and introduced dysentery spread to the local population.[181] Amidst the

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[172] Hahl, above n 61, 37.
[173] Firth, 'German Labour Policy in Nauru and Angaur 1906–1914', above n 152, 42.
[174] For a seminal analysis of the discourse of the 'lazy native' and its relation to colonial capitalism, see Syed Hussein Alatas, *The Myth of the Lazy Native* (Frank Cass, 1977).
[175] Firth, 'German Labour Policy in Nauru and Angaur 1906–1914', above n 152, 39. On Kiaochow, see Conrad, above n 35, 58–62.
[176] Bean, above n 170, 141. Firth, 'German Labour Policy in Nauru and Angaur 1906–1914', above n 152, 40, 42.
[177] Firth, above n 152, 40.
[178] Ibid.
[179] Ibid
[180] Ibid 41.
[181] Ibid 42.

violence of indentured labour, between 1906 and the outbreak of European war, the total amount of phosphate shipped from Nauru by the Pacific Phosphate Company was 781,000 tons.[182] The phosphate was exported for agricultural use primarily to Germany, Australia, New Zealand, and Japan.[183]

9. Nauru, the European war and Australian 'sub-empire' in the Pacific

As the Pacific Phosphate Company's operations on Nauru thrived under German administration and paid large dividends to its British and German investors, diplomatic relations between the German and British empires soured.[184] Following the 1907 entente, growing hostility between the triple alliance of Reich, Austro-Hungarian empire and Italy on one hand, and British, French and Russian empires on the other, was only distantly felt by the German colonial administration in New Guinea. Across the Pacific, the European empires largely maintained their existing commercial relations right up until August 1914.[185] Unlike in the African protectorates, where the shift toward colonial rule and the militarisation of the Reich under Kaiser Wilhelm II was accompanied with the creation of the *Schutztruppe*, there were no colonial troops in the German Pacific, and only minimal police forces maintained in New Guinea and Samoa. Despite the Reich's expanding naval force, no German warships were permanently stationed in the Pacific. By August 1914, no official instructions had been received in the German colonial administration in the Pacific as to conduct in the event of war.[186] In contrast, Australia and New Zealand had by 1911 adopted formal plans for military occupation of the German Pacific colonies should war be declared between Britain and Germany.[187] As the European empires clashed over territorial claims and spheres of influence in northern Africa and eastern Europe, the notion of sub-empire developed in Australian political discourse. Explicitly borrowing from the notion of a 'Monroe Doctrine for the Pacific', which had circulated in the colonies since the 1870s, after federation the Commonwealth government increasingly styled itself as the 'sub-imperial'

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[182] British Foreign Office, 'Economic Conditions: German Melanesia' in *German Possessions in the Pacific*, Handbooks prepared under the Direction of the Historical Section of the Foreign Office, June 1919, 70.
[183] Ibid 70.
[184] A German account of relationship between German foreign policy and the outbreak of war in August 1914 is given in Erich Brandenburg, *From Bismarck to the World War: A History of German Foreign Policy 1870–1914* (Annie Elizabeth Adams trans, Oxford University Press, 1927).
[185] Ibid 514–517; Hermann Hiery, *The Neglected War: The German South Pacific and the Influence of World War 1* (University of Hawai'i Press, 1995), 11–12.
[186] Brandenburg, above n 184, 517; Hiery, above n 185, 20–21.
[187] Hiery, above n 185, 19.

power in the Pacific.[188] The discourse of sub-empire drew on both anti-German and anti-Japanese sentiment, which grew as Meiji Japan was increasingly recognised by Europe and the United States as a Great Power in the first decades of the twentieth century.[189]

Yet Australia's self-positioning as the ascendant power in the Pacific was undermined by its inability to enter autonomously into treaties on the use of force. Australia was not consulted on the Franco-British Entente of 1904 or the Anglo-Japanese Alliance of 1907, despite French and increasing Japanese activity in the Western Pacific.[190] At the Imperial Conference in 1907, the Dominions accepted that on British declaration of war, they would be automatically regarded in international law as belligerents; yet Canadian Prime Minister Sir Wilfred Laurier openly questioned the extent of their legal obligations to give military assistance.[191] At the Imperial Conference of 1911 in London, the tension between the administrative independence of the Dominions and their legal obligations with respect to British foreign policy was debated at length.[192] Australian Prime Minister Andrew Fisher, a proponent of the 'Monroe Doctrine for the Pacific', openly demanded prior consultation on entry into treaties understood by the parties to bind the British empire, describing the limitations on the Dominions' external sovereignty with respect to non-commercial treaty obligations as 'a weak link in the chain of our common interests'.[193]

The tension between Australia's posturing as a sub-imperial power in the Pacific and its legal obligations with respect to British foreign policy is reflected in official communications and statements made on the escalation of war in Europe in July 1914. On 6 August 1914, two days after Britain's declaration of war on Germany, the Secretary of State for the Colonies, the Viscount Lewis Harcourt, sent a carefully worded telegram to the Governor-General of Australia, Ronald Ferguson:

> 'If your Ministers desire and feel themselves able to seize German wireless stations at Yap in the Marshall Islands, Nauru or Pleasant Island, and New Guinea, we should feel that this was a great

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[188] On the rise of the concept of a 'Monroe Doctrine for the Pacific', see Roger C Thompson, *Australian Imperialism in the Pacific: The Expansionist Era 1820–1920* (Melbourne University Press, 1980), 45.
[189] For a general historical account of the relationship between the Meiji Constitution of 1889 and the international status of Japan, see Taksuji Takeuchi, *War and Diplomacy in the Japanese Empire* (Doubleday, Doran and Company, 1935).
[190] Noel-Baker, above n 87, 47–48.
[191] Ibid 48–49.
[192] *Minutes of Proceedings of the Imperial Conference 1911 presented to both houses of Parliament by the command of His Majesty* (His Majesty's Stationery Office, 1911), 97–116.
[193] Prime Minister Andrew Fisher in Great Britain Colonial Office, *Proceedings of the Imperial Conference 1911 presented to both houses of Parliament by the command of His Majesty* (His Majesty's Stationery Office, 1911), 98.

> and urgent Imperial service. You will, however, realise that any territory now occupied must be at the disposal of the Imperial Government for purposes of an ultimate settlement at conclusion of the war. Other Dominions are acting in a similar way on the same understanding'.[194]

The British declaration of war and subsequent request for Australian occupation of German interests in the Pacific occurred during a federal election campaign in Australia. The 1914 election was a contest between the Commonwealth Liberal party under incumbent Prime Minister Joseph Cook, and the Labor party under Andrew Fisher, well known as a Pacific imperialist.[195] In the context of the election campaign, *The Age* newspaper in Melbourne on 12 August editorialised on the significance of the British request to Australia's imperial ambitions:

> 'We have long since realised that we have a Pacific Ocean destiny, and for some years past we have been striving to attain Imperial recognition for our right to enforce a definite Pacific Ocean policy. By virtue of the European war an unexpected path has been opened to the furtherance of our ambition…The whole business should not take more than a month. We should then have laid the foundations of a solid Australian sub-empire in the Pacific Ocean, and we should own five groups of islands…'[196]

Against such clamouring, a further telegram from Harcourt reiterated that the requested Australian occupation of German interests in the Pacific should not be understood as a pretext for Australian territorial acquisition:

> 'In connection with the expedition against German possessions in the Pacific, British flag should be hoisted in all territories occupied successfully by His Majesty's Forces and suitable arrangements made for temporary administration: but no proclamation formally annexing any such territory should however be made without previous communication with His Majesty's government'.[197]

Without any official instructions from the Reich on how to proceed, the German administration of Nauru responded to the British declaration of war by deporting the forty

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[194] Telegram from the German Secretary of State to the Governor-General of Australia sent 7.30pm 6 August 1914, reproduced in Great Britain Colonial Office, *Correspondence respecting Military Operations against German Possessions in the Pacific, presented to both Houses of Parliament by Command of His Majesty* (His Majesty's Stationery Office, 1915), No. 1. On the international legal status of the Dominions prior to the war, see Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green and Co, 2nd ed, 1912), vol 1, s 65, 109–110.
[195] Thompson, above n 188, 204.
[196] 'Melbourne, Wednesday, 12th August 1914', *The Age* (Melbourne) 12 August 1914, 8.
[197] Telegram from the German Secretary of State to the Governor-General of Australia, above n 194, no 3.

British employees of the Pacific Phosphate Company to Ocean Island.[198] On 9 September 1914, four days after the federal election that returned Andrew Fisher to the Prime Ministership, the Australian naval cruiser *HMAS Melbourne* visited Nauru and reported via telegram that it had 'put the wireless station out of action' as requested, albeit without leaving troops to occupy the island.[199] On 14 September the Acting Governor of German New Guinea, also without instructions or standing troops, surrendered Herbertshöhe and Rabaul to the Australian officers of the *HMAS Sydney*.[200] With no wireless station to receive the news of official surrender of German New Guinea, the District Office on Nauru was left in limbo for a month. In mid-October, a plan for Nauru was agreed between the Governor-General of Australia, the British High Commissioner for the Western Pacific, and the Pacific Phosphate Company. The Company would continue phosphate operations under an Australian military administration and provision the island for the duration of the occupation.[201] On 6 November 1914, 66 Australian troops arrived on the Company steamer to occupy Nauru, hoisting the British flag.[202] In his telegram advising the British Secretary of State of the Colonies of the Nauruan occupation, Governor-General Ferguson signed off with a pointed question: 'May Nauru now be considered open to trade?'[203]

Tension between the Pacific Phosphate Company and the Australian government over substantive control of the administration of Nauru was evident from the outset of the occupation. Immediately after the occupation, the Company declared and delivered up its German-owned shares to the Public Trustee in London, for auction to British buyers.[204] Now comprised predominantly of British capital, the Pacific Phosphate Company regarded Australian military administration of a Nauru as a temporary measure, to be replaced at the

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198 Harold B Pope, *Nauru and Ocean Island: Their Phosphate Deposits and Workings* (Albert J Mullett, Government Printer, 1920), 25; Williams and Macdonald, above n 132, 107.
199 Telegram from the Commonwealth Naval Board of Administration to Admiralty received 9 September 1914, reproduced in Great Britain Colonial Office, *Correspondence respecting Military Operations against German Possessions in the Pacific, presented to both Houses of Parliament by Command of His Majesty* (His Majesty's Stationery Office, 1915), No. 4. Bean, above n 170, 145.
200 Bean, above n 170, ch 5, 51–52.
201 Telegram from the High Commissioner of the Western Pacific to the Secretary of State received 4.50am 14 October 1914, reproduced in Great Britain Colonial Office, *Correspondence respecting Military Operations against German Possessions in the Pacific, presented to both Houses of Parliament by Command of His Majesty* (His Majesty's Stationery Office, 1915), no 8.
202 Pope, above n 198, 25.
203 Telegram from the Governor-General of Australia to the German Secretary of State received 4.44pm 19 November 1914, reproduced in Great Britain Colonial Office, *Correspondence respecting Military Operations against German Possessions in the Pacific, presented to both Houses of Parliament by Command of His Majesty* (His Majesty's Stationery Office, 1915), no 14.
204 Pope, above n 198, 20.

end of the war with the control of the High Commissioner for the Western Pacific.[205] Yet Australian aspirations to the territorial annexation of Nauru and German New Guinea intensified after October 1915, when William Morris Hughes replaced Andrew Fisher as Prime Minister of Australia. Open criticism of the prospect of British control of Nauru after the war appeared in the Australian media, where the Pacific Phosphate Company was described as 'a few big European capitalists' who had 'allowed themselves to be puppets in the hands of German plotters against the interests of Australia'.[206]

From mid-1917, the idea that Australia should be granted possession of Nauru in recompense of for war losses was strongly advocated in the media. The likely worth of Nauruan phosphate became a matter of common speculation.[207] Hobart's *Daily Post* put the point bluntly:

> 'Australia's share of the cost of the war will be at least £200,000,000 sterling. The question is how to recoup ourselves for this enormous expenditure, equal to the indemnity paid by the French to the Germans in 1870. Nauru Island was mainly German property…German properties, interests and territories captured in the Pacific Islands by the valor of Australians and New Zealanders could be used as a national investment for the purpose of paying back the cost of the war to Australia and New Zealand.'[208]

The *Sunday Times* in Sydney described the benefit to Australia not as one of the value of phosphate as an export commodity, but of increased agricultural production: 'the value to the Commonwealth is not to be estimated in figures of phosphate. It must be calculated in figures of wheat'.[209]

The question of territorial annexation of the German colonies by the Dominions was discussed at the Imperial Conference of 1917 in London, ever more closely bound up with growing demands for control over external affairs. The 1917 Conference headed by the new British Prime Minister, Lloyd George, proceeded without Australian representation, as Hughes remained in Australia to campaign in a notorious federal election fought on the issue of conscription.[210] In the absence of an Australian delegation, the Conference adopted a

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[205] Bean, above n 170, ch 9, 146.
[206] 'The Riches of Nauru', *Daily Post* (Liverpool) 19 May 1917, 9.
[207] See for example, ibid; and 'Nauru Island — Great Wealth in Phosphatic Rock', *The Sunday Times* (London) 20 May 1917.
[208] 'The Riches of Nauru', *Daily Post* (Liverpool) 19 May 1917.
[209] 'Nauru Island – Great Wealth in Phosphatic Rock', *The Sunday Times* (London) 20 May 1917.
[210] L F Fitzhardinge, *William Morris Hughes: A Political Biography* (Angus and Robertson, 1964), vol 1, 45. Quoted in Thompson, above n 188, 207.

Resolution on the 'Constitution of the Empire', which provided that 'the readjustment of the constitutional relations of the component parts of the Empire is too important and intricate a subject to be dealt with during the War'. [211]

On the urging of Lieutenant-General Smuts, the South African Minister for Defence, and William Massey, the Prime Minister of New Zealand, the Resolution further provided that any such 'readjustment' 'should be based on a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth', and should 'recognise the right of the Dominions and of India to an adequate voice in foreign policy and foreign relations'.[212] In the Imperial War Cabinet appended to the Conference, Smuts and Massey pushed for territorial annexation of the German colonies by the Dominions after the war - South West Africa to South Africa, and the Pacific colonies to New Zealand and Australia.[213] Whereas Massey's justifications for annexation of the Pacific colonies rested on regional security, Smuts argued for annexation on bases both of security and of the barbarism of the German colonial administration in South West Africa.[214] On Smuts' account, the German colonies in South West Africa and the Pacific could not be handed back to Germany after the war, as German imperialism had proved barbaric; and the only alternative was that they be annexed by the Dominions.

10. Internationalisation, the mandatory principle and the Peace Treaty

The Dominions' annexationist aspirations conflicted directly with emerging proposals for internationalisation of the occupied German and Ottoman imperial territories. Internationalisation had been advocated within Britain as an alternative to annexation from as early as 1915, primarily by the Labour Party, prominent public intellectuals associated with the Fabian Society including H.G. Wells and Leonard Woolf, and socialist associations including the Inter-Allied Conference of Labour and Socialist Organisations.[215] Advocates of an internationalist basis for peace converged in asserting that European imperial competition had precipitated the conflagration, and as such territorial annexation would be

[211] Resolution IX, 'Constitution of the Empire' in *Imperial War Conference 1917: Extracts from Minutes of Proceedings Laid Before the Conference* (His Majesty's Stationery Office, 1917), 5.
[212] Ibid.
[213] Louis, above n 58, 82–85.
[214] Ibid 85–86.
[215] Ibid 88–92. See for example L S Woolf, *International Government: Two Reports prepared for the Fabian Research Department* (Brentano's, 1916).

unstable grounds for peace.[216] On its entry into the war in April 1917 after three years of avowed neutrality, the United States government under President Woodrow Wilson aligned with the internationalist movement in describing its intention to 'vindicate the principles of peace and justice in the world as against selfish and autocratic power'.[217]

Yet competing concepts of internationalisation circulated. Some versions focused on economic principles of 'open door' trade, and imagined the occupied territories as internationally administered areas of free commerce, with the resolutions of the Berlin Conference on free trade in the African interior providing a structural blueprint.[218] British Conservative politicians including Lord Robert Cecil also advocated internationalisation, arguing that an international structure to guarantee economic liberalisation was the only means by which to achieve political stability.[219] Other advocates of internationalisation focused on political concepts of national self-determination, and imagined an allocation amongst the Allied Powers of responsibility for the administration of the occupied territories - this time with the consent of the local population.[220] On 5 January 1918, in a speech to the British Trades Union Congress later labelled his 'War Aims' speech, Lloyd George broadly advocated the adoption of a principle of self-determination in any peace settlement, defining 'self-determination' as 'government by the consent of the governed'.[221] Without ruling out annexation, George declared that 'government with the consent of the governed must be the basis of any territorial settlement in this war'.[222] Three days later in his 'Fourteen Points' address to a joint session of Congress on 8 January 1918, US President Wilson did not go so far as to adopt a principle of self-determination, instead advocating a reconciliation of

[216] See for example H G Wells, *In the Fourth Year: Anticipations of a World Peace* (MacMillan Company, 1918), 62.
[217] President Woodrow Wilson, Speech delivered to the Congress of the United States, Washington DC, 2 April 1917.
[218] Examples include E D Morel, *Africa and the Peace of Europe* (London, 1917); and the proposal put forward (and later abandoned) by the British Labour Party in its 'Memorandum of War Aims' published on 28 December 1917.
[219] Robert Cecil, 'Memorandum on Proposals for Diminishing the Occasion of Future Wars', reproduced in Robert Cecil, *A Great Experiment* (Jonathan Cape, 1941), 353–356.
[220] Examples include John Atkinson Hobson, *Towards International Government* (G Allen and Unwin, 1915); and Henry Noel Brailsford, *A League of Nations* (Headley Bros, 1917).
[221] Prime Minister Lloyd George, speech delivered to Trades Union Congress, Caxton Hall, London, 5 January 1918.
[222] Ibid.

imperial claims with 'the interests of the populations concerned'.[223] Wilson's fifth point called for:

> 'A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined'.[224]

In his influential 1918 manifesto on the subject, Lieutenant-General Smuts approved of internationalisation in principle, putting forth a proposal for the formation of a League of Nations which would function as 'the successor to the Empires'.[225] With respect to the occupied territories, Smuts acknowledged both principles of national self-determination and open door trade, yet differed from Lloyd George and Wilson in addressing as a matter of pragmatism the question of how such territories might best be administered after the war. In Smuts' view, a new League of Nations would not have the necessary experience to take on direct administrative control.[226] Whilst territorial annexation was not desirable, only existing states had the capacity to administer the occupied territories:

> '(t)he only successful administration of undeveloped or subject peoples has been carried on by States with long experience for the purpose and staffs whose training and singleness of mind fit them for so difficult and special a task. If serious mistakes are to be prevented and the League is to avoid discrediting itself before public opinion, it will have to begin its novel administrative task by making use of the administrative organisation of individual States for the purpose'.[227]

Smuts is often credited as the originator of the mandatory principle.[228] From the outset, Smuts advocating mandatory administration for all occupied territories except German South West Africa and the German Pacific. In response to t Lloyd George on self-determination as 'government by the consent of the governed', Smuts reframed the justification for territorial annexation of these exceptions not on regional security, as argued

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[223] Woodrow Wilson, 'Address to Congress outlining the Program of the World's Peace, giving the Fourteen Points Necessary to its Consummation', 8 January 1918, reproduced in John Randolph Bolling and others, Chronology of Woodrow Wilson (Frederick A Stokes Company, 1927), 251–258.
[224] Ibid 256.
[225] J C Smuts, *A League of Nations: A Practical Suggestion* (Hodder and Stoughton, 1918), 26.
[226] Ibid 19.
[227] Ibid.
[228] Mark Mazower, 'Jan Smuts and Imperial Internationalism' in *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press, 2009), 28–65. Christopher Gevers argues that the concept of the mandate was proposed earlier by W E Du Bois. See Christopher Gevers, 'An Intellectual History of Pan-Africanism and International Law', PhD thesis in progress at Melbourne Law School.

by Hughes and Massey, but on the basis of the incapacity of the indigenous peoples to comprehend their own interests:

> 'the German colonies in the Pacific and Africa are inhabited by barbarians, who not only cannot possibly govern themselves, but to whom it would be impracticable to apply any ideas of political self-determination in the European sense…The disposal of these Colonies should be decided on the principles which President Wilson has laid down in the fifth of his celebrated Fourteen Points'.[229]

Wilson's fifth point left open the possibility of territorial annexation; all that was required was an 'impartial adjustment of colonial claims' that balanced the interests of the local population against the 'equitable title' of the occupying government. On Smuts' account, obtaining the consent of the governed in the German colonies of Africa and the Pacific was simply 'impracticable'.[230]

In contrast, Australian Prime Minister Hughes did not bother himself with the niceties of principle in the debate over the occupied territories, instead applying the blunt force of *realpolitik*. Against the discourse of self-determination as consent or welfare broadly adopted by the British and the United States in early 1918, Australian Prime Minister Hughes maintained that the Dominions and the Imperial War Cabinet had 'decided definitely' in July 1918 that German New Guinea, Samoa and South West Africa 'must be ceded to the Dominions'; and that should a mandatory principle be adopted in which Powers would administer occupied colonies under some form of international oversight, it should not be applicable to the Pacific territories for reasons of Australian regional security.[231]

Despite the growing prominence of Smuts and Hughes in the debate over the fate of the German colonies, the Dominion governments were not consulted by the Imperial Government on the terms of the armistice agreed between the Allies and the Reich on 11 November 1918, the Reich on the basis of Wilson's Fourteen Points.[232] In the Imperial War Cabinet convened immediately after the armistice, Hughes demanded that the Dominion

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[229] Smuts, above n 225, 15; Louis, above n 58, 81–85.

[230] Smuts' reasoning resonated with jurist James Lorimer's racial division of 'humanity' into 'civilised', 'barbarous' and 'savage'. See James Lorimer, *Institutes of the Law of Nations* (William Blackwood and Sons, 1883), vol 1, 101–103.

[231] The Right Hon W M Hughes, *The Splendid Adventure: A Review of Empire Relations Within and Without the Commonwealth of Britannic Nations* (Ernest Benn Limited, 1929), 83; and L F Fitzhardinge, 'Hughes, Borden and Dominion Representation at the Paris Peace Conference' (1968) 49 *Canadian Historical Review* 160.

[232] Williams and Macdonald, above n 132, 126; and Alma Luckau, *The German Delegation at the Peace Conference* (Columbia University Press, 1941), 140–143.

governments be directly represented at the planned Peace Conference.[233] Over the six months of the Paris Peace Conference from 18 January 1919 to the signing of the Treaty of Versailles on 28 June 1919, the terms of the peace agreements, the future of the occupied territories and the formation of a League of Nations were negotiated between the delegations of thirty-two nations.[234] European histories of the Conference have tended to focus on the significance of the informal negotiations between Lloyd George, Wilson, and French Prime Minister Georges Clemenceau, and to a lesser extent Italian Prime Minister Vittorio Orlando, as determinative of Conference outcomes.[235] Yet the international significance of the frustrated attempts of non-European politicians and jurists to engage in the process is more recently a subject of increased consideration.[236] A prominent example is the presence of Emir Faisal of the Kingdom of Greater Syria, later King of Iraq, who unsuccessfully sought the renunciation by Britain and France of the 1916 Sykes-Picot Agreement.[237]

The inclusion of the Dominion delegations in official Conference proceedings, however, was understood at the time as marking a fundamental shift in Dominion status both within the British empire and within international law. [238] However the nature of that shift was not yet clear. As the mandatory principle gathered strength as the principle on which

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[233] Hughes, above n 231, 93–95; on the position of Canadian Prime Minister Borden, see Fitzhardinge, above n 231, 160–169.

[234] For contemporaneous accounts of the Conference, see, from the US perspective: Edward Mandell House and Charles Seymour (eds), *What Really Happened at Paris: The Story of the Peace Conference by American Delegates* (Hodder and Stoughton, 1920); and Charles Homer Haskins, 'Tasks and Methods of the Conference', *Some Problems of the Peace Conference* (Harvard University Press, 1920), 3–34. From the British perspective, see David Lloyd George, *The Truth about the Peace Treaties* (Victor Gollanz Ltd, 1938) vol I; and John Maynard Keynes, 'Chapter III: The Conference' in *The Economic Consequences of the Peace* (Harcourt, Brace and Howe Inc, 1920), 27–55.

[235] See for example Margaret Macmillan, *Peacemakers: The Paris Conference of 1919 and its Attempt to End War* (J Murray, 2001); and Alan Sharp, *The Versailles Settlement: Peacemaking after the First World War, 1919–1923* (Palgrave, 2nd ed, 2008).

[236] See for example Fleur Johns and Thomas Skouteris, 'The League of Nations and the Construction of the Periphery — Introduction' (2011) 24 *Leiden Journal of International Law* 797.

[237] On Faisal, see Ali A Allawi, *Faisal I of Iraq* (Yale University Press, 2014); and on Iraq, see Usha Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty' (2011) 24 *Leiden Journal of International Law* 799. For European reconsiderations of the significance of the Conference for the non-European world, see Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press, 2015), 77–103; and William Roger Louis, 'The Beginning of the Mandate System of the League of Nations' in *Ends of British Imperialism: The Scramble for Empire, Suez, and Decolonization* (I B Tauris, 2006), 251–278.

[238] In the third edition of *International Law: A Treatise* published in 1920, Oppenheim wrote that the international status of the Dominions 'underwent a fundamental change' after the Great War; membership pin the League of Nations 'gave them a position in International Law'; it 'defied exact definition' but 'was none the less real for being hard to reconcile with precedent'. Lassa Oppenheim, *International Law: A Treatise* (Robert Roxburgh ed, Longmans, Green and Co, 3rd ed, 1920), 169–170. Assistant to Lord Robert Cecil, Philip Noel-Baker, wrote in 1929 that 'the admission of their separate delegations to the Peace Conference was the decisive step in the development of the international status of the Dominions'. Noel-Baker, above n 87, 56.

internationalisation of the occupied territories would take place, Smuts, Hughes and Massey continued to maintain that the while the principle properly applied to occupied territories in the Middle East and North Africa, it could not apply to the German colonies of South West Africa, New Guinea or Samoa; and in open conflict with Wilson, Hughes reiterated the unacceptability to Australia of German New Guinea passing to any Power save Australia.[239]

Part I of the Treaty of Versailles comprised the draft Covenant of the League of Nations, and Article 22 articulated the position reached by the Conference on the future of the occupied colonies. In heavily negotiated language, Article 22 sought to reconcile the mandatory principle, the principle of self-determination and the exception of the German colonies of South West Africa and the Pacific from the operation of either.[240] The Article adopted a mandatory principle in providing that the 'well-being and development' of peoples formerly under German or Ottoman rule and 'unable to stand by themselves under the strenuous conditions of the modern world' formed 'a sacred trust of civilisation'; and that the 'best method of giving practical effect to this principle' was 'that the tutelage of such peoples should be entrusted to advanced nations' and 'exercised by them as Mandatories on behalf of the League'.[241] Yet the success of Hughes' and Smuts' campaign with respect to South West Africa and German New Guinea is evident in the section half of the article. After broadly stating the mandatory principle by which the German and Ottoman territories were to be administered under international oversight, Article 22 goes on to provide for differential application of the principle, stating that 'the character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions, and other similar circumstances'.[242] Distinguishing first 'certain communities formerly belonging to the Turkish Empire' as having 'reached a stage of development where their existence as independent nations can be provisionally recognized, subject to the rendering of administrative advice and assistance by a Mandatory', then 'other peoples, especially those of central Africa' as being 'at such a stage that the

[239] Hughes, above n 231, 100; Lloyd George, above n 234, 515–522, 542.
[240] For a contemporaneous account of the settlement of article 22, see H W V Temperley, 'The Mandatory System' in *History of the Peace Conference of Paris* (Oxford University Press, 1924), vol. VI, 500–523; and Pedersen, above n 237, 27–35.
[241] *Treaty of Peace between the Allied and Associated Powers and Germany ('Treaty of Versailles')*, opened for signature 28 June 1919, 2 USTS 43 (entered into force 10 January 1920), pt I, art 22. On the drafting of article 22 of the Covenant, see Temperley, above n 240, 500–502.
[242] *Treaty of Versailles*, pt I, art 22.

Mandatory must be responsible for the administration of the territory', Article 22 codifies the position of Smuts and Hughes:

> '…There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population'.[243]

The precise form in which South West Africa and 'certain of the South Pacific Islands' were to be 'administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned' was left to the new League to be determined. The three categories of mandate distinguished in Article 22 subsequently became known as the A, B and C Class Mandates. The C Class would include only the former German colonies of South West Africa, German New Guinea, and German Samoa. Under the terms of Article 22, an 'open door' to other members of the League with respect to trade and commerce would not be required in the C Mandates.[244] Belgian statesman Paul Hymans was commissioned by the League to advise on the legal obligations falling to the League and to Mandatories under Article 22.[245] Hymans reasoned that with respect to the B and C Class Mandates, the Mandatory Power appointed by the Allied Powers and granted a mandate by the League would 'enjoy' 'a full exercise of sovereignty, in so far as such exercise is consistent with the carrying out of the obligations' imposed by Article 22; and that with respect to the C Class, 'the scope of those obligations is narrower', 'thus allowing the Mandatory Power more nearly to assimilate the Mandated territory to its own'. The difference between a C Class Mandate and territorial annexation was real; but it was slight, and ambiguous.

11. The Nauru Island Agreement of 1919

With Nauru under Australian military occupation and Hughes' annexationist intentions evident from his ascent to the Prime Ministership in October 1915, the Board of the now British-controlled Pacific Phosphate Company sought to use its influence with the British

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[243] Ibid. On the influence of Smuts in the drafting of article 22, see Aaron Margalith, *The International Mandates* (John Hopkins Press, 1930), 25–26.
[244] *Treaty of Versailles*, pt I, art 22.
[245] Paul Hymans, 'Obligations Falling Upon the League of Nations under the Terms of Article 22 of the Covenant (Mandates)' (1920) *League of Nations Official Journal* 334, 337.

ruling elite, including Foreign Secretary Lord Balfour and chair Earl Stanmore, to campaign for Nauru to be placed under British administration on the conclusion of the European war.[246] In 1918, Balfour had written on behalf of the Company to Lord Milner, Secretary of State for the Colonies, to submit that its shareholders were entitled to 'some voice in determining the future jurisdiction' of Company property on Nauru, and to propose that Nauru be included in the British Protectorate of the Gilbert and Ellice Islands with Ocean Island, to bring Nauru under the 'direct administrative control of the Imperial Government' via the Commissioner for the Western Pacific.[247] Milner appears to have personally supported this proposal, later writing confidentially to Lloyd George that 'British agriculture is vitally interested in Nauru'.[248]

In February 1919, with the Peace Conference underway, Lord Milner proposed in a separate meeting with the Dominion delegates that the occupied German colonies south of the equator be allocated with German Samoa to New Zealand, German New Guinea to Australia, and Nauru to Britain under the Commission for the Western Pacific; and that all those north of the equator – including the Marshall Islands and the Caroline Islands – be offered to Japan.[249] Hughes agreed to the arrangement with Japan, having long agreed to mark the equator as the delineation of the Australian sphere of Pacific influence.[250] Yet, distrustful of the Pacific Phosphate Company's close connection with the Imperial government, Hughes pushed back against Milner's proposal for Nauru, insisting that Nauru be included in the Australian allocation. In March, he reiterated his position in writing to the British and Dominion delegates that territorial annexation of occupied Nauru was Australia's due for losses sustained during the war.[251] New Zealand Prime Minister Massey disputed Hughes' claim to exclusive title, arguing that New Zealand had both similar need for phosphate and a comparable claim to control of the German Pacific on the basis of regional security and Dominion status.[252] Milner's diaries record over twenty meetings about Nauru during the Conference: nine with Hughes, six with Massey, and eight with Sir Alwyn

[246] Williams and Macdonald, above n 132, 124–125.
[247] Ibid 125.
[248] Weeramantry, above n 20, 50.
[249] Williams and Macdonald, above n 132, 126.
[250] Fitzhardinge, above n 210, 164.
[251] Williams and Macdonald, above n 132, 127; Weeramantry, above n 20, 43.
[252] 'Triangular Battle between Milner, Hughes and Massey', *The Sun* (Sydney), 17 March 1919.

Dickinson, the Director of the Pacific Phosphate Company, with Balfour present at three in his capacity as Chairman.[253]

The compromise agreement reached between Britain, Australia and New Zealand for Nauru severed the island from the erstwhile administrative unit of German New Guinea, and purported to deal both with administrative control of the island on the one hand, and phosphate rights on the other.[254] As detailed above, the legal situation with respect to Nauruan phosphate prior to military occupation was understood as follows: under its agreement with the *Gesellschaft*, the Company held the exclusive right to exploit Nauruan phosphate; proprietary rights in phosphate were held by the Reich; and proprietary rights in land resided with Nauruan landowners under Nauruan law, leased to the Company. The question of whether Nauru itself was sovereign territory of the Reich had not been explicitly considered prior to the war. It is clear that it was not regarded as such whilst part of the protectorate of the Marshall Islands, yet from its incorporation into German New Guinea in 1906, the island was likely understood to be under German sovereignty to the extent that this was so for German New Guinea.

The Nauru Island Agreement was signed by George, Hughes and Massey in Paris on 2 July 1919, less than a week after the signing of the Treaty of Versailles. The Agreement purported to derive its authority to deal with Nauru not from the new League of Nations but from the Treaty of Versailles, describing its source of authority as 'a Mandate…conferred by the Allied and Associated Powers upon the British Empire' to operate from the coming into force of the 'Peace Treaty with Germany'.[255] Whilst the Agreement was novel in its tripartite compromise that reflected the changing status of the Dominions within the empire, the administrative form it contemplated essentially continuous with that established during the protectorate era. Whereas in 1888, the Reich had vested administrative powers directly in the *Jaluit Gesellschaft*, which exercised both private rights and public powers through to 1906 when administrative control passed back to the Reich, the Nauru Island Agreement created two new public bodies, and vested administrative powers in one, and private rights in the other.

The same structure of public and private power, however, remained in place. Administrative powers previously exercised by the District Officer vested in the new Administrator; and

[253] Williams and Macdonald, above n 132, 129.
[254] See *Nauru Island Agreement Act 1919* (Cth); the Agreement is reproduced as the Schedule to the Act.
[255] Ibid.

corporate rights previously held by the *Gesellschaft* then the Pacific Phosphate Company vested in the new Board of Commissioners. Article 1 created the office of Administrator, with power to 'make ordinances for the peace, order, and good government of the Island, subject to the terms of this Agreement' and to 'provide for the education of children on the Island, to establish and maintain the necessary police force, and to establish and appoint courts and magistrates with civil and criminal jurisdiction'.[256] The Administrator was initially to be appointed by the Australian government for the first five years, and 'thereafter…appointed in such manner as the three Governments decide'. Article 3 created a 'Board of Commissioners', comprising three members, one appointed by each Government; and Article 6 provided that 'title to the phosphate deposits on the Island of Nauru and to all land, buildings, plant, and equipment on the island used in connexion with the working of the deposits, shall be vested in the Commissioners'.[257] The Board of Commissioners was to become known as the British Phosphate Commission. Article 9 provided that '(t)he deposits shall be worked and sold under the direction, management, and control of the Commissioners', and that is was the 'duty of the Commissioners to dispose of the phosphates for the purpose of the agricultural requirements of the United Kingdom, Australia and New Zealand'.[258]

Importantly, Article 2 replicated the revenue structure set up by the 1888 Agreement. It provided that '(a)ll the expenses of the administration (including the remuneration of the Administrator and of the Commissioners), so far as they are not met by other revenue, shall be defrayed out of the proceeds of the sales of the phosphates', thereby making the Administrator and the administration of the island financially dependent on Commission profits.[259] At the same time, Article 14 excluded the Commission's phosphate operations from administrative oversight, providing that there was to be 'no interference by any of the three Governments with the direction, management, or control of the business of working, shipping, or selling the phosphates'.[260] Article 15 provided that the phosphate was to be divided at cost between the three Governments in proportion of 42% to the United Kingdom, 42% to Australia, and 16% to New Zealand', and Article 17 provided that 'such

[256] Ibid, schedule, art 1.
[257] Ibid schedule, art 3, 6.
[258] Ibid schedule, art 9.
[259] Ibid schedule, art 2.
[260] Ibid schedule, art 14, 15.

allotment shall be for home consumption for agricultural purposes in the country of allotment, and not for export'. [261]

12. Reception of the Nauru Island Agreement and its relationship to Article 22

It is not clear from the Nauru Island Agreement whether the signatories understood themselves to be acquiring the rights of the Pacific Phosphate Company in a chain of title originating with the Reich, or whether they understood themselves to be claiming rights derived from some form of radical title to Nauru, created in the British empire either by conquest or by Article 22 of the Covenant.[262] Parliamentary debates suggest that there was no consensus between the parties on this point. The Agreement was the subject of parliamentary debate over the following year, as Article 15 required ratification of all three Parliaments. The Nauru Island Agreement and the text of the Peace Treaty were tabled in the Australian House of Representatives on the same day of 18 September 1919, reflecting Hughes' belief that the significance of the Peace Conference for Australia was in Australia's international aggrandisement.[263] Hughes framed the Agreement in his second reading speech on 24 September 1919 as a commercial one, in which the administration arrangements were secondary to the commercial objective of securing phosphate for agricultural use. Describing the mandate principle as 'the tenure under which the sovereignty of the island is held at present', Hughes stated that the purpose of the Agreement was 'to make the phosphates available at cost price to the three parties to the agreement'.[264] In the debate that ensued, the contradictions between the Agreement as a tripartite commercial monopoly and the open door and mandatory principles of the Covenant were not raised; rather, a series of members of Parliament took issue with the estimations as to the quantity and value of Nauruan phosphate according to which the Pacific Phosphate Company was to be compensated under Article 7.[265]

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[261] Ibid schedule, arts 15, 17.
[262] Evidence suggests Hughes understood the latter to be the case. Commonwealth, *Parliamentary Debates,* House of Representatives, 24 September 1919 (Prime Minister W M Hughes, on the Nauru Island Agreement Bill second reading).
[263] Commonwealth, *Parliamentary Debates,* House of Representatives, Thursday 18 September 1919.
[264] Commonwealth, *Parliamentary Debates,* House of Representatives, 24 September 1919 (Prime Minister W M Hughes, on the Nauru Island Agreement Bill second reading).
[265] Ibid.

In January 1920, the Council of the League of Nations held its first meeting in Paris.[266] The official conferral of the mandates did not receive direct treatment by the League; as stated by the first Council Chairman, French Senate President Leon Bourgeois, the first of the two tasks given to the League was 'the practical execution of the Treaties of Peace'.[267] The second Bourgeois termed the 'task of the future', which he described as securing 'the definite foundation of international justice' and the 'protection of races not yet able to stand by themselves, whose welfare and development, in the words of Article 22, "form a sacred trust of civilisation"'.[268] While the League dealt with other business, including plans for the Permanent Court of International Justice provided for in Articles 13 and 14 of the Covenant, the Allied Powers allocated the mandates, some ten months after the execution of the Nauru Island Agreement, and eight months after its ratification by the Australian Parliament.[269]

It was not until after the allocation of the Nauru mandate by the Allied Powers that Lloyd George saw fit to introduce the Nauru Island Agreement into the House of Commons for ratification.[270] The Bill was tabled for second reading on 16 June 1920. In the debate that ensued, the Coalition Government and the Opposition adopted contrasting characterisations of the nature of the Agreement and its compliance with the Covenant. With the Government, Charles Palmer argued that the Agreement contemplated the purchase of British corporate interests under private law and was therefore outside the purview of the new League of Nations. [271] The Opposition argued that the Agreement was an international administrative agreement that fell squarely within the purview of Article 22 of the Covenant. William Ormsby-Gore, a prominent internationalist appointed as British representative to the Permanent Mandates Commission of the League, vigorously opposed passage of the Bill on four grounds.[272] Firstly, he disputed that authority to dispose of the island derived from the Treaty of Versailles, arguing that authority did not reside with the Empire until formally delegated by the League. Ormsby-Gore argued that what was agreed in Article 22 of the Covenant was that the League would create Mandates which would confer powers on Mandatories, and that until this was done, the 'British Empire' had no authority to dispose

[266] Council of the League of Nations, '*Proces-Verbal* of the First Meeting of the Council of the League of Nations' (Feb 1920) *League of Nations Official Journal* 1, 17.
[267] Ibid 19.
[268] Ibid.
[269] See H Duncan Hall, *Mandates, Dependencies and Trusteeship* (Stevens & Sons Limited, 1948), 31–32.
[270] Commonwealth, *Parliamentary Debates,* House of Representatives, 16 June 1920, vol 130, 1299–1351 (Nauru Island Agreement Bill second reading).
[271] Ibid 1335–1337.
[272] On Ormsby-Gore's opposition to the Nauru Island Agreement, see Pedersen, above n 237, 74–76.

of Nauru.[273] Secondly, if the 'British Empire' did indeed derive mandatory authority from the Peace Treaty as opposed to the League, he took issue with the assumption made in the Agreement that the 'British Empire' could be read down to include only Britain, Australia and New Zealand; in his terms, '(i)f the mandate is conferred upon the whole British Empire you cannot without gross violation of our whole Imperial arrangement confine the mandate to two self-governing Dominions and the Mother Country, and shut out the others'.[274]

Thirdly, Ormsby-Gore argued that the Agreement contravened the two major principles agreed to at the Peace Conference. In effectively creating a 'Government monopoly' over Nauruan phosphate, the Agreement directly contradicted both the principle of 'open door' trade in the occupied territories, and the mandatory principle of trusteeship on behalf of the League.[275] Ormsby-Gore was supported by Lord Robert Cecil, who argued that the Nauru Island Agreement directly contravened the spirit of Article 22, and that there was no authority to dispose of Nauru until the League granted a formal mandate.[276] Despite the lengthy arguments of Ormsby-Gore and Cecil, the Bill was passed without amendment by the House of Commons the same day, 218 votes to 57.[277] In New Zealand, the Agreement was ratified unconditionally by parliamentary resolution.[278]

13. The Transfer Agreement with the Pacific Phosphate Company

Following parliamentary ratification of the Nauru Island Agreement, it remained to formally acquire the rights of the Pacific Phosphate Company. The Company, unhappy with the compromise arrangement, argued via Lord Balfour that its Ocean Island concern could not compete with the proposed tripartite monopoly over Nauruan phosphate, and that the new Commission should buy out both concerns.[279] On 25 June 1920, an Agreement of purchase and sale of both the Nauruan and Ocean Island rights of the Company to the new 'Board of Commissioners' was executed.[280] In the Transfer Agreement, description of the rights

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[273] Commonwealth, *Parliamentary Debates,* House of Representatives, 16 June 1920, vol 130, 1308–1313 (Nauru Island Agreement Bill second reading).
[274] Ibid 1309.
[275] Ibid 1308–1313.
[276] Ibid 1317.
[277] Campbell L Upthegrove, *Empire by Mandate: A History of the Relations of Great Britain with the Permanent Mandates Commission of the League of Nations* (Record Press, 1954), 84.
[278] *Public Acts of New Zealand 1908–1931* (Butterworths, 1933), vol 2, 657.
[279] Williams and Macdonald, above n 132, 130–131.
[280] *Agreement between His Most Gracious Majesty King George V and Others and The Pacific Phosphate Company*, Westminster, 25th June 1920.

transferred from Company to Commission slips from mining concession toward property in phosphate.[281] The concession rights conferred upon the *Jaluit Gesellschaft* are described as 'the exclusive right of exploiting the Guano (phosphate) deposits existing in the Marshall Islands', which accurately reflected the 1905 German instrument, annexed in translation to the Agreement.[282] The rights transferred from the *Gesellschaft* to the Pacific Phosphate Company are described as 'the right to the exclusive exploitation and utilisation of the rights conferred upon the said Jaluit Gesellschaft', with the 1906 renewal of the private agreement annexed as the second schedule.[283] The rights transferred from Company to Commission, however, are described as 'all the right title and interests of the Company in the guano phosphate deposits in and upon the said Islands and in the lands buildings plant and equipment on the said Islands', for consideration of £3,500,000.[284] It is hard to imagine in such a laboriously drafted commercial contract that this slippage from concession to property was unintentional. Certainly the transaction appears to have been understood in Australia as the purchase not of a mining concession but of property, and property not only in Nauruan phosphate but in Nauru itself. When the Appropriations Bill for Australia's proportion of the purchase price was tabled by Hughes in the House of Representatives, the Transfer Agreement was discussed not as the purchase of the Pacific Phosphate Company but as 'the purchase of Nauru Island'.[285]

14. The Mandate for Nauru and the tension between international and sub-imperial status

With the execution of the Nauru Island Agreement and the Transfer Agreement, both administrative control of the island and the phosphate operation passed to the three governments, and vested in the new offices of Administrator and British Phosphate Commission. On their face, both Agreements constituted British sub-imperial rather than international arrangements; yet the international status of the British Dominions was rapidly shifting. On 29 November 1920, the Council of the League passed the Constitution of the Permanent Mandates Commission (PMC), which provided that the majority of the PMC was to comprise nationals of non-Mandatory powers, and one representative of the International

[281] Ibid 2.
[282] Ibid 2, schedule 1.
[283] Ibid 2–3.
[284] Ibid clauses 1 to 9, 5–12.
[285] Commonwealth, *Parliamentary Debates*, House of Representatives, 29 July 1920, (Member for West Sydney, Supply Bill (no 2) 1920–1921).

Labour Organisation.[286] The PMC was not delegated the power to issue formal mandates, which remained with the Council of the League; rather, it was delegated the power to 'receive and examine' the reports required to be rendered to the Council each year by the Mandatories, and to 'advise' the Council on 'all matters relating to the Mandates'.[287] On 17 December 1920, the Council settled the allocation of the C Class Mandates. As expected, the 'Mandate for German South-West Africa' was conferred upon 'His Britannic Majesty to be exercised on his behalf by the Government of the Union of South Africa'. The 'Mandate for German Samoa' was conferred upon 'His Britannic Majesty to be exercised on his behalf by the Government of the Dominion of New Zealand'.[288] Most of the German administrative unit of New Guinea was dealt with in the 'Mandate for German Possessions in the Pacific Ocean Situated South of the Equator, Other than German Samoa and Nauru', conferred upon 'His Britannic Majesty to be exercised on his behalf of the Government of the Commonwealth of Australia'.[289] The Marshall Islands, which with Nauru as the Marshall Islands Protectorate had been brought within German New Guinea in 1906, were once again administratively separated from New Guinea and Nauru, and allocated to Japan along with the Caroline Islands and the Mariana Islands in the 'Mandate for the Former German Possessions in the Pacific Ocean Lying North of the Equator', conferred upon 'His Majesty the Emperor of Japan'.[290]

As pre-empted in the Nauru Island Agreement, Nauru was dealt with by the Council of the League separately from the Marshall Islands and New Guinea. In contrast to the other C Mandates conferred on the British empire, which included the recognition of Dominion status fought for so doggedly by Hughes and Smuts, the 'Mandate for Nauru' was conferred upon 'His Britannic Majesty' alone.[291] Seven articles long, the Mandate provided that, subject only to its terms, the Mandatory would have 'full power of administration and legislation over the territory…as an integral portion of his territory'; and would 'promote to the utmost the material and moral well-being and the social progress of the inhabitants of the

[286] Council of the League of Nations, 'Constitution of the Permanent Mandates Commission' (Nov–Dec 1920) 1 *League of Nations Official Journal* 8, 87.
[287] Ibid.
[288] Ibid 89–90, 91–92.
[289] Ibid 85–86.
[290] *Mandate for Nauru*, Council of the League of Nations, 17 December 1920 (His Majesty's Stationary Office, 1921), art 1; Council of the League of Nations, 'Constitution of the Permanent Mandates Commission' (Jan–Feb 1921) 2 *League of Nations Official Journal* 1, 87–88.
[291] Council of the League of Nations, 'Constitution of the Permanent Mandates Commission' (Jan-Feb 1921) 2 *League of Nations Official Journal* 1, 93–94.

territory'.[292] The Mandatory was required to make an annual report to the Council of the League, containing 'full information with regard to the territory', and indicating 'measures taken to carry out the obligations assumed'.[293] There was no mention of the Nauru Island Agreement in the Mandate.

As such, the tripartite arrangement agreed upon by Britain, Australia and New Zealand seventeen months earlier to administer the pre-empted mandate was not codified at the international level. While Hughes had succeeded in gaining administrative control of the northeast of New Guinea in addition to the southeast already under Australian administration, his attempt to annex Nauru to Australian territory had, at least on paper, failed.[294] Whether the provisional allocation of the mandate by the Allied Powers or the Mandate for Nauru was the instrument of public international law by which administrative control of Nauru passed from the Reich, it passed to the British empire; and the Nauru Island Agreement, negotiated alongside the Peace Treaties, could not clearly be said to be an international as opposed to a sub-imperial instrument. Yet while the Dominions were still not independent, given the continued curtailment of Dominion power with respect to external affairs, their inclusion in the Paris Peace Conference negotiations signalled a shift toward international status.[295] While the Australian and South African governments had failed to achieve their goal of territorial annexation of the occupied German colonies, through the process of trying to assert themselves as sub-imperial powers in their own regions they had achieved two significant outcomes: the recognition of the Dominions as subjects of international law, and the creation of the C Class Mandate.

15. Conclusion

This chapter has redescribed the shift in status of Nauru from protectorate to colony to mandate at the intersection of three processes of international legal formation: the imbrication of company and administrative rule that had been fixed under the German regime prior to the 'discovery' of phosphate, and continued when control of the Nauru passed to the British empire; the internal tension in the British empire between the Imperial

[292] *Mandate for Nauru*, Council of the League of Nations, 17 December 1920 (His Majesty's Stationary Office, 1921) art 2.
[293] Ibid art 6.
[294] Hughes maintained that this failure was not his but his Cabinet's. See Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 2 July 1920 (Prime Minister Hughes, Procedural Text).
[295] See above n 238.

government and the Dominions over Dominion independence in external affairs; and the tension between territorial annexation and internationalisation of occupied territory at the Paris Peace Conference, codified in Article 22 of the Covenant. Whereas at the commencement of the protectorate era, German concern was largely with keeping out commercial interests of other European imperial powers, over the following twenty years a legal regime developed particular to Nauru. As with the other German protectorates, Nauru was administered under what was effectively unfettered executive rule, severed from the development of constitutional jurisprudence in the German Reich. As the model of company rule proved unworkable in its assertion of property rights in the absence of a framework of territorial sovereignty, and the Wilhelmian Reich embarked upon its New Course of expansionism, the mode of administration shifted toward direct colonial rule. In other parts of the German empire, this shift was accompanied by military force.

Within a period of twenty years, the status of Nauru in international law shifted from protectorate via colony to C Class Mandate. Both the protectorate and the mandate form struck an ambiguous balance between administrative control and territorial annexation that responded directly to commercial and domestic political pressures.[296] Yet whereas the Bismarckian Reich had in the 1880s considered the protectorate form attractive precisely because it did not purport territorial annexation of Nauru to the Reich whilst at the same time purporting to provide legal protection to Hanseatic trading interests, Australia – along with fellow Dominions of South Africa with respect to South West Africa, and New Zealand with respect to Western Samoa - considered the C Class Mandate form attractive because it was the closest to territorial annexation of the occupied territories that could be negotiated in the rooms of Versailles.

What occurred at the administrative level for Nauru was at first glance more elaborate; yet the basic continuities in administrative form were marked. The shift from company administration as provided for in the 1888 Agreement between the *Jaluit Gesellschaft* and the Reich to mandatory administration occurred via two principal instruments. The Nauru Island Agreement of 1919 passed public power from District Office to Administrator, excluding the new Commission's phosphate profits from administrative oversight whilst rendering the Administration financially dependent upon them. As had been the case in 1888, the power

[296] A similar point is made by Tony Anghie in 'The Heart of My Home: Colonialism, Environmental Damage, and the *Nauru* Case' (1993) 34 *Harvard Journal of International Law,* 445, 494–495.

of the Administrator to issue new laws and ordinances was restricted by a requirement that the company be consulted, and commercial operations not affected. The Transfer Agreement of 1920 transferred private rights from the Pacific Phosphate Company to the new British Phosphate Commission, augmenting those rights from concession to property in the process; and the new Commission employed all the Pacific Phosphate Company's junior staff.

In the protectorate period, the Nauruan people remained as ghosts to international law.[297] Under German rule, they appear via their capacity to hold real property rights, but not rights in minerals; and in the *ad hoc* imposition of total jurisdiction over them. Beyond this, they are known primarily through their refusal to succumb to the forced labour that was violently imposed in the commercial empires of the late nineteenth century Pacific. In this chapter, we hear of Islanders moved around the Pacific and Australia, of Indian peoples moved to Mauritius, Trinidad, and Fiji, and of Chinese peoples moved to Nauru, yet the scale of this movement and the extent of its violence remains to be carefully understood. The imposition of mandatory administration, however, was to have a significant effect on the representation of Nauruan people at the international level. Chapter 4 traces the development of the administrative regime from the mandate period, with creation of a weak but coalescing jurisdiction of international oversight of mandatory administration of Nauru.

[297] The language of ghosthood is borrowed from Natasha Wheatley, 'Spectral Legal Personality in Interwar International Law: On New Ways of Not Being a State', *Law and History Review* (forthcoming 2017).

Chapter 4

From Mandate to Trust Territory, 1947

1. Introduction

From 1921, Nauru was administered by Australia as a C Class Mandate of the British empire. This chapter commences with an account of the accretion of Nauruan administrative practice in the mandate period, in accordance with the provisions of the Mandate and the Nauru Island Agreement. In the interwar period, the ambiguous status of the C Mandates in international law posed a problem for jurists, for the League, and for Australia and South Africa as mandatory powers advocating an interpretation of Article 22 as authorising territorial annexation. The chapter then traces the development of the Nauruan phosphate industry under the tripartite monopoly of the British Phosphate Commission, and the benefits that accrued to United Kingdom, Australia and New Zealand in the world phosphate market. The impact of Nauruan phosphate on the development of Australian agriculture is traced in context of international debates on population growth and food security prompted by the global depression of the late 1920s and early 1930s. In Australia, these debates were framed racially as risks to the white Australia policy that required a proactive response to prevent Asian immigration, a racial prejudice that fed directly into imperial tensions with Japan.

The chapter moves to consider the impact of the War of 1939-1945 on Nauru at the intersection of this imperial competition in the Pacific, between Australia, Japan and the United States. Tensions between Australia and Japan over restricted trade access to the C Mandates in the Pacific had appeared during the Versailles negotiations, worsening as the League lost political legitimacy. The war of 1939 to 1945 is redescribed with focus on the Japanese offensive in the Pacific, which included the occupation of the Australian C Mandates of Nauru and New Guinea. As Nauru was occupied by the Japanese, the reconstitution of the League as the United Nations was already being negotiated. The negotiation of the new United Nations is redescribed with a focus on the expansion of Article 22 of the Covenant into three full Chapters of the Charter of the United Nations. The Charter, adopted at the San Francisco Conference of 1945, removed the distinctions between

the A, B and C Mandates, and juridified the obligations of administering powers with respect to both the new 'trust territories' in particular, and to 'non-self-governing territories' in general. The status of Nauru shifted from C Mandate to Trust Territory in 1947 with the approval of the Trusteeship Agreement for Nauru in 1947 by the new Trusteeship Council. The successor body to the Permanent Mandates Council, the Trusteeship Council comprised an expanded membership including newly independent states, and significantly increased powers of review. Whilst the shift into trusteeship proved significant in providing a clearer framework in which the relationship between Nauru and Australia could be characterised as a matter of international law, at the administrative level the shift in status correlated with a further bureaucratisation of the existing administrative form.

2. Administration of Nauru as a C Mandate

As detailed in Chapter 3, the Pacific Phosphate Company's Nauru operations continued without interruption from Australian military occupation in 1914 right through the Versailles negotiations and the deal struck in 1919 between Britain, Australia and New Zealand in the Nauru Island Agreement. The transition from military occupation to mandatory administration was smooth, and in the first year of production after the war, phosphate exports were the highest they had ever been, and continued to grow.[1] Phosphate production took priority over all else; under the Agreement, the Australian Administrator's powers to 'issue ordinances for the peace, order, and good government of the island' were limited only by the power of the British Phosphate Commission to conduct phosphate operations without interference.[2] Under the Transfer Agreement that assigned the Pacific Phosphate Company's rights to the new tripartite board of the British Phosphate Commission created by the Agreement to run the phosphate mine, the operation was transferred as a going concern. All employees of the PPC were employed by the BPC, and the three Commissioners themselves, now publically employed, had previously held high positions with the PPC.[3] The first Commissioners were Albert Ellis for New Zealand, the Pacific Phosphate Company

[1] As championed by Australian Commissioner Harold Pope, '(t)he Australian farmer, therefore, has no need to be anxious about his supplies of superphosphate. Whatever may happen in less fortunate countries, his supplies are assured for the next four or five generations at any rate.' Harold B Pope, 'Nauru and Ocean Island: Their Phosphate Deposits and Workings — Progress Under Government Ownership' (Government Printer, Melbourne, 1921), 22–23.

[2] *Nauru Island Agreement Act 1919* (Cth) arts 1 and 13.

[3] See generally *Agreement between His Most Gracious Majesty King George V and Others and the Pacific Phosphate Company,* Westminster, 25th June 1920; on employment, see clause 10.

employee and later Director who claimed to have discovered Nauruan phosphate from the office door stop; Harold Pope for Australia, formerly the Company's accountant; and Alwyn Dickinson for the United Kingdom, formerly a Director.[4]

As the PPC became the new BPC, the first Administrator appointed by the Australian Government was English-born war veteran Brigadier Thomas Griffiths, who took office in June 1921.[5] In the first year of the mandate, Griffiths issued a series of ordinances that clarified the transition from German protectorate to British mandatory rule. The *Laws Repeal and Adopting Ordinance of 1922* provided that all laws 'of the German Empire and of the German State' would cease to apply in Nauru, to be replaced with the laws of the Australian State of Queensland; however all rights and obligations created under German law would continue on foot until satisfied or discharged.[6] Any lands formerly owned by the German state would vest in the Administrator.[7] The *Judiciary Ordinance of 1922* established a Central Court of record and a District Court of petty sessions. [8] Whilst 'judicial power' was vested in the Court, the Court was stipulated to consist of the Administrator and his appointees. Thus, as the administrative structure of Nauru developed additional layers of bureaucracy, the Administrator was vested with a similar concentration of executive, legislative and judicial powers as had defined the post of District Officer under German rule.

Other ordinances passed in the early years of the mandate reflected the obligations imposed on mandatories by Article 22 of the Covenant, obligations that were soon reiterated by the Permanent Mandates Commission in its annual questionnaire to the Nauruan Administrator. However, the incorporation of these obligations at the local level required little more than a reframing of existing practice, and in many cases provided opportunity for an augmentation of administrative power at the expense of the Nauruan people. The *Nauru Lands Ordinance of 1921* provided that Nauruan landowners were not permitted to sell, lease or contract with respect to their land.[9] Similar measures were adopted in many mandates, purportedly to

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[4] Maslyn Williams and Barrie Macdonald, *The Phosphateers: A History of the British Phosphate Commissioners and the Christmas Island Phosphate Commission* (Melbourne University Press, 1985), 94 et seq.

[5] Parliament of the Commonwealth of Australia, *Report on the Administration of Nauru during the Year 1922, prepared by the Administrator for Submission to the League of Nations*, (Albert J Mullett: Government Printer for the State of Victoria, 1923), 5 ('*Report on the Administration of Nauru during the year 1922*').

[6] Laws Repeal and Adopting Ordinance (No 8 of 1922), appended to ibid 22–23.

[7] Ibid.

[8] *Judiciary Ordinance (No 9 of 1922),* appended to *Report on the Administration of Nauru during the year 1922*, above n 5, 24.

[9] *Nauru Lands Ordinance (No 12 of 1921)*, appended to the *Report of the Administration of Nauru covering the period from date of Confirmation of the Mandate, 17th December 1920, to 31st December 1921*. The Report is reproduced in Parliament of the Commonwealth of Australia, *Parliamentary Papers 1922*, vol II Part 2, 2815 *et seq*.

prevent exploitation of 'natives' by unscrupulous commercial operators. However, the *Lands Ordinance* provided that Nauruans were permitted to lease land to the BPC, subject to the approval of the Administrator, at regulated rates.[10] The Administrator's approval was purported to protect the 'well-being and development' of native peoples as secured in Article 22, but in effect prevented Nauruans from freely exercising property rights that had been recognised under German rule. In exchange for this limitation, the *Lands Ordinance* regulated the payment of royalties to Nauruan landowners, raising the rate from the German halfpenny to threepence pence per ton of phosphate.[11] However of the threepence owed per ton, only twopence was to be paid directly to the landowner, with the remaining one pence paid by the BPC to the Administrator, to be held on trust for the Nauruan population.[12] The fund into which the BPC paid the quarantined portion subsequently became known as the Nauru Landowners Phosphate Royalty Trust.

The mandate system and the assumption of international administrative power over the occupied territories by the League of Nations effectively resolved the question of jurisdiction over indigenous populations that had so vexed British jurists in the late nineteenth century. Vested by the Mandate for Nauru with the 'full power of administration and legislation over the territory', the Administrator issued the *Native Status Ordinance of 1921*, which defined 'native' as 'any aboriginal of any island in the Pacific Ocean, or of any of the East Indian Islands or of Malaysia'.[13] The *Native Administration Ordinance of 1922*, which applied to natives 'including an aboriginal native of China, or of any island of the Pacific Ocean', stipulated that the Administrator had the power to make 'any regulation affecting the affairs of natives', including marriage, property rights, criminal and civil offences.[14]

The transition to international oversight was, however, less smooth than the transition from German to Australian administrative control. Neither the Nauru Island Agreement nor the appointment of Australia rather than the Imperial government as Administrator of the Mandate for Nauru was officially communicated to the League of Nations, matters on which the Permanent Mandates Commission commented when it first turned its attention to Nauru

[10] Ibid.
[11] Ibid; also A H Charteris, 'The Mandate over Nauru Island' (1923–1924) 4 *British Yearbook of International Law* 137, 151.
[12] *Nauru Lands Ordinance (No 12 of 1921)*; also Charteris, above n 11, 151.
[13] *Nauru Status Ordinance (No 12 of 1921).*
[14] *Native Administration Ordinance (No 17 of 1922)*, appended to *Report on the Administration of Nauru during the Year 1922,* above n 5, 28–29.

in 1922.[15] In its 1922 report to the Council of the League, the PMC noted that although the Administrator was responsible for meeting mandatory obligations in the new system, the BPC was in effective control. [16] The Nauru Island Agreement provided that the Administrator was funded entirely from the profits of the British Phosphate Commission, which existed purely for the purpose of exploiting Nauru's phosphate deposits; and that the Administrator had no authority with respect to the phosphate operations. As the PMC observed, this exemption of the BPC from administrative oversight created the potential for conflict with mandatory obligations, not only with respect to labour conditions but with respect to the mandatory principle itself:

> '[the Commission] fears on the other hand, that the disproportion between the material wealth of this island and the small number of inhabitants may induce the mandatory Power to subordinate the interests of the people to the exploitation of the wealth. It is, therefore, not without the deepest concern that it considers the question whether the well-being and development of the inhabitants of this island, which in the words of the Covenant 'form a sacred trust of civilisation', the accomplishment of which it is the Commission's duty to safeguard, are not in danger of being compromised'.[17]

In response to the PMC's concerns, the Accredited Representative of the three governments, Australian High Commissioner Sir Joseph Cook, obliquely insisted that any concerns with the arrangement between the Administrator and the BPC 'did not really arise'.[18] On Cook's reasoning, the arrangement simply continued the status quo established before the war, in that the BPC was 'merely the substitution of a publicly owned monopoly for a privately owned one', the Pacific Phosphate Company.[19] Cook argued that the BPC did not escape administrative oversight, and its legal position was 'strictly analogous to that of the directorate of a company'; in all matters except the phosphate operation, the Commissioners

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[15] League of Nations, Permanent Mandates Commission, Minutes of the Second Session, 1922, 46, cited in Campbell L Upthegrove, *Empire by Mandate: A History of the Relations of Great Britain with the Permanent Mandates Commission of the League of Nations* (Record Press, 1954), 85 ('League of Nations, Minutes of the Second Session, 1922').

[16] 'General Observations of the Permanent Mandates Commission concerning the Reports relating to the Administration of the Island of Nauru, under the Mandate of His Britannic Majesty, August 1922', reproduced in Christopher Weeramantry, *Nauru: Environmental Damage under International Trusteeship* (Oxford University Press, 1992) 379–380. See also ibid 84.

[17] League of Nations, Minutes of the Second Session, 1922, above n 15, 46; Charteris, above n 11, 146.

[18] 'General Observations of the Permanent Mandates Commission concerning the Reports relating to the Administration of the Island of Nauru, under the Mandate of His Britannic Majesty, August 1922', reproduced in Weeramantry, above n 16, 380.

[19] Ibid.

'were subject to the control of the Administrator'.[20] With respect to the PMC's concern about the subordination of the interests of the Nauruan people to phosphate operations, Cook replied similarly obliquely that there was no risk of conflict between the phosphate operation and the mandatory obligation to promote Nauruan 'well-being and development', as the Nauruans themselves made no use of the island's central plateau from which phosphate was removed: 'the population is confined to narrow coastal strips, which are more or less fertile. The phosphate deposits themselves, situated within these strips, occupy an area that is neither populated nor food-producing'.[21] Reporting on Cook's interactions with the PMC in the Commonwealth Parliament, Prime Minister Billy Hughes reiterated Cook's argument that the interests of the Nauruan people and the BPC's interest in mining of phosphate could not conflict as they were mutually exclusive: on Hughes' account, '(t)he working of the phosphate deposits is in no way prejudicial to the interests of the natives who, on the contrary, have never been so well off as they are under the present Administration'.[22]

Notwithstanding Cook's awkward sidestepping of the PMC's questions on conflict of interest – a move repeated by Administrators for decades to come - the compromise between internationalisation and annexation that had been struck at Versailles on the insistence of Hughes and Jan Smuts attracted significant attention. The contradiction between the Nauru Island Agreement, with its exclusive focus on phosphate extraction, and the mandatory principle articulated in Article 22 of the Covenant was evident not only to the PMC but to jurists writing on the new mandate system. Those who defended the Nauru arrangement - including A.H. Charteris, Professor of Law at the University of Sydney – took a strict interpretive approach, arguing that under Article 22, C Mandates placed no positive obligations on mandatories with respect to free trade, and neither did the Mandate for Nauru itself; therefore, the monopolisation of phosphate by the tripartite BPC contravened no mandatory obligations.[23] Charteris argued that all that was required of the Administrator was the promotion of the 'well-being and development' of the Nauruan people; and that under the new *Lands Ordinance*, Nauruans received a higher royalty than had been the case under the German regime, indicating that their 'well-being and development' was indeed being

[20] Weeramantry, above n 16, 117.
[21] 'General Observations of the Permanent Mandates Commission concerning the Reports relating to the Administration of the Island of Nauru, under the Mandate of His Britannic Majesty, August 1922', reproduced in Weeramantry, above n 16, 381.
[22] Commonwealth of Australia, *Ministerial Statement made by the Prime Minister with Reference to the Administration of Nauru,* House of Representatives, Parl Paper No 32, 8th September 1922 (Government Printer, 1922).
[23] Charteris, above n 11, 150–151.

prioritised over profit.[24] Finding no positive conflict with the mandatory principle, Charteris went further, positing that the C Mandates functioned as a new sort of conditioned annexation: in providing that C Mandates were 'best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned', Article 22 allowed 'incorporation subject to conditions', which on a strict positivist reading went no further than those given in the Article itself.[25] Charteris' legal opinion was popular with the Australian government, but was not shared internationally. English international lawyer Thomas Baty argued that the C Mandate could not be considered 'incorporation' into the territory of the mandatory power, as in no case did a C Mandate involve the extension of rights of nationality to indigenous populations, nor the subsumption of the fiscal affairs of the mandated territory into the economy of the mandatory power.[26] Baty further rejected the analogy drawn by some commentators between the C Mandate and a private law trust.[27] For Baty, the C Mandate relationship was could not be characterised as one in which powers of sovereignty were assumed by the mandatory as trustee on behalf of the indigenous population as beneficiary, as there was no positive obligation placed on the mandatory power to not profit from the role.[28]

The conflict between the mandatory principle and resource exploitation in the Nauru case was thus less an anomaly than a demonstration of the defining ambivalence of the C Mandate. During the 1920s, scholarly analysis of the mandate system came to focus on the question of where the sovereignty of the mandated territory resided.[29] Reviewing the 'law and practice' of the South African mandate of South West Africa and the New Zealand mandate of Western Samoa, American political scientist Luther Harris Evans argued, *contra* Charteris, that the C Mandates were not territorial annexations in which sovereignty vested in the mandatory power - not least because the 'semi-autocratic' concentration of administrative power in a single office 'would be considered to be too undemocratic to be

[24] Charteris was not only legally but seemingly ideologically in support of the Australian government's position on Nauru: 'The remuneration is small, perhaps, in the eyes of a civilised man in view of the immense value of the product in the Commonwealth, but it is not small to a child of nature who lives on cocoa-nuts and fish and sunshine.' Charteris, above n 11, 151.
[25] Ibid 149.
[26] Thomas Baty, 'Protectorates and Mandates' (1922) 2 *British Yearbook of International Law* 109, 118.
[27] Ibid.
[28] Ibid.
[29] H V Evatt, *The British Dominions as Mandatories* (Melbourne University Press, 1934), 5–11; Susan Pederson, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press, 2015) 204–205.

tolerated within the confines of the territory' of each mandatory power. [30] Instead, Evans argued, the C Mandates were *sui generis* entities in international law, in which sovereignty resided with neither the mandatory power nor the indigenous population, but 'in the mandatory power and the Council [of the League] acting together'.[31] Similarly to Evans, political scientist Elizabeth van Maanen-Helmer reasoned that the C Mandates were differentiated from territorial annexation by the existence of the League itself – or more specifically, by the existence of the Permanent Mandates Commission.[32] It was the fact of PMC oversight of matters of 'native well-being and development' that marked the line between the mandate system and 'old-fashioned' annexation - as limited as PMC oversight was to issuing questions and receiving reports.[33] Yet this interpretation of the C Mandate as providing for joint sovereignty held between the mandatory power and the Council was not adopted by the Council itself. When the matter was raised, the Council opted against taking a position on the juridical question of sovereignty over the C Mandates, instead directing the PMC to request submissions from the mandatory powers themselves as to their interpretations of their legal relationship with the mandated territories.[34] Charged with reporting on the matter to the Council, the Netherlands representative on the PMC, Frans Beerlaerts von Blokland, concluded without further elaboration that the C Mandate relationship was 'clearly a new one in international law'.[35]

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[30] Luther Harris Evans, 'Are 'C' Mandates Veiled Annexations?' (1927) 7 *Southwestern Political and Social Science Quarterly* 381, 389 et seq. Evans aligned with the position of compatriot Quincy Wright, who surmised 'a close approach to truth in ascribing sovereignty of mandated territories to the mandatory acting with the consent of the Council of the League'. Quincy Wright, 'Sovereignty of the Mandates' (1923) 17 *American Journal of International Law* 691, 698.

[31] Evans, above n 30, 389 et seq. Evans aligned with the position of compatriot Quincy Wright, who surmised 'a close approach to truth in ascribing sovereignty of mandated territories to the mandatory acting with the consent of the Council of the League'. Quincy Wright, 'Sovereignty of the Mandates' (1923) 17 *American Journal of International Law*, 691, 698.

[32] Elizabeth van Maanen-Helmer, *The Mandates System in Relation to Africa and the Pacific Islands* (P S King and Son Ltd, 1929) 202 *et seq*.

[33] 'In the opinion of the author, had there been no Permanent Mandates Commission the disposition of the former German Colonies would so unquestionably have been equivalent to annexation that the mandates system would no longer be heard of…It is to the proceedings of the Permanent Mandates Commission that we must look, therefore, to find out in what respects the mandates system differs from old-fashioned annexation'. Ibid 203.

[34] 'As regards territories under C mandate, the Commission desired further information concerning the views of the Government of the Union of South Africa on the question of its legal relationship to the mandated territory of South-West Africa. This question was raised previously in the report of the Commission on its Tenth Session, and in March last the Council decided that it should not express any opinion on the difficult point as to where sovereignty over a mandated territory resides.' M Beelaerts van Blokland, 'Report of the Permanent Mandates Commission on the Work of its Eleventh Session' (October 1927), 8 *League of Nations Official Journal* 1118, 1119–1120.

[35] Ibid.

By the 1930s, administration of the Mandate of Nauru had settled into the rhythm of the phosphate operation. In 1930, the BPC completed construction of an industrial cantilever that allowed phosphate to be from carted from the central plateau directly into the holds of cargo ships, along the cableways that ran down the slopes of the plateau, through Aiwo district, and out across the reef into the ocean.[36] Northeast of the cantilever on the forested hills of Aiwo was the 'European Settlement', where staff of the Administration and the BPC resided in houses; by ordinance of the Administrator, no 'natives' were permitted to enter the European Settlement between sunset and sunrise.[37] Adjacent to the cantilever directly on the coast was the BPC labourers' accommodation. Chinese labourers on three year contracts numbered between 700 and 1100 at any one time; the Administrator reported to the PMC that the 'Chinese coolies' were 'healthy and contented', yet first hand records of their experience are scant.[38] Every year the Administrator claimed the cost of administration directly from the BPC via an Appropriations Ordinance, which included provision for wages and other costs of maintaining the police station and prison, wireless station, post office, medical services and all other public works.[39] The BPC deducted appropriations from its accounts as a liability.[40] Nauruan phosphate, in other words, paid entirely not only for the BPC's operation, but for the administration of the Mandate for Nauru.

The annual ritual of reporting to the PMC required the Administration to account for the satisfaction of mandatory obligations to advance the 'social, moral and material welfare of the natives'. In his Annual Reports, Administrator Griffiths focused on two main initiatives: the creation of a Nauruan 'Council of Chiefs', and the provision of compulsory education. In response to the PMC's questionnaire, Griffiths noted in his 1924 Report that Nauru had 'since time immemorial' been divided into fourteen districts, each under a 'Chief', from whose number a 'Head Chief' was drawn.[41] Griffiths wrote that as the policy of the Administration was to 'encourage the preservation of native customs and rights where it can

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[36] Parliament of the Commonwealth of Australia, *Report to the Council of the League of Nations on the Administration of the Island of Nauru during the Year 1931* (Canberra: Commonwealth Government Printer).
[37] *Movement of Natives Ordinance (No 12 of 1921)*, appended to *Report of the Administration of Nauru covering the period from date of Confirmation of the Mandate, 17th December 1920, to 31st December 1921*.
[38] Parliament of the Commonwealth of Australia, *Report to the Council of the League of Nations on the Administration of the Island of Nauru during the Year 1931*, above n 36.
[39] See for example Appropriations Ordinance (1 of 1931), Parliament of the Commonwealth of Australia, *Report to the Council of the League of Nations on the Administration of the Island of Nauru during the Year 1931* above n 36, appendix A.
[40] Ibid appendix B.
[41] Parliament of the Commonwealth of Australia, *Report to the Council of the League of Nations on the Administration of the Island of Nauru during the Year 1924* (Victoria, H J Green, Government Printer), 13–14.

reasonably do so', the 'Council of Chiefs' had been formally recognised, and 'charged with the maintenance of order in their districts', including the power to deal with 'minor offences' as stipulated by the Administrator in the Native Regulations.[42] In 1924, Griffiths reported that Timothy Detudamo of Uaboe had been elected as Head Chief, and a monthly meeting would be held with the Chiefs during which they would be 'afforded an opportunity' to bring matters to the notice of the Administration.[43] This institution of the 'Council of Chiefs' formalised a practice of nominal consultation first established by District Officer Jung in the protectorate period.[44]

The other initiative pointed to by the Administration's reports as satisfying Article 22 obligations was native education. Via the *Compulsory Education Ordinance of 1921*, all children between 8 and 16 were required to attend one of the two mission schools, which were subsidised by the Administration with funds taken from the Royalty Trust.[45] In extension of compulsory primary education, in the early 1930s Griffiths' replacement as Administrator, W.A. Newman, instigated a program of selective secondary education whereby certain Nauruan male students, mostly between the ages of 18 and 20, were sent to Geelong, outside of Melbourne, for further education in 'technical subjects'.[46] All costs of the Geelong program were appropriated by ordinance from the Royalty Trust. In reference to the selective secondary education of 'promising' Nauruan young men, Newman concluded in his 1931 report to the PMC that '(e)ncouragement and sympathetic assistance have been given with a view to enabling, in due course, the native inhabitants of the Territory to administer their own affairs'.[47]

Privately, however, both the Administrator and the BPC worried about the connection between further education and Nauruan demands for greater self-government than the Council of Chiefs allowed. The second British Commissioner, Thomas Lodge, appointed to the BPC from the refugee section of the League of Nations in Geneva, expressed concern

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[42] Ibid.
[43] Ibid 14.
[44] See section 2 'Administration of Nauru under the Marshall Islands protectorate' in Chapter 3, 'From Protectorate to Mandate, 1920'.
[45] See 'Measures Taken to Carry Out the Obligations Assumed under Articles 2, 3, 4 and 5 of the Mandate' in *Report of the Administration of Nauru covering the period from date of Confirmation of the Mandate, 17th December 1920, to 31st December 1921*, 6.
[46] 'Nauru Boys' Progress', *The Argus* (Melbourne) 22 December 1938. See also Don Chambers, *'Boss' Hurst of Geelong and Nauru* (Hyland House, 1994), 114 *et seq*.
[47] Parliament of the Commonwealth of Australia, *Report to the Council of the League of Nations on the Administration of the Island of Nauru during the Year 1931,* above n 36.

that British interest in Nauruan phosphate could be 'seriously affected' if such 'ill-considered policy on native questions' were to continue. [48] On Lodge's estimation, drawn from his League experience, further education of Nauruans could only result in native unrest.[49] Administrator Newman himself expressed the same doubt, worrying that even selective secondary education of the Nauruan people would 'inevitably lead to unsettlement and difficulties such as would appear to be the case in at least one of the dominions of the Empire'.[50] In the 1937 Report to the League, Newman's replacement as Administrator, Commander Rupert Garsia, reported that the education policy for Nauru had been revised, and the secondary education program curtailed.[51] The reason given for the revision was not the risk of political unrest, but the limited prospects of the Nauruan people:

> 'education must take into account the changing social and economic conditions and circumstances of life of the communities concerned. This implies a need for periodical revision of the education programme. Such a revision has been initiated in Nauru in 1937, the idea being to have an education system which will be genuinely related…to the developmental needs and changing conditions of the island as interpreted by the Administration; in other words, an education suitably adapted to the Nauruan environment'.[52]

3. Phosphate, agriculture, population and race in the Australian interwar period

By the late 1930s, the administrative form of Nauru had taken shape around the division of powers between the Administration and the BPC set out in the Nauru Island Agreement, itself defended by tripartite monopoly as a simple formalisation of the arrangement of official and corporate rule struck during the protectorate period. The benefits that flowed from the Nauru monopoly were inestimable. During the mandatory period, the agricultural industries of Australia, and to a lesser extent New Zealand, came to depend heavily on the continuous supply of cost price phosphate from Nauru, and from Ocean Island in the British protectorate of the Gilbert and Ellice Islands, both operations run by the BPC.[53] As Australian Commissioner on the BPC, Harold Pope proved an adept propagandist for the

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[48] Williams and Macdonald, above n 4, 252–253.
[49] Ibid.
[50] Weeramantry, above n 16, 113.
[51] Parliament of the Commonwealth of Australia, *Report to the Council of the League of Nations on the Administration of the Island of Nauru during the Year 1937* (Canberra: L F Johnson, Commonwealth Government Printer, 1938), 33–34.
[52] Ibid 33.
[53] See S M Wadham and G L Wood, *Land Utilization in Australia* (Melbourne University Press, 1939), 59, 164, 199; and Robert D Watt, *The Romance of the Australian Land Industries* (Angus and Robertson, 1955), 133–139.

benefits of the Nauru arrangement to Australia. Openly equating the 'progress' of Nauruan peoples with which the mandatory powers were charged under Article 22 with the 'progress' of the phosphate industry, Pope made explicit the connection between the monopolisation of Nauruan phosphate and the economic stability of Australian primary industry in an official pamphlet circulated in Australia:

> '(t)he Australian farmer, therefore, has no need to be anxious about his supplies of superphosphate. Whatever may happen in less fortunate countries, his supplies are assured for the next four or five generations at any rate…Now that we have guaranteed supplies for a great many years to come of some of the highest grade phosphate in the world, there appears to be no reason why the area under wheat should not be larger and still larger, and future harvest still more bountiful'.[54]

New Zealand Commissioner for the BPC, Albert Ellis, was similarly evangelical about the benefits of phosphate, not only for the agricultural development of Australia and New Zealand, but also for the emerging problem of population growth:

> 'there is practically no crop which does not respond to phosphoric acid, and indeed it can be said, without the annual top-dressing of water soluble phosphatic fertilizer, agriculture as it exists to-day could not be conducted…there can be no doubt as to the use of phosphate and the growing importance it will have in helping to provide food for the world's increasing population'.[55]

Access to high grade phosphate via government monopoly enabled the continuous growth of the Australian sugar, wheat, wool and pastoral industries, which by the 1930s had become emblematic of Australian national identity.[56] The ecological repercussions of routine phosphate use on the eastern seaboard of Australia were immense. Forced raising of crops further depleted soils of already low mineral content, affecting the distribution of indigenous plant species and aggravating soil erosion. Introduced plant species raised as stock fodder, including rye grass and clover, quickly became endemic weeds throughout the temperate

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[54] Harold Pope, *Nauru and Ocean Island: Their Phosphate Deposits and Workings* (Albert J Mullett, Government Printer, 1922), 23, 38.
[55] Albert F Ellis, *Ocean Island and Nauru: Their Story* (Angus and Robertson Limited, 1935), 290–293.
[56] See for example 'On the Sheep's Back', *The Cumberland Argus* (Parramatta) 3 May 1934; and 'Australian Agriculture: None Better in the World', *The West Australian* (Perth) 10 November 1934. This account of Australian national identity was by the 1930s pitted against the nationalism of the 'city wage-earning unionist'. See 'Backbone of the Nation: Farmers' Difficulties', *The Mackay Daily Mercury* (Mackay) 28 September 1935.

regions of the continent.[57] At the same time, phosphate had appreciable impact on land settlement patterns in Australia. As the intensive farming of sugar, wheat, cattle and sheep became possible in inland areas formerly used for pastoral grazing, emigration to the new rural communities of Australia was marketed by the Commonwealth government to returned soldiers and prospective British immigrants.[58]

The development of Australian agriculture in the 1920s had a particular geopolitical resonance, as the global deflationary recession that followed the First World War sharply increased food prices.[59] Increase in food prices contributed to the revival of Malthusian arguments of the relation between population growth and agricultural production, and prompted increasing interest in technocratic governance as means of regulating food production and distribution.[60] In Australia, both Europe and Asia were popularly regarded as facing problems of 'overpopulation' relative to food production; and the comparative 'underpopulation' of Australia was held out as a risk that required active policy response.[61] Australian treatments of the world 'population problem' routinely drew a connection between Australia's agricultural capacity and the White Australia policy. Sydney lawyer and social scientist Henry Lane Wilkinson argued that in order to avert the risk of unsolicited immigration from Asia, the Commonwealth should actively solicit British immigration, whilst increasing agricultural export to Japan, China and India.[62] Agricultural export to Asia was, Wilkinson argued, a 'logical extension' of the White Australia policy.[63] At the same time, the problem of 'depopulation' of the Pacific Islands was widely held out as a basis for extending Australian control of the Pacific region to prevent 'Asiatic' immigration to Australia via the islands.[64] As food prices continued to rise, Japanese mandatory administration of the Pacific Islands North of the Equator was regarded with increasing suspicion in Australia.

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[57] Ellis, above n 55, 288–290; Gregory T Cushman, *Guano and the Opening of the Pacific World* (Cambridge University Press, 2013), 129–130.
[58] CSIRO, *The Australian Environment* (Cambridge University Press, 1949), 52–53.
[59] Cushman, above n 57, 208 *et seq*.
[60] See for example Alexander Morris Carr-Saunders, *The Population Problem: A Study in Human Evolution* (Clarendon Press, 1922); Edward East, *Mankind at the Crossroads* (Scribners, 1923); and Warren S Thompson, *Danger Spots in World Population* (Alfred A Knopf, 1930). Cushman, above n 57, 208 *et seq*.
[61] A prominent proponent of this argument was Sydney lawyer and social scientist Henry Lane Wilkinson; see H L Wilkinson, *The World's Population Problems and A White Australia* (P S King and Son Ltd, 1930).
[62] Ibid 317.
[63] Ibid 317.
[64] Stephen H Roberts, *Population Problems of the Pacific* (George Routledge and Sons, Ltd, 1927).

In the international debate over food production and population distribution, assured phosphate supply became a national imperative. By the 1920s, global phosphate production was booming in the southern states of the United States, the French and Spanish protectorates of Morocco, the French protectorate of Tunisia, and in the Pacific Islands – including Nauru and Ocean Island, but also Angaur in the Japanese mandated Islands, Makatea in the French protectorate of *Etablissements des français en Océanie* (now French Polynesia), and Howland, Baker, and the Phoenix Islands, claimed in the nineteenth century as 'appurtenances' to the United States under the *Guano Islands Act*.[65] Terms of commercial access to phosphate resources in the mandates and protectorates had by the 1930s become a question of international interest. In 1938, the Permanent Court of International Justice handed down its decision in the *Phosphates in Morocco Case*, brought by Italy on behalf of an Italian company in protest at French monopolisation of the phosphate industry in the French protectorate of Morocco.[66] Italy argued that the establishment of a French phosphate monopoly was inconsistent with France's obligation in international law to maintain an 'open door' for European commerce in the protectorate.[67]

Whilst the PCIJ decided on France's preliminary objection that it had no jurisdiction to hear the matter, the strength of the Italian case accentuated even further the juridical peculiarity of the C Mandate, in its silence on mandatory monopolisation of resource exploitation. The ambiguity of the C Mandate was further emphasised by the fact that the 'economic equality' afforded to States Members of the League with respect to trade in the A and B mandates through free trade obligations was routinely held out by the League as one of its successes.[68] Van Maanen-Helmer had identified in 1929 that the absence of obligations of economic equality in the C Mandates was a crucial weakness in the mandate system if not in the League itself, as it undermined the principle of free trade in the occupied German and Ottoman territories that had animated the Versailles settlement; on her reckoning, 'the reason that the principle of equality of treatment was not included in the C Mandates was the desire of the Australians for the exclusion of Asiatic immigration'.[69] Maanen-Helmer's attribution of

[65] See for example A N Gray, 'Phosphate Rock: The World's Output', *Perth Western Mail* (Perth) 11 August 1932; Ellis, above n 55, Appendix C, 300–301. See Section 5, 'Agriculture, Labour and Phosphate in the Pacific' in Chapter 3, 'From Protectorate to Mandate, 1920'.
[66] *Phosphates in Morocco (Italy v France) (Judgment)* [1938], PCIJ, ser A/B74, 4.
[67] Ibid 7.
[68] Secretariat of the League of Nations, *The Aims, Methods and Activity of the League of Nations* (Office de Publicité, 1935), 114.
[69] Van Maanen-Helmer, above n 32, 237.

causation to Hughes' aggressive pursuit of Nauru understated the influence of South Africa, and General Smuts in particular, on the compromise reached during the Versailles negotiations; however it accurately identified the connection between the British Dominions' policies of racial supremacy in South West Africa and the Pacific and the development of the C Mandate.[70]

The connection between mandatory monopolisation of resources in the C Mandates and the racial policy of Australia had been drawn by Japan during the Versailles negotiations themselves. Japan had been allocated the former German territories north of the equator, including the Marshall Islands and the Caroline Islands, and reconstituted as the C Mandate of the Islands North of the Equator.[71] Yet during negotiations, Japanese delegate Makino Nobuaki had protested the absence of an obligation of economic equality for the C Mandates in the drafting of Article 22, noting that Hughes' arguments against the application of the open door principle in the occupied German territories of the Pacific were not commercial, but racial: unable to secure outright territorial annexation of New Guinea and Nauru, Hughes had insisted on rights of commercial exclusion in the territories as security against Asian immigration.[72] From 1920, the tension between the two mandatory powers was only to get worse: Japan and Australia shared maritime borders where the C Mandates of New Guinea, Nauru, and the Islands North of the Equator met, but across which commercial activity could no longer freely pass.

4. The co-existence of mandates and protectorates: the interwar international

Internationally, the interwar period was marked by the continuing diversity of administrative arrangements within and between the European empires. The mandate system applied only to the former German and Ottoman territories, and therefore existed alongside the imperial protectorates, dependencies and colonies that had existed prior to the War of 1914-1918. This heterogeneity of administrative form produced odd juxtapositions in which one imperial

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[70] See section 11 'Internationalisation, the mandatory principle and the Peace Treaty' in Chapter 3, 'From Protectorate to Mandate, 1920'.

[71] Council of the League of Nations, *Mandate for the German Possessions in the Pacific Ocean Lying North of the Equator*, 17 December 1920 (Jan–Feb 1921) *League of Nations Official Journal* 87. See section 12 'The Nauru Island Agreement of 1919' in Chapter 3, 'From Protectorate to Mandate, 1920'.

[72] 'Japan feels strongly in this matter…She sees herself excluded on an attenuated legal quibble from these very islands, in a way which Germany never attempted. It really is not a good demonstration of the benefits of the era of mutual helpfulness which she supposed to have been inaugurated by the Covenant of the League of Nations'. Baty, above n 26, 121. Also George H Blakeslee, 'The Mandates of the Pacific' (September 1922) *Foreign Affairs*, 98, 101; Van Maanen-Helmer, above n 32, 34.

power administered two adjacent territories under different administrative structures, one subject to League oversight, the other not.[73] In the Pacific, the British protectorate of the Gilbert and Ellice Islands existed adjacent to the British Mandate of Nauru. The Australian Territory of Papua existed adjacent to the Australian Mandate of New Guinea. In Africa, German Togo and German Cameroon had each been divided between the British and the French empires. The B Mandate of British Togo existed adjacent to the British protectorate of the Gold Coast, and the B Mandate of French Togo existed adjacent to the French colony of Dahomey, in the federation of French West Africa.[74] The B Mandate of British Cameroon existed adjacent to the British protectorate of Nigeria. German East Africa, meanwhile, had been divided between Belgium and Britain. The Belgian B Mandate of Ruanda-Urundi existed adjacent to the colony of Belgian Congo, and the British B Mandate of Tanganyika existed adjacent to the protectorate of British East Africa, later British Kenya.

This administrative heterogeneity attracted many scholarly attempts to settle a coherent juridical taxonomy of empire that provided reasons for the inconsistencies between internationalised territory and imperial territory. The tension between attempts at the international level to articulate a coherent body of principles for the mandate system and attempts at the imperial level to articulate a coherent internal structure attracted significant attention.[75] Within the British empire, the co-existence of A, B and C Mandates, Dominions, protectorates and colonies proved a fertile jurisprudential problem. The development of the international status of the British Dominions of Canada, New Zealand, South Africa and Australia after the First World War was accompanied by shifting interpretations of the nature of imperial relation, the gradual renaming of the British 'empire' as the British 'Commonwealth of Nations', and a surge in histories of British imperialism.[76] The Imperial Conferences that had begun in the 1880s continued to provide a platform for the Dominions

[73] Evans, above n 30, 389.
[74] Ralph Bunche wrote his PhD dissertation on the contrasting administrative systems of French Togoland and Dahomey, submitted to Harvard University in 1934. Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press, 2015), 323.
[75] Baty, above n 26; also Evatt, above n 29.
[76] See for example H *Duncan Hall, The British Commonwealth of Nations: A Study of its Past and Future Development* (Methuen & Co Ltd, 1920); Manfred Nathan, *Empire Government: An Outline of the System Prevailing in the British Commonwealth of Nations* (Harvard University Press, 1930); Shankat Anant Desai, *Constitutional Law of England, Colonies, Dominions, and India* (Tatva Vivechanka, 1932); and Royal Institute of International Affairs, *The British Empire: A Report on its Structure and Problems* (Oxford University Press, 1937).

to assert their claims for greater autonomy with respect to foreign affairs.[77] Following the Dominions' involvement in the Versailles negotiations, they were broadly recognised as having attained international personality.[78] At the Imperial Conference of 1923, the Imperial government agreed that the practice of consultation with Dominion governments on matters of defence begun in the late nineteenth century had advanced to the status of a right to be informed in advance of any prospective treaty negotiations with foreign states.[79] It was further agreed that the Dominions would not be bound by any new treaties without executive signature and legislative ratification.[80] At the Imperial Conference of 1926, this shift in the status of the Dominions toward full external sovereignty was confirmed by a new definition: the Dominions were declared to be 'autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations'.[81] At the same time, the declared principle of equal status was acknowledged as not entirely reflected in practice; the Imperial government still exercised a catalogue of *ad hoc* executive, legislative and judicial powers over the Dominions.[82]

As the international status of the Dominions took on clearer legal definition, the status of the other British imperial territories remained vague. The 1926 Imperial Conference declared of the British empire that the 'widely scattered parts have very different characteristics, very different histories, and are at very different stages of evolution; while, considered as a whole, it defies classification and bears no real resemblance to any other political organisation which now exists or has ever yet been tried'.[83] The Royal Institute of International Affairs, in its 1937 report on the 'structure and problems' of the British empire, described the 'colonial

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[77] Arthur Barriedale Keith, 'Notes on Imperial Constitutional Law' (1924) 6 *Journal of Comparative Legislation and International Law* 135, 135–136; also generally Robert MacGregor Dawson (ed), *The Development of Dominion Status 1900–1936* (Oxford University Press, 1937).

[78] See section 11, 'Internationalisation, the mandatory principle and the Peace Treaty' in Chapter 3, 'From Protectorate to Mandate, 1920'.

[79] For an extended treatment of the development of international status of the Dominions, see P J Noel Baker, *The Present Juridical Status of the British Dominions in International Law* (Longmans, Green and Co, 1929).

[80] Ibid.

[81] The Summary of Proceedings of the 1926 Conference is reproduced in Arthur Barriedale Keith, 'The Imperial Conference 1926' (1927) 9 *Journal of Comparative Legislation and International Law* 69. See also Arthur Barriedale Keith, *The Sovereignty of the British Dominions* (Macmillan and Co. Limited, 1929).

[82] The Summary of Proceedings goes on to state that '(e)xisting administrative, legislative, and judicial forms are admittedly not wholly in accord with the position described…' See Arthur Barriedale Keith, 'The Imperial Conference 1926', above n 81.

[83] Ibid.

empire' beyond the Dominions and India – which retained its irreducible status in British imperial law - as consisting of Crown colonies, protectorates and mandated territories, each defined by source of legal authority. [84] The Crown colonies were those claimed under the law of nations via conquest, cession, occupation or treaty; the protectorates were those claimed under the *Foreign Jurisdiction Acts*; and the mandated territories, those allocated by the League of Nations.[85] On this account, the heterogeneity of administrative form within the colonial empire was due to the differential stages of 'constitutional development'.[86] Along similar lines, Sir Cecil Hurst, British lawyer and judge on the Permanent Court of International Justice, assessed the British empire in its entirety as a political rather than a juridical entity.[87] However, Hurst's was indicative of a subtler trend. As the relationship between the Dominions and the Imperial government was increasingly framed as a constitutional one, the relationships the 'non-self-governing units of the Empire' and the 'self-governing units' - here including both Britain and the Dominions – was held to exist in the realm of international politics, rather than in the realm of constitutional jurisprudence.

5. The 'colonial question' and the failing legitimacy of the League of Nations

By the 1930s, such disjunctures between the register of international legal principle and the register of political fact were coming to characterise the international arena. The inconsistencies that the mandate system produced in imperial administrative practice were but one theme in a growing list of critiques of the principles and activity of the League itself. In 1935, the League's list of 'States, Colonies, Protectorates, Overseas Territories and Territories under Suzerainty or Mandate' included 69 states and at least 118 'territories'.[88] However the legitimacy of both the territorial settlement reached at Versailles and its protection via the Covenant was increasingly criticised by Japan, Italy and Germany as serving the material interests of the Allied Powers, under a thin veil of internationalist principle.[89] The global economic depression of the late 1920s and early 1930s exacerbated the antagonism of the 'dissatisfied Powers' toward the material benefit that Britain, France

[84] Royal Institute of International Affairs, above n 76, 133.
[85] Ibid.
[86] Ibid 135.
[87] Cecil B Hurst, 'British Empire as a Political Unit under International Law' in Harris Foundation, *Great Britain and the Dominions* (Chicago University Press, 1928), 3–32.
[88] H Duncan Hall, *Mandates, Dependencies and Trusteeship* (Stevens & Sons Limited, 1948), 44; League of Nations Secretariat, above n 68, 220.
[89] Royal Institute of International Affairs, above n 76, 251–253.

and the United States (and to a lesser extent Belgium and Portugal) extracted from their imperial territories, both within and outside the mandate system.[90] As the political equilibrium struck in 1919 increasingly wavered and the legitimacy of the mandate principle came under scrutiny, imperialism itself came under ideological attack from a range of political movements, including the Marxist-Leninism championed by the post-revolutionary state in the Soviet Union, the civil disobedience of the Indian nationalist movement led by Mohandas K. Gandhi, and the pan-African nationalism of W.E.B Du Bois.[91] Against the proliferation of anti-imperialisms, British internationalists proposed various solutions to the 'colonial question'. The Royal Institute of International Affairs proposed the internationalisation of all imperial territories through the allowance of free trade and submission to League oversight.[92] International historian Arnold Toynbee proposed a readjustment of the Versailles territorial settlement in favour of Germany and to a lesser extent Italy and Japan, a proposal subsequently labelled 'colonial appeasement'.[93]

The stability of the League was fatally undermined by the successive withdrawals of Germany, Japan and Italy from 1933. Germany had joined the League in 1926 during the Weimar period with the support of German liberal internationalists including Foreign Minister Gustav Stresemann and jurist Hans Wehberg.[94] However many German jurists shared Carl Schmitt's assessment that the advent of the League marked not the rise of internationalism, but the ascendance to global hegemony of the United States.[95] Germany's involvement with the League ended abruptly in October 1933. From the mid-1920s, the rationale on which German and Ottoman colonial territories had been relinquished under Article 119 of the Versailles treaty was openly questioned within Germany. German lawyer and statesman Dr. Heinrich Schnee, the last Governor of German East Africa, wrote at

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[90] Pedersen, above n 74, 298.

[91] On Soviet anti-imperialism, see V L Lenin, *Imperialism: The Highest Stage of Capitalism* (Progress Books, first published 1916, 1970 ed) and Anthony Brewer, *Marxist Theories of Imperialism: A Critical Survey* (Verso Books, 2nd ed, 1990). On the anti-imperialism of Gandhi, see M K Gandhi, *Hind Swaraj and Other Writings* (Anthony J Parel ed, Cambridge University Press, 1927); cf Ashwin Desai and Goolam Vahed, *The South African Gandhi: Stretcher-Bearer of Empire* (Stanford University Press, 2015). On the pan-Africanism of W E Burghardt du Bois, *The Souls of Black Folk: Essays and Sketches* (A C McClurg & Co, 2nd ed, 1903); and Christopher Gevers, 'An Intellectual History of Pan-Africanism and International Law', PhD thesis in progress at Melbourne Law School.

[92] Royal Institute of International Affairs, above n 76, 265–268.

[93] Arnold Toynbee, 'Peaceful Change or War? The Next Stage in the International Crisis' (1936) 15 *International Affairs* 1, 26–56; and Pedersen, above n 74, 326–329.

[94] For a recent account of Germany's involvement in the League, and particularly in the PMC, Sean Andrew Wemper, 'From Unfit Imperialists to Fellow Civilizers: German Colonial Officials as Imperial Experts in the League of Nations, 1919–1933' (2016) 34 *German History* 1, 21–48.

[95] See G L Ulmen, 'Introduction' in Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Telos Press Publishing, 2006), 16–19.

length on the 'lie of colonial guilt', refuting the Allied Powers' condemnations of German colonial administration in Africa as more barbaric than the colonial administration of the other European powers.[96] On Schnee's reckoning, justifications of the confiscation of German colonies as protecting the 'welfare of the natives' against the abuses of German rule were duplicitous; the objective of the mandate system was territorial annexation, barely dressed up with the weak obligation of self-reporting to a powerless PMC.[97] Schnee's strident critique of the imperial objectives of the mandate system found ironic support in the arguments put forward by proponents of the system. In her scholarly exposition on the regime, van Maanen-Helmer had concluded that mandates were preferable to the old system of 'economic imperialism', as 'it would no longer be necessary for a Power to conquer a territory and secure political control over it in order to benefit by its material resources'.[98] The Secretariat of the League itself argued that the objective of the mandate system was to enable the extraction of material resources of a territory to the 'advantage of both colony and home country':

> 'formerly, a good colonial administration was deemed to be that which procured the greatest economic advantages for the home country without sacrificing the future. The standard of good colonial administration is now that, while facilitating trade between the colony and the home country to the advantage of both, the administration should take the greatest care of the native population…'.[99]

In Germany, such justifications were met with the indignance of Schnee. In October 1933, nine months after Adolf Hitler was appointed to the office of Chancellor by President von Hindenburg, Germany withdrew abruptly from the League without giving the requisite two years' notice.[100]

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[96] Dr Heinrich Schnee, *German Colonization Past and Future: The Truth about the German Colonies* (George Allen and Unwin Ltd, 1925); also section 10 'Nauru, the European war and Australian 'sub-empire' in the Pacific' in Chapter 3, 'From Protectorate to Mandate, 1920'.

[97] Schnee, above n 96, 153–154. See also G L Steer, *Judgment on German Africa* (Hodder and Stoughton Ltd, 1939), 24–35.

[98] Van Maanen-Helmer, above n 32, 202.

[99] League of Nations Secretariat, above n 68, 115. This position echoed the concept of the 'dual mandate' espoused by former Governor General of Nigeria and British representative on the PMC, Frederick Lugard. See Frederick Lugard, 'Conclusion: The Value of British Rule in the Tropics to British Democracy and to the Native Races' in *The Dual Mandate in British Tropical Africa* (William Blackwood and Sons, 1922), 606–620.

[100] League of Nations Secretariat, 'Notification by the German Government of its Intention to Withdraw from the League of Nations' (January 1934) *League of Nations Official Journal* 16.

Japan's ambivalence toward the League was largely a response to the League's ambivalence toward Japan.[101] Japan's failed attempt to include a provision on racial equality in the Covenant in 1919 coloured much of Japanese engagement with League activity, including Japan's continued protest against Article 22's silence on economic equality in the C Mandates.[102] This tension came to a head with Japan's escalation of its military presence in mainland Manchuria with the institutionalisation of the Manchukuo regime.[103] With Japan a member of the Council of the League, the unanimity rule that governed decision-making created an impasse on the 'Manchurian question', resolved only by Japan's announcement in 1933 of its intention to withdraw from the League altogether.[104] The islands comprising the C Mandate of the Islands North of the Equator, however, remained in Japanese control, adjacent to the Australian controlled C Mandate of New Guinea.[105] In October 1935, Italy invaded Abyssinia, which in 1923 had itself been admitted as a Member of the League.[106] Italy justified its breach of the prohibition of aggression between League Members by refusing to accept Abyssinia's equality.[107] Coming after the Manchurian crisis, the Italian invasion of Abyssinia placed significant pressure on the League to defend the mandate system as fundamentally different to the territorial annexation engaged in by Japan and Italy.[108] This pressure was sharpened by the presence of the Italian Marquis Theodoli on the PMC.[109] However the League prevaricated in response to the Italian invasion of Abyssinia. Rather than enforcing Article 15 of the Covenant, which stipulated that an act of war against one Member would be deemed an act of war against all, the Council adopted a

[101] For an extended account of Japan's involvement with the League, see Thomas W Burkman, *Japan and the League of Nations: Empire and World Order 1914–1938* (University of Hawai'i Press, 2008).
[102] On Japan's proposal at Versailles, see Naoko Shimazu, *Japan, Race and Equality: The Racial Equality Proposal of 1919* (Routledge, 1998).
[103] League of Nations Secretariat, 'Fifth Meeting (Private, then Public)' (December 1932) *League of Nations Official Journal*,1870 *et seq*.
[104] League of Nations Secretariat, 'Notification by the Japanese Government of its Intention to Withdraw from the League of Nations' (May 1933) *League of Nations Official Journal*, 657–658. See generally Ian Nish, *Japan's Struggle with Internationalism*: *Japan, China and the League of Nations, 1931–1933* (Kegan Paul International, 1933).
[105] Pedersen, above n 74, 290.
[106] League of Nations, 'Report of the Council under Article 15, Paragraph 4 of the Covenant submitted by the Committee of the Council on October 5th and adopted by the Council on October 7th, 1935' (November 1935) *League of Nations Official Journal*, 1605 *et seq*. For an extended treatment of this issue, see Rose Parfitt, 'Empire des Nègres Blancs: The Hybridity of International Personality and the Abyssinia Crisis of 1935–6' (2011) 24 *Leiden Journal of International Law* 849.
[107] League of Nations, 'Report of the Council under Article 15', above n 106. See also Parfitt, above n 106.
[108] Pedersen, above n 74, 297.
[109] Ibid.

recommendation that Abyssinia be placed under the mandatory administration of the League itself – a proposal roundly rejected by both Italy and Abyssinia.[110]

The legitimacy of the mandate system was further undermined by open contradictions in the British A Mandate for Palestine, which on its face could be interpreted to support both Jewish and Arab nationalist claims to the former Ottoman territory.[111] Although the Mandate for Palestine did not explicitly contemplate the creation of a Jewish state, it incorporated the language of the 1917 Balfour Declaration in providing that Britain was responsible for 'placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home', 'facilitat(ing) Jewish immigration', and encouraging 'close settlement of Jews on the land'.[112] At the same time, the Mandate included an obligation to ensure 'that the rights and position of other sections of the population are not prejudiced', a provision repeatedly invoked by Arab nationalists in petitions to the PMC protesting dispossession of land under British rule.[113] The seizure of power in Germany by the Nazis accelerated the immigration of European Jews to Palestine, where British policy supported the sale of land to Jewish people.[114] Increasingly violent political protest in Palestine could not be resolved via recourse to League principles of internationalism and self-government, which could be interpreted to support both Jewish and Arab causes.[115] The PMC adopted an essentially pro-Zionist position by interpreting the explicit obligation placed on Britain in the Mandate to facilitate Jewish immigration as taking precedent over the more amorphously expressed Article 22 objects of 'self-government', 'well-being' and 'development' on which Arab nationalists relied.[116] The PMC's interpretation of Britain's mandatory obligations exacerbated nationalist protests against British imperial rule in other majority Arab territories, including in the protectorate of Egypt, and in the A Mandates of

[110] League of Nations, 'Report of the Council under Article 15, above n 106.
[111] Pedersen, above n 74, 361.
[112] Council of the League of Nations, *British Mandate for Palestine*, signed and entered into force on 24 July 1922, (August 1922) *League of Nations Official Journal* 1007, arts 2, 6.
[113] Ibid.
[114] Neil Macaulay, *Mandates: Reasons, Results, Remedies* (Methuen and Co Ltd, 1937), 160–169; Pedersen, above n 74, 366–368.
[115] See Louis J Gribetz, *The Case for the Jews: An Interpretation of their Rights under the Balfour Declaration and the Mandate for Palestine* (Block Publishing Company, 1930); and League of Nations Secretariat, 'Report from the Executive Committee of the Arab Palestine Congress' (June 1921) *League of Nations Official Journal*, 331–340.
[116] Pedersen, above n 74, 359–366.

Syria and Iraq.[117] By 1936, Arab Palestine was in open revolt against British rule.[118] The British Imperial government responded with military intervention in Palestine, explicitly prohibited by Article 22.[119] From 1936, the PMC and Britain – by the mid-1930s, the strongest proponent of the mandate system amongst the Allied Powers - were in open disagreement.[120]

6. The return to war and the Japanese occupation of Nauru

Between 1939 and 1941, the outbreaks of war that followed Germany's invasion of Poland in September 1939 were confined largely to Europe. In the Pacific, the configuration of imperial administration remained in its pre-war status quo until Japan's attack on Pearl Harbour in Hawai'i in 1941. In mid-1941, the Australian Administration of Nauru sent what was to prove its final Annual Report to the PMC, for the year 1940. On the BPC's own estimate, approximately 1.25 million tons of phosphate had been removed from Nauru under mandate rule from 1920 to 1940.[121] The PMC, however, was never to meet again.[122]

Mining on Nauru continued unabated until December 1940, when two German raiders made an attempt at seizing the island.[123] The German offensive succeeding in sinking three of four BPC vessels moored off the coast, and then in bombarding the phosphate cantilever, the largest piece of infrastructure on the island, and setting alight the BPC's oil tanks, used to run the electricity plant.[124] By early 1942, Nauru Administrator Lieutenant Chalmers had evacuated all Europeans from the island except a core contingent of five, and all BPC assets that could be dismantled were either buried on the island or shipped to Melbourne.[125] Around 390 Chinese labourers were also evacuated to Australia, leaving around 190 Chinese and 150 Gilbertese BPC labourers on the island without support.[126] The abrupt halt in export of Nauruan phosphate supply caused a sharp rise in the phosphate price in Australia, as

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[117] See generally Usha Natarajan, 'Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty' (2011) 24 *Leiden Journal of International Law* 799.
[118] Neil Caplan, *The Israel-Palestine Conflict: Contested Histories* (Wiley-Blackwell, 2009), esp Chapter 5, 'Collapse of the Mandate: Rebellion, Partition, White Paper, 1929–1939'; Royal Institute of International Affairs, 'British Policy in Palestine, 1937–8 (1938) 15(23) *Bulletin of International News*, 3–7.
[119] Pedersen, above n 74, 385–393.
[120] Ibid 373–384.
[121] Albert Ellis, *Mid-Pacific Outposts* (Brown and Stewart Limited, 1946), 8.
[122] Pedersen, above n 74, 395.
[123] 'Raider Shells Nauru Island' *The Australian Worker* (Sydney) 1 January 1941, 8.
[124] Ellis (1946), above n 121, 11–15.
[125] 'Evacuation of Nauru and Ocean I', Courier Mail (Brisbane) 10 March 1942, 3; ibid 19.
[126] Ellis, above n 121, 140; Williams and Macdonald, above n 4, 315.

primary producers were subjected to international market rates for the first time in twenty years. The question of phosphate prompted lengthy debates in federal Parliament over whether the government should subsidise the difference, in order to sustain the agricultural industry that had come to depend on the Nauru price.[127]

In December 1941, the Japanese attack on Pearl Harbour was followed by a rapid succession of assaults across the Pacific, all mounted from the Japanese mandated islands.[128] The US-held island of Guam was attacked in January 1942, followed by Rabaul in the Australian Mandate of New Guinea.[129] With the Australian withdrawal from the Mandate of New Guinea south into the Australian territory of Papua, New Guinea was effectively under Japanese control from April 1942.[130] In June 1942, Japanese troops attacked Nauru and Banaba; and on 23 August 1942, Nauru was officially surrendered to Japan.[131] Only limited research into the Japanese occupation of Nauru has been undertaken, both in Japanese and in English.[132] What has been documented goes little beyond statistics, although post-war testimony given by Nauruans indicated that the five Australian officials who remained on Nauru were executed by Japanese officers soon after the occupation.[133] Over 300 Japanese troops were initially stationed in Nauru in 1942, and over the course of the next two years, that number increased to over 2,600.[134] In addition to the troops, over 70 officials of the Japanese South Seas Development Company were installed to run the phosphate plant, and over 1,000 Japanese construction workers were shipped to Nauru to construct an airfield.[135]

Yet with Japanese supply lines from the mandated islands increasingly blockaded by Allied forces and the phosphate plant practically inoperable, conditions on Nauru deteriorated rapidly.[136] As the Australian Parliament debated agricultural subsidies, food supply on Nauru dropped sharply, with an unprovisioned population of nearly 3,000 Japanese in addition to

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127 See for example Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 25 June 1941 (MP Thomas Marwick, WA, second reading speech of Supply Bill No 1 (1941–1942)). 'Farmers Urge Local Search for Phosphate, *The Land Sydney* (Sydney) 13 March 1942, 1.
128 Stewart Firth, 'The War in the Pacific' in Donald Denoon with Stewart Firth, et al (eds), *Cambridge History of the Pacific Islanders* (Cambridge University Press, 2008), 294–295.
129 Ibid 294.
130 Ibid.
131 Ellis, above n 121, 24–25.
132 Yuki Tanaka, 'Japanese Atrocities on Nauru during the Pacific War: The Murder of Australians, The Massacre of Lepers and the Ethnocide of Nauruans' (2010) 45(2) *The Asia-Pacific Journal*, 1–19.
133 Ibid 4–6.
134 Ibid 3.
135 Ibid 2–3; Ellis, above n 121, 25.
136 Firth, above n 128, 299.

over 2,000 Nauruans and around 180 Chinese labourers.[137] The Japanese army's response to the food shortage was to relocate the majority of Nauruan men and some Nauruan women to Truk Atoll, the site of Japan's military base in the Japanese mandated islands.[138] Between 1942 and 1943, 1,200 Nauruans were moved from Nauru to Truk, where food supply was initially better but quickly run down to indigenous atoll flora and fauna.[139] On Truk, the malnourished Nauruans were made to work, many contracting dysentery, tuberculosis and yaws.[140] By the time the Nauruans were returned to Nauru on 31 January 1945 after the Japanese surrender, over 460 had died, most of starvation.[141]

From January 1944, the United States was reversing the Japanese offensive in the Pacific.[142] Over the following year, the US Army forced Japanese troops back out of pre-war Allied territories, and occupied the Japanese mandated islands north of the equator.[143] In February 1944, the Americans bombarded the Japanese military base at Truk, severely damaging Japanese capability in the Pacific.[144] Nauru, too, was bombarded by US planes for a year before it was retaken.[145] As the Japanese offensive was reversed, calls to retake Nauru and recommence phosphate production emerged immediately in the media and in Parliament; yet Nauru was left in Japanese hands, as the US prioritised the occupation of Truk and the rest of the Japanese mandated islands.[146] Following the end of the war in Europe in May 1945, the Australian government and the BPC entreatied the British High Commissioner to prioritise the retaking of Nauru, so that production of phosphate could resume.[147] In early

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137 Ellis, above n 121, 29.
138 Truk is now known as Chuuk. On the internment of Nauruans, see Nancy Viviani, *Nauru: Phosphate and Political Progress* (Australian National University Press, 1970) 82–87.
139 Tanaka, above n 132, 11–13.
140 Ibid 13.
141 Williams and Macdonald, above n 4, 342.
142 On the Japanese-United States conflict, see Saburo Ienaga, *Japan's Last War: World War II and the Japanese, 1931–1945* (Frank Baldwin trans, Blackwell, 1979); and John Costello, *The Pacific War 1941–1945* (Collins, 1931).
143 Firth, above n 128, 296; Williams and Macdonald, above n 4, 329–330.
144 Firth, above n 128, 299.
145 'Large Fires at Nauru', *Tweed Daily* (Tweed Heads) 14 December 1943, 3.
146 'Having regard to the changed position in the South Pacific, and the great need of Australia to-day for phosphatic fertilizers, will the Minister for Commerce and Agriculture state what steps the Government has taken to ensure that supplies of phosphatic rock will be obtainable from Nauru as soon as that island is occupied by the Allies?' Commonwealth of Australia, *Parliamentary Papers,* House of Representatives, 20 July 1944 (Question from Member for Flinders). See also 'Good News: Early Occupation of Nauru', *Albany Advertiser WA* (Albany) 9 March 1944.
147 In May 1945 Labor Minister Ben Chifley, speaking on behalf of Prime Minister John Curtin two months prior to Curtin's death in July 1945, addressed the matter of recommencing the BPC's phosphate operation in the Commonwealth House of Representatives: '(t)he Government has taken an active interest in this matter, because of the great importance to Australia of the phosphate deposits of Ocean Island and Nauru Island. The Prime Minister communicated some time ago with the Prime Minister of Great Britain. He had previously

September 1945, the United States officially handed military control of the Western Pacific south of the Equator to Britain, whilst maintaining its military occupation of Truk and the Japanese mandated islands.[148] The Australian government moved immediately to retake Nauru. On 13 September 1945, Nauru was surrendered by the small Japanese contingent remaining on the island, to an equally small Australian convoy led by Brigadier Stevenson. Amongst the convoy was Albert Ellis, self-proclaimed luminary of the Pacific Phosphate Company and the New Zealand Commissioner on the BPC.[149]

7. The formation of the United Nations and the Trusteeship Council

Four months prior to the Japanese attack on Pearl Harbour in 1941, the renovation of the mandate system of international administration had begun, with the declaration of the Atlantic Charter by British Prime Minister Winston Churchill and US President Franklin D. Roosevelt.[150] In its eight principles, the Atlantic Charter declared that neither Britain nor the US would seek territorial aggrandisement from the war, and that any territorial gains made would be in accordance with the 'freely expressed wishes of the people concerned'.[151] Echoing Woodrow Wilson's Fourteen Points speech of 1919,[152] the Atlantic Charter affirmed a principle of 'open door' trade, defined as 'access, on equal terms, to the trade and to the raw materials of the world which are necessary for…economic prosperity', and a principle of self-government, defined as the 'right of all peoples to choose the government under which they live'.[153] On January 1942, as Japan occupied Guam and Rabaul, the Atlantic Charter was endorsed by 26 nations, including the British Dominions. The 'Declaration of the United Nations' provided the consensus needed to reconstitute the Assembly of the League.[154] In October 1943, as 1,200 Nauruans were interned by the Japanese on Truk Atoll,

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discussed the matter with the British Government, during his visit to that country. My recollection is that the British Government had taken the matter up with the authorities concerned'. Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, 10 May 1945 (Ben Chifley). Also Williams and Macdonald, above n 4, 337–339.

148 Williams and Macdonald, above n 4, 339.

149 Ellis, above n 121, 53–57.

150 *Atlantic Charter*, opened for signature 14 August 1941, ATS 1942(4), reproduced in Royal Institute for International Affairs, *United Nations Documents 1941–1945* (Broadwater Press, 1946), 9–10.

151 Ibid.

152 On Woodrow Wilson's fifth point, see section 11 'Internationalisation, the mandatory principle and the Peace Treaty' in Chapter 3, 'From Protectorate to Mandate, 1920'.

153 *Atlantic Charter*, above n 150.

154 *Declaration by United Nations (Subscribing to the Principles of the Atlantic Charter)*, opened for signature 1 January 1942, ATS 1942(4), reproduced in Royal Institute for International Affairs, *United Nations Documents 1941–1945* (Broadwater Press, 1946), 11.

British and US negotiations with the Union of Soviet Socialist Republics (USSR) and the Republic of China on the terms of a peace settlement resulted in the Moscow Declarations. The Moscow Declarations endorsed the United Nations Declaration and the creation of an international organization to replace the League, 'based on the principle of the sovereign equality of all peace-loving States and open to membership by all such States, large or small, for the maintenance of international peace and security'.[155] As the United States occupied Truk Atoll in May 1944, the Commonwealth Prime Ministers Conference – the successor to the Imperial Conferences commenced in the late nineteenth century – was held in London, and the United Kingdom secured the support of the Dominion governments for the Moscow Declarations.[156]

In July 1944, delegates of 44 nations met at Bretton Woods in New Hampshire to negotiate the general terms of international financial and monetary organisation, resulting in the creation of the International Bank for Reconstruction and Development, and the International Monetary Fund.[157] In October 1944, Churchill, Roosevelt and Stalin met at Dumbarton Oaks Manor in Washington DC to agree on the constitution of the successor to the League, and the principles according to which it would operate.[158] Laying down the general terms of the composition and procedure of a General Assembly, Security Council, International Court of Justice, and Secretariat, the Dumbarton Oaks communiqués omitted any official treatment of the mandates or of colonial territories, focusing instead on 'international peace and security' and 'economic and social co-operation'.[159] In February 1945 at Yalta in the Crimea, with Japan still in occupation of Nauru, Churchill, Roosevelt and Stalin met to agree on the terms of defeat of Germany; and it was resolved to hold the inaugural Conference of the United Nations General Assembly.[160] Rather than opening the 'colonial question' to the General Assembly, it was agreed at Yalta that each of the Allied

[155] *Moscow Conference Declarations*, 19–30 October 1943. Reproduced in Royal Institute for International Affairs (1946), *United Nations Documents 1941–1945* (Broadwater Press, 1946), 13–16.
[156] 'A Great Conference', *The Argus* (Melbourne) 13 May 1944.
[157] *United Nations Monetary and Financial Conference*, 1–22 July 1944, reproduced in Royal Institute for International Affairs, *United Nations Documents 1941–1945* (Broadwater Press, 1946) 28–91.
[158] *Dumbarton Oaks Conference on World Organization*, August 21–October 7, 1944, reproduced in Royal Institute for International Affairs, *United Nations Documents 1941–1945* (Broadwater Press, 1946) 92–104.
[159] See Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011), 49–54.
[160] *Report of the Crimea Conference, 11 February 1945*, reproduced in Royal Institute for International Affairs, *United Nations Documents 1941–1945* (Broadwater Press, 1946) 142–148.

Powers would put forward individual proposals at San Francisco on a system to replace the mandates, and that an *ad hoc* committee would be tasked with deciding between them.[161]

In April 1945, three months after the interned Nauruans had been returned, the United Nations met in San Francisco to settle the drafting of a new Charter to replace the Covenant of the League.[162] As planned, a technical committee was formed to decide on five proposals put forward by the United States, the United Kingdom, China, France, and Australia, for an international system of 'trusteeship' to replace the mandates.[163] Whereas all five drafts contemplated 'self-government' of subject peoples as the aspiration of a trusteeship system, the definition of self-government remained disputed. So too did the question of whether trusteeship principles would apply to the former mandates only, or to both mandates and imperial territories.[164] The Chinese proposal described the objective of trusteeship as 'independence or self-government' - the only proposal of the five to include reference to independence.[165] In contrast, the UK proposal described 'self-government in forms appropriate to the varying circumstances of each territory', reflecting Churchill's concern that the trusteeship system would be deemed to apply to the entirety of the British empire.[166]

The compromise between the five proposals reached by the *ad hoc* committee - later renamed the Trusteeship Council, the sixth committee of the United Nations - was to maintain the categorical distinction between former mandates and other imperial territories, whilst stipulating administrative obligations for both, reconstituted as 'trust territories' in the former instance, and 'non-self-governing territories' in the latter.[167] A general set of administrative obligations would apply to all non-self-governing territories, including colonies and protectorates; and an additional set of more specific obligations would apply to all trust

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[161] Charmian Edwards Toussaint, *The Trusteeship System of the United Nations* (Stevens & Sons Limited, 1956), 18–19.
[162] Australia Delegation to the United Nations Conference on International Organization, 1945, *United Nations Conference on International Organization, held at San Francisco, USA, from 25th April to 26th June, 1945: Report by the Australian Delegates* (Commonwealth Government Printer, 1945).
[163] Toussaint, above n 161, 20; Yassin El-Ayouty, *The United Nations and Decolonization: The Role of Afro-Asia* (The Hague: Martinus Nijhoff, 1971), 17–22.
[164] Ibid 20; R N Chowdhuri, *International Mandates and Trusteeship Systems: A Comparative Study* (Martinus Nijhoff, 1955), 71–76.
[165] Toussaint, above n 161, 21. Chowdhuri attributes the introduction of the language of independence to the Indian delegation at San Francisco. Chowdhuri, above n 164, 234.
[166] Toussaint, above n 161, 21. As Pahuja notes, Churchill himself was loathe to submit the British empire to international oversight at all. Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011), 50.
[167] Hall, above n 88, 277 *et seq*.

territories.[168] International trusteeship obligations were to apply to the former mandates, as well as to additional territories confiscated from Germany, Japan and Italy; however, transition from mandate to trusteeship would in each instance require a renovated agreement between the new UN and the administering power.[169] This mechanism of individual negotiation of trusteeship terms obviated the need for a hierarchical classification of territories under international oversight, as had proven the major outcome of mandate negotiations two decades earlier.[170]

In another contrast to the Versailles negotiations, the issue of military fortification of territories under international trusteeship proved a major point of disagreement between the Allies, and particularly between the United States and the Soviet Union. Whereas the prohibition of fortification in the mandates had proven uncontroversial in 1919, rapid developments in aerial warfare had by 1945 made the matter of military utilisation of mandated territory a point of dispute.[171] The United States insisted on continued occupation for military purposes of the former Japanese C Mandate of the Islands North of the Equator.[172] The Soviet Union held that military fortification of territories under international administration was tantamount to the territorial annexation that had been disavowed in the Atlantic Charter.[173] Arguing that the Dumbarton Oaks imperative of 'international peace and security' supported its case for military fortification of trust territories, the US, French and Chinese delegations proposed that two types of trust be created – 'strategic', and 'non-strategic'.[174] With respect to 'strategic trusts', military fortification would be permitted. The deal struck with the Soviet Union was that if strategic trusts were to be allowed, then oversight would be exercised by the Trusteeship Council reporting to the Security Council, and not to the General Assembly as would be the case for 'non-strategic' trusts.[175]

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[168] Toussaint, above n 161, 39; Hall, above n 88, 285.
[169] Chowdhuri, above n 164, 76–82.
[170] See section 11 'Internationalisation, the mandatory principle and the Peace Treaty' in Chapter 3, 'From Protectorate to Mandate, 1920'.
[171] Chowdhuri, above n 164, 60–61.
[172] Ibid 41–42.
[173] Huntington Gilchrist, 'The Japanese Islands: Annexation or Trusteeship?' (July 1944) *Foreign Affairs* 635, 642. Within the US, however, the political debate include arguments for annexation based on conquest, as had been insisted upon by Australian Prime Minister Billy Hughes during the Versailles negotiations twenty years earlier. See ibid 41–42.
[174] Toussaint, above n 161, 25–26.
[175] William Rappard, Swiss professor of law and representative on the Permanent Mandates Council, noted in 1946 that the US invention of the 'strategic trust' paralleled the C Class Mandate in operating as a political compromise between 'disinterested humanitarianism and acquisitive nationalism': 'as the Mandates System, so the Trusteeship was also born of a compromise between disinterested humanitarianism and acquisitive

The outcomes of the trusteeship negotiations at San Francisco thus resulted in Chapters XI and XII of the Charter, respectively titled 'Declaration Regarding Non-Self-Governing Territories' and 'International Trusteeship System'.[176] In Chapter XI, Article 73 stipulated general principles for the administration of non-self-governing territories, which was stated to apply to all UN members which 'have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government'.[177] Administering authorities were exhorted to 'recognize the principle that the interests of the inhabitants of these territories are paramount', and to 'accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories'.[178] With respect to the principle of self-government, however, the success of the United Kingdom's attempt to attenuate the obligation to promote self-government in the British empire via reference to local 'circumstance' is evident. Article 73 placed on UN members the obligation 'to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement'.[179]

The articulation of the trusteeship system in Chapter XII reflects the compromise struck between the five proposals and their competing objectives of military security, free trade, and self-government. The success of the United States with respect to the primary objectives of the trusteeship system is clear: the first objective of the trusteeship system was listed in Article 76(a) as the furtherance of 'international peace and security'.[180] The second objective of self-government listed in Article 76(b) bore the mark of the Chinese insistence on the inclusion of independence as a goal of international administration, whilst again moderating any corresponding obligation through reference to local circumstance: administering authorities were obliged to 'promote the 'political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-

nationalism. But whereas in 1919 the two conflicting urges animated two rival sets of states, today it would seem as if they were fighting for the soul of the same nation'. William Rappard, 'The Mandates and the International Trusteeship Systems' (1946) 61(3) *Political Science Quarterly* 408, 413.

[176] *Charter of the United Nations*, Chapters XI and XII.

[177] Ibid art 73.

[178] Ibid art 73.

[179] Ibid art 73(b).

[180] Ibid art 76(a).

government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned'.[181] The third objective of free trade is included in Article 76(d), and defined as the assurance of 'equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals…without prejudice to the attainment of the foregoing objectives'.[182] Article 76(c) imported the language of human rights into the trusteeship system, defining a fourth objective of trusteeship as the '[encouragement of] respect for human rights and for fundamental freedoms for all'.[183]

The mechanism for accession to the new trusteeship system was laid out in Article 79, which provided that the terms of trusteeship for each territory were to be agreed to by the 'states directly concerned', and approved by the Security Council in the case of a strategic trust, and by the General Assembly in all other instances.[184] Chapter XIII stipulated the functions and powers of the Trusteeship Council. As provided in Article 86, the Council would comprise representatives of all UN Members administering trust territories, all remaining Members of the Security Council, and representatives of as many other Members as required to ensure that the Council was comprised of an equal number of non-trust administering states as trust administering states.[185] The Trusteeship Council was thus not only much larger, but fundamentally different in its constitution.[186] Whereas the PMC had been comprised by and large of European 'experts' in imperial administration sitting in a personal capacity, the Trusteeship Council included representatives of states ideologically opposed to European imperialism, such as the Soviet Union and China, and in non-permanent capacity, states formerly subject to European imperialism.[187] Furthermore, the Council was given more power than the PMC had held. In addition to the PMC's sole functions of receiving reports from mandatory powers and reporting in turn to the Council of the League, the Trusteeship Council was delegated the authority to consider the annual reports of the administering

[181] Ibid art 76(b).
[182]Ibid art 76(d).
[183] Ibid art 76(c). The historiography of the relationship between international law and human rights is a matter of contemporary contention. See Jenny S Martinez, *The Slave Trade and the Origins of International Human Rights Law* (Oxford University Press, 2012); cf Samuel Moyn, *Human Rights and the Uses of History* (Verso Books, 2014).
[184] *Charter of the United Nations*, art 79, 83 and 85.
[185] Ibid art 86.
[186] Toussaint, above n 161, 106–161.
[187] Hall, above n 88, 278–279.

authorities, to accept petitions directly from trust subjects, to visit trust territories to review administration, and to report to the General Assembly.[188]

8. Nauru becomes a Trust Territory

New Zealand was the first mandatory power to propose a trusteeship agreement, submitting a draft for Western Samoa to the UN on 1 January 1946.[189] Over the following eighteen months, as proposed trusteeship agreements for the rest of the mandates were submitted for approval, Australia and South Africa lagged on proposing agreements for New Guinea, Nauru and South West Africa. In San Francisco, South Africa had submitted a memorandum stating its case for territorial incorporation of the C Mandate of South West Africa into the Union of South Africa.[190] The proposal was rejected, however South Africa maintained that despite the demise of the League, existing mandates remained on foot, and that the UN lacked the power to amend terms of mandatory administration without securing the agreement of the Mandatory Power.[191] In the South African Senate after the signing of the Charter, General Smuts made clear that the South African government had no intention of acceding to the trusteeship system: South West Africa would be more efficiently incorporated into the Union of South Africa, as the white population of the Mandate desired.[192] The Australian government's delay in proposing trusteeship agreements for its C Mandates was largely due to its desire to incorporate the administrations of the protectorate of Papua and the mandate of New Guinea into a single administrative unit of Papua and New Guinea, to comprise the entire eastern half of the island of New Guinea plus the islands to the north, still known internationally as the Bismarck Archipelago.[193] Both administrations had been severely disrupted during Japanese occupation. As was the case for the British in relation to Togo, and the French in relation to Cameroon, the Australian government's policy was to seek administrative union of the former Mandate with the adjacent protectorate, whilst limiting the application of trusteeship obligations to the former mandate only. Australia's gambit was to accept as inevitable the independence of New Guinea, whilst seeking

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[188] *Charter of the United Nations*, art 86.
[189] Chowdhuri, above n 164, 72.
[190] Solomon Slonim, *South West Africa and the United Nations: An International Mandate in Dispute* (Johns Hopkins University Press, 1973), 75–78.
[191] *Summary of Fourth Meeting of Committee II/4*, UNCIO Docs, vol 10, 439; cited in Toussaint, above n 161, 32.
[192] Chowdhuri, above n 164, 44.
[193] The Commonwealth government had contemplated the joinder of the two administrations from at least as early as 1939. 'Papua and New Guinea: Joint Administration Question', *The West Australian* (Perth) 16 February 1939. The joinder was finalised in the New *Papua and New Guinea Act 1949* (Cth).

incorporation of Papua into Queensland, an annexation first attempted in 1884.[194] The Australian government opted to proceed in two stages. A trusteeship agreement for New Guinea was approved by the UN in December 1946; and in 1949, territory and protectorate were incorporated via domestic legislation into the singular Territory of Papua and New Guinea.[195] The western half of the island of New Guinea, also occupied by the Japanese during the war, was still recognised internationally as the colonial territory of the Dutch East Indies; however the declaration of Indonesian independence in 1945 on the withdrawal of the Japanese placed the legitimacy of the international status of the western half of New Guinea into a limbo which remains unresolved.[196]

In September 1947, a month after the legal partition of British India into the independent Union of India and Dominion of Pakistan, Australia submitted the draft Nauru Trusteeship Agreement to the Trusteeship Council for approval.[197] Expressed as a continuation of the Mandate for Nauru, the proposed trusteeship agreement was the only one to nominate a group of three states as Administering Authority. Article 4 of the draft indirectly incorporated the Nauru Island Agreement into the Trusteeship Agreement, thus effectively excluding the BPC's phosphate operation from administrative and thus international oversight:

> '(t)he Administering Authority will be responsible for the peace, order, good government and defence of the Territory, and for this purpose, in pursuance of an Agreement made by the Governments of Australia, New Zealand and the United Kingdom, the Government of Australia will on behalf of the Administering Authority and except and until otherwise agreed by the Governments of Australia, New Zealand and the United Kingdom continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory'.[198]

With respect to trusteeship obligations stipulated in Article 76(b) of the Charter to promote the 'progressive development toward self-government or independence', Article 5 of the Nauru draft agreement emphasised the caveat of local circumstance insisted upon by the

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[194] Chowdhuri, above n 164, 254; Hall, above n 88, 83.
[195] Commonwealth of Australia, *Papua and New Guinea Act* (No 9 of 1949).
[196] The United Nations Temporary Executive Authority in West Irian administered the region from 1962 to 1963, after which administrative control was handed to the Indonesian government. The Free Papua Movement or *Organisasi Papua Merdeka*, formally established in 1965 to seek indigenous independence, remains banned by the Indonesian government. In 2003, the Indonesian government separated the territory into Papua and West Papua. See generally Richard Chauvel, *Essays on West Papua: Volume One* (Working Paper Series 120, Monash University, 2003).
[197] United Nations Department of Public Information, 'Trusteeship for Nauru Debated: Fourth Committee Examines Draft Agreement', (October 1947) 16 *United Nations Weekly Bulletin*, 492–494.
[198] *Trusteeship Agreement for the Territory of Nauru*, Australia–New Zealand–United Kingdom of Great Britain and Northern Ireland, signed and entered into force 1 November 1947, 138 UNTS 4, art 4.

British in San Francisco, placing on the Administering Authority the responsibility only for 'assur(ing) the inhabitants of the Territory, as may be appropriate to the particular circumstances of the Territory and its peoples, a progressively increasing share in the administrative and other services of the Territory'.[199]

The Trusteeship Council formed a sub-committee to review the draft, chaired by Awni Khalidy of Iraq, and including representatives of India and Yugoslavia.[200] Australian Deputy Prime Minister and Minister for Foreign Affairs H.V. Evatt, who had taken part in the drafting of the UN Charter, presented the draft.[201] Evatt defended the arrangement between the Administration and the BPC provided for in the Nauru Island Agreement as in the interests not only of the three partner governments, but also of Nauru and the world.[202] The agricultural sectors of Australia and New Zealand were dependent on BPC phosphate, and in turn, Australia and New Zealand exported wheat and dairy to the world: '(t)hus Nauru under Australian administration is making an important contribution to the world's greatest need. This is being done not only without prejudicing the native people but under conditions which assure them an entirely satisfactory standard of living, adequate social services, and an assured future'.[203] The 'conditions' Evatt pointed to as securing an 'entirely satisfactory standard of living' were the provision of education and health programs; and on his account, Nauru's 'assured future' was secured by the Nauru Landowners Phosphate Royalty Trust.

The Soviet representative on the Trusteeship Council, Professor Boris Stein, did not agree with Evatt's logic. According to Stein, Australia's proposed trusteeship agreement for Nauru represented 'a backwards step' toward resuscitation of the mandate system.[204] It failed to articulate clear obligations on how Nauruan involvement in administration would be increased; and in specifying in Article 7 that 'matters of international peace and security' could be taken into account in interpreting trusteeship obligations, the proposed agreement opened the door to the instrumentalisation of Nauru for military purposes in the Pacific.[205]

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[199] Ibid art 5.
[200] United Nations Department of Public Information, 'Trusteeship for Nauru Debated: Fourth Committee Examines Draft Agreement', above n 197, 492.
[201] Evatt was subsequently appointed President of the United Nations General Assembly in 1948. For a recent biography of Evatt and his role in the early years of the United Nations and in Australian politics, see John Murphy, *Evatt: A Life* (New South Publishing, 2016).
[202] United Nations Department of Public Information, 'Trusteeship for Nauru Debated: Fourth Committee Examines Draft Agreement', above n 197, 493.
[203] Ibid.
[204] United Nations Department of Public Information, 'Committee Approves Trusteeship for Nauru: Draft Agreement Calls for Three-Power Administration', (November 1947) 19 *United Nations Weekly Bulletin* 589–590.
[205] Ibid 589–590.

The Yugoslav and Ukrainian representatives on the sub-committee raised related objections: the administrative regime contemplated in the draft trusteeship agreement was 'static' in that it disclosed no real measures of political advancement; and the emphasis on local circumstance limited the trusteeship obligation to nominal rather than substantive promotion of self-government, thereby contradicting the spirit of Chapter XII.[206] Despite the reservations of the Soviet bloc, when the Nauru draft was brought before the General Assembly, it was approved by 46 to 6 votes.[207] On the same day that the Nauru Trusteeship Agreement was approved, the General Assembly passed a motion calling on South Africa to submit a draft proposal for South West Africa, the final of the C Mandates to remain outside the trusteeship system.[208] No draft proved forthcoming.

9. Conclusion

During the mandate period, the ambivalent status of the C Mandates in international law was not resolved. Authorised by the Nauru Island Agreement to exercise mandatory control granted under the Mandate for Nauru, the new Australian Administration built upon the existing order of legal rights and obligations established under German rule with a growing yet still skeletal set of executive ordinances regulating Nauruan life. Whilst Nauruan real property rights continued to be recognised as had been the case in the protectorate period, in 1922 Nauruans were by ordinance prohibited from disposing of their land other than via lease to the BPC, and were paid a nominal royalty, part of which was paid directly in the new Nauru Landowners Phosphate Royalty Trust. The phosphate industry expanded rapidly under the tripartite monopoly of the British Phosphate Commissioners in whom property in Nauruan phosphate, as well as the mining concession, was now purported to vest. Under the terms of the Nauru Island Agreement, the BPC was insulated from administrative oversight, and thus from the oversight of the Permanent Mandates Council and the Council of the League in which, some analyses suggested, joint sovereignty over Nauru was vested. The weak response of the PMC to the Nauruan arrangement reflected both its limited powers under the terms of Article 22 of the Covenant, and the steady delegitimisation of both the mandate system and the League itself over the interwar period.

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[206] Ibid 589.
[207] Ibid 590.
[208] United Nations Department of Public Information, 'Trusteeship and Non-Self-Governing Areas', (December 1947) 24 *United Nations Weekly Bulletin* 767.

At the same time, a guaranteed supply of Nauruan superphosphate at cost price facilitated the conversion of inland regions of Australia otherwise unsuitable for the raising of crops to farmland, and insulated the flourishing Australian agricultural industry from the worst effects of economic depression. The connection between phosphate, food supply and population was framed in Australia as a problem for the White Australia policy, which exacerbated tension between Australia and Japan over the racial motivations behind restricted trade in the C Mandates. The Japanese offensive in the Pacific from 1941, launched from Truk Atoll in the Japanese mandated islands, included the occupation of the Mandates of Nauru and New Guinea. As over a thousand Nauruan men were interned on Truk, negotiations in Europe and the United States resulted in the reconstitution of the League as the United Nations, and the expansion of Article 22 of the Covenant into three Chapters of the new Charter of the United Nations. The transition from mandate to trusteeship status for Nauru was finalised in 1947 with the approval by the Trusteeship Council of the Trusteeship Agreement for Nauru.

Yet as significant as the formation of the United Nations was, the transition in international status from mandate to trust prompted no major alterations in the administrative structure of Nauru. The Nauru Island Agreement that had established the tripartite monopoly over the Nauruan phosphate industry and insulated it from administrative oversight was indirectly incorporated into the Trusteeship Agreement approved by the Trusteeship Council. As will be seen in Chapter 5, however, the transition League to UN, and from mandate to trusteeship system, produced the conditions under which Nauruan independence moved from an effective impossibility to a political inevitability. The transformation of the vague mandatory principle into a codified set of trusteeship obligations - including the promotion of 'self-government or independence' - and the expanded membership of the Trusteeship with significantly increased powers of review undermined the justifications for differentiated treatment of the C Mandates, and with it the international position of both Australia and South Africa as sub-imperial powers.

Chapter 5

From Trust Territory to Sovereign State, 1968

1. Introduction

This chapter traces the impacts on Nauruan administration of the shift to trusteeship and the development of the principle of self-government under the new United Nations. The chapter argues that the shift in status from mandate to trust territory in 1947 provided a conceptual vocabulary through which the Nauruan people were able to negotiate terms of political independence with the Australian government, resulting in the shift from trust territory to sovereign state in 1968; but at the administrative level, the shift into independence as a constitutional Republic precipitated accretions in form that did not dismantle so much as further expand upon the existing structure of governmental relations first instantiated in the late nineteenth century.

The juridification of the concept of international trusteeship after the second World War and the removal of differentiated international status for the C Mandates significantly altered the international context of Australia's administration of Nauru. Firstly, Australia as Administering Authority was now charged with meeting the clearer and broader obligations of trusteeship stipulated in the UN Charter and the Nauru Trusteeship Agreement, in substitution for the ambiguous terms of Article 22 and the Mandate for Nauru.[1] Secondly, in contrast to the mandate system the trusteeship system did not classify a hierarchy of status designations, instead applying the same Charter-based trusteeship principles to all trust territories. As such, the object of self-government – now defined as 'self-government or independence', rather than as the right to choose which imperial power to be governed by, as US President Woodrow Wilson had articulated almost twenty years previously in his Fourteen Points speech[2] – was rendered common to all externally administered territories. The sudden removal of differentiated status for the C Mandates placed their administering powers out of step with the international trend toward political self-determination. Over the

[1] *Charter of the United Nations*, opened for signature 26 June 1945, (entered into force 24 October 1945) Chapter XII 'International Trusteeship System'. United Nations, *Trusteeship Agreement for the Territory of Nauru* (entered into force 1 November 1947) 1947 ATS 8.

[2] See section 11 'Internationalisation, the mandatory principle and the Peace Treaty' in Chapter 3, 'From Protectorate to Mandate, 1920'.

trusteeship period, attempts to continue administering the former C Mandates of South West Africa, the Islands North of the Equator, Western Samoa, Nauru and New Guinea in the same way as during the mandate period attracted international opprobrium, particularly from the Soviet Union and the increasing body of newly decolonised states. South Africa's refusal to bring its administration of South West Africa into the new UN trusteeship system prompted a protracted series of cases in the International Court of Justice that drew international attention to the maintenance of unwanted administrative control in the former C Mandates.[3] The ICJ's decisions in the South West Africa Cases became emblematic of the political divisions in the United Nations system between the old European imperial powers and the newly decolonised states, supported by the Soviet Union and China.

Thirdly, the United Nations Charter included principles of external administration applicable not only to the former mandates, or to territory seized during the Second World War, but to all 'non-self-governing territories', including colonies, protectorates and other forms of imperial administration. The differentiation between mandatory and other forms of external administration lessened as the United Nations General Assembly assumed to itself the power to scrutinise the administration of all 'non-self-governing territories'.[4] In contrast to the interwar period, the former C Mandates were no longer quarantined from the broader push toward decolonisation. Fourthly, the new Trusteeship Council wielded more powers in the United Nations structure than its predecessor, the Permanent Mandates Council, had done in the League. In addition to the PMC's truncated powers of receiving reports and issuing questionnaires to mandatories, and making recommendations to the Council of the League, the Charter of the United Nations gave the Trusteeship Council powers of territorial visitation, which greatly expanded its capacity to criticise administrative practice in the trust territories.[5] Furthermore, the Trusteeship Council reported to the General Assembly, not to the Security Council. As the General Assembly came to be increasingly constituted of post-imperial and post-colonial states, the administering powers' justifications for continued

[3] The series of Advisory Opinions and preliminary hearings in the South West Africa Cases reached a head in International Court of Justice, 'Judgment' South West Africa Cases (*Ethiopia v South Africa*; *Liberia v South Africa (Preliminary Objections)* [1962] ICJ Rep 319, no 46 and 47), 21 December 1962. For a detailed historical account of the South West Africa Cases, see Solomon Slonim, *South West Africa and the United Nations: An International Mandate in Dispute* (Johns Hopkins University Press, 1973).
[4] *Charter of the United Nations*, 'Chapter XI: Declaration regarding Non-Self-Governing Territories'.
[5] Ibid 'Chapter XIII: Trusteeship Council'.

deviations from Charter principles of trusteeship initially met with less tolerant, and then openly critical, institutional responses.

At the local level, the shift to trusteeship status and the development of the concept of international trusteeship placed pressure on Australia as Administering Authority to formalise Nauruan participation in the administrative structure. The renovation of the object of international territorial administration away from the amorphousness of native 'well-being and development' as defined in Article 22 of the Covenant of the League, and toward 'self-government or independence' as provided for in the UN Charter, prompted the formalisation of the Nauruan 'Council of Chiefs' as the Nauru Local Government Council (the 'NLGC'). Although the NLGC lacked substantive administrative power and remained entirely subordinate to the Administrator, it came to function as a vehicle through which Nauruan requests for greater autonomy and ultimately full political independence were relayed to the UN. The series of negotiations between the Australian Department of Territories and the NLGC that came to be known as the 'Nauru Talks' commenced in the mid-1960s under active Trusteeship Council oversight. The original issue that prompted the Nauru Talks was the NLGC's demand that the phosphate royalty rate be calculated according to the world phosphate price, rather than fixed at arbitrary 'needs-based' rates by the Administration as had been the practice since the commencement of phosphate mining under German rule, in nominal recognition of Nauruan land ownership.[6] As the principle of trusteeship developed over the 1950s and the 1960s from a vague principle into a juridical doctrine that drew heavily on private law notions of the trust relationship, the NLGC's demands for increased royalty payments developed into calls for property in Nauruan phosphate to be recognised as vesting in Nauruan landowners, and for the central plateau of the island to be rehabilitated at the tripartite governments' expense. Australia refused the rehabilitation request, offering instead the wholesale resettlement of the Nauruan population on Curtis Island off the coast of Queensland, and political assimilation as Australian citizens. Although the NLGC's refusal of the resettlement and assimilation proposal was supported by the UN, both the Trusteeship Council and the General Assembly assumed with the Administering Authority that the resettlement of the Nauruan people on the exhaustion of phosphate was a foregone conclusion. Despite the assumption of impending inhabitability

[6] On royalty payments under German rule, see section 7 'The Pacific Islands Company and its Agreement with the *Jaluit Gesellschaft*' in Chapter 3, 'From Protectorate to Mandate, 1920'; and under British rule, see section 2 'Administration of Nauru as a C Mandate' in Chapter 4, 'From Mandate to Trust Territory, 1947'.

of the island, in the international political climate of the mid-1960s the push toward recognition of Nauru as a sovereign state overwhelmed Australian objections. By the mid-1960s, what remained to be decided was not whether Nauru would become a sovereign state, but the manner in and extent to which administrative control on the one hand, and control of the phosphate operation on the other, would be transferred into Nauruan hands. In the businesslike negotiations that followed, the Australian government yielded only slowly and begrudgingly on both fronts.

The central contention of this chapter is that a historical focus on the shift from trusteeship to sovereign status in international law works to obscure the fact that the administrative form of the new Republic of Nauru was fundamentally continuous with the imperial administration that preceded it. Recognition of sovereign status at the international level prompted the rapid drafting of a Constitution providing for a 'Westminster-style' parliamentary system that did not disrupt the existing structure of Nauruan administration but provided for its bureaucratic expansion. In both its express provisions and its silences, the 1968 Constitution codified an administrative structure that risked autocratic concentration of executive and legislative power in the office of President, excluded the commercial phosphate operation from public administrative oversight, and failed to establish financial transparency both of that phosphate operation and of the disposal of phosphate royalty trust funds, despite its status as the primary revenue base of the state. The chapter concludes that while the achievement of the Nauruan people as represented via the Nauru Local Government Council under head Chief Hammer DeRoburt in gaining independence in 1968 should not be underestimated, the international status of sovereign statehood attached to an administrative form gradually expanded upon over eighty year period on the blueprint of a 1888 agreement between a Hanseatic trading company and the Bismarckian Reich.

2. Administration of Nauru as a Trust Territory

The re-establishment of Australian administration on Nauru after the war was focused almost exclusively on the restoration of the BPC phosphate operation.[7] However, the

[7] 'The chief considerations in the administration of the Trust Territory of Nauru over the last preceding twelve months have been the restoration of institutions, industry and property destroying by the Japanese during their occupation…The phosphate industry, which is the sole economic means of the Territory and of vital importance to two major food-producing countries, has been largely restored and within another year should have production back to normal'. Parliament of the Commonwealth of Australia, *Report to the General Assembly*

Nauruan Council of Chiefs – including many of the 'Geelong boys', led by Head Chief Timothy Detudamo - objected to the Administration's prioritisation of repair of the phosphate plant over repair of Nauruan homes and villages.[8] This post-war tension between Australian and Nauruan perspectives on the best interests of the Nauruan people came to mark the next twenty years of administration. From the late 1940s, the concept of international administration came to be more consistently interpreted as a juridically definable trust relationship. This eliminated the ambivalence that had characterised the C Mandate in theory and in practice, and threw into question the British empire's default position of defining its relationship with 'non-self-governing territories' as political, rather than legal. Yet despite the expansions in bureaucratic practice implemented by the Administering Authority ostensibly in satisfaction of these more defined obligations of trusteeship, the basic form of the administration of Nauru remained intact. The tripartite Nauru Island Agreement remained on foot, with Nauru the only UN Trust Territory nominally administered by a board of three governments. As Administering Authority, Australia continued to wield executive, legislative and judicial power. The administration of Nauru continued to be funded exclusively from the profits of the BPC, with little obligation of financial transparency as between the BPC and the Administration. The Trusteeship Council thus had limited access to BPC financial records. Property in phosphate continued to purportedly vest in the BPC, and phosphate exports continued at ever increasing rates, primarily to Australia and New Zealand. However, two significant differences marked the trusteeship period from the mandate period that preceded it. The first, as explained above, was the strengthened powers of Trusteeship Council oversight of Nauruan administration. The second was that from the early 1950s, the administration of Nauru proceeded on the assumption that the island would be uninhabitable on the exhaustion of phosphate supplies.

In 1948, Australia submitted its first Annual Report on the Administration of the Trust Territory of Nauru to the United Nations.[9] All pre-war laws and ordinances had been re-

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of the United Nations on the Administration of the Territory of Nauru from 1st July 1947 to 30th June 1948 (Canberra: L F Johnson, Government Printer, 1948), 1.

[8] Maslyn Williams and Barrie Macdonald, *The Phosphateers: A History of the British Phosphate Commissioners and the Christmas Island Phosphate Commission* (Melbourne University Press, 1985), 344; Christopher Weeramantry, *Nauru: Environmental Damage under International Trusteeship* (Oxford University Press, 1992) 113 –114. On the Geelong education program, see section 2 'Administration of Nauru as a C Mandate' in Chapter 4, 'From Mandate to Trust Territory, 1947'.

[9] Parliament of the Commonwealth of Australia, *Report to the General Assembly of the United Nations on the Administration of the Territory of Nauru from 1st July 1947 to 30th June 1948* (Canberra: L F Johnson, Government Printer, 1948).

restablished, and '(f)ull powers of legislation, administration and jurisdiction' were restated as vesting in the Administrator.[10] The Trusteeship Reports were organised as a response to the provisions of Article 76 of the Charter, and became far longer and more comprehensive than had been the case under the mandate system. Each Report contained sections on political, social, educational and economic advancement, on international peace and security, and fundamental rights and freedoms. The paternal tone of the first Trusteeship Report is evident in its Introduction which, in an echo of the logic of the C Mandate, articulates for the first time the Administration's position of endorsing the general principles of UN trusteeship and local self-government as the aspirational objectives of administration, whilst insisting on their untimeliness in the Nauruan case:

> (t)he principles outlined in the Charter are strongly rooted in the Territory, although in a physical sense some are in embryo form only. The chief tasks of the Administration are to adapt the indigenous inhabitants in a changing environment, to educate them to accept responsibility and to show them predominance of reason over instinctive modes of thought. The Administration by sowing these seeds is developing the political, economic, social and educational advancement of the Nauruan people and paving the way for their self-determination'.[11]

As such, the Administering Authority reported that the trusteeship objective of 'self-government or independence' stated in Article 76(b) of the Charter would be interpreted in the Nauruan case as 'ultimately to train these people for administrative positions in their own Territory'.[12] A new organisation chart of the 'Administrative Structure of Government' made the point visually. Under the office of Administrator in a band marked 'Europeans' was a tier of managerial offices – including 'Director of Public Health', 'Native Affairs Officer', 'Supervisor of Works' and 'Director of Police'. Under each managerial office was a list of administrative offices – including 'Store Keeper', 'Clerk Typist', 'House Orderly', 'Senior Postal Clerk' and 'Labourer' - grouped together in a band marked 'Nauruans'.[13] The Council of Chiefs appeared outside the hierarchy in the bottom right of the chart, reporting directly to the Administrator.[14]

The Trusteeship Reports appended a growing list of statistics on health, justice, and expenditure. The 1948 Report updated phosphate statistics which had last been made public

[10] Ibid 12.
[11] Ibid 1.
[12] Ibid 59.
[13] Ibid appendix II.
[14] Ibid appendix II.

in 1940, and in its language made clear the anticipation of eventual exhaustion.[15] Of the island's total area of 5,263 acres, 4,116 acres or 78% were estimated to be phosphate-bearing; prior to the war, 459 acres had already been mined out, producing 11,000,000 tons of phosphate; as such, the Report concluded, on the basis of a rate of extraction of 1,000,000 tons per year, Nauru's phosphate industry would 'continue for at least another 70 years'.[16] In the section on 'Economic Advancement', the Report noted that the total royalty payable on each ton of phosphate had been increased on the restoration of the operation from three pence to thirteen pence, inclusive of the portion paid directly to the landowner, the portion paid into the Nauru Phosphate Royalty Trust, and a new portion paid into a new Long Term Investment Fund.[17] The purpose of the Long Term Investment Fund, the Report stated, was to provide for the inevitable resettlement of the Nauruan people on the exhaustion of the island's phosphate.[18] In a section entitled 'Conservation of Natural Resources', the Report stated that the mined out areas were converted into 'waste land', but that conservation was not necessary as the central plateau of the island was 'not, and has never been, arable land'; and that in any event, it was 'not practicable to level the worked-out fields as part of a land reclamation project'.[19] In 1951, the Administration reported that possibilities for eventual resettlement were being explored: 'when the deposits are exhausted Nauru may not provide sufficient space or opportunity for the Nauruan population to continue there, and it may be necessary to transfer them elsewhere'.[20]

By the early 1950s, the Trusteeship Council's responses to the Nauru Trusteeship Reports had started to focus on two Article 76(b) obligations: firstly, the obligation to promote political advancement via progressive development toward 'self-government or independence as may be appropriate'; and secondly, the obligation to promote economic advancement. This focus reflected a growing attentiveness in the General Assembly to conditions in the former C Mandates. In 1949, the General Assembly had passed resolutions calling for Administering Authorities of all Trust Territories to adopt measures to 'hasten the

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[15] Ibid 9.
[16] Ibid 9.
[17] Ibid 24.
[18] Ibid 24; Barrie Macdonald, *In Pursuit of the Sacred Trust: Trusteeship and Independence in Nauru* (New Zealand Institute of International Affairs, 1988), 38.
[19] Parliament of the Commonwealth of Australia, *Report to the General Assembly of the United Nations on the Administration of the Territory of Nauru from 1st July 1947 to 30th June 1948*, above n 9, 29.
[20] Ibid 38.

advancement…toward self-government or independence' in accordance with Article 76(b).[21] Addressing the former C Mandates specifically – all established by trading companies and formerly exempt from obligations of economic equality - the General Assembly expressed 'concern that the lack of budgetary autonomy' of Administering Authorities 'did not allow the Trusteeship Council to make a thorough examination' of the financial status of the Territories, and called for the promotion of 'greater participation of indigenous inhabitants in the profits and management of entities, public and private, engaged in the exploitation of mineral and other natural resources…basic to the economy of Trust Territories'.[22] In same resolution, however, the General Assembly held Nauru up as a model of economic advancement: it 'noted with satisfaction' the 'excellent financial situation' in Nauru, and called for 'formulation of plans laying down a sound economic foundation' for the Territory.[23]

In 1951, the Commonwealth government under Liberal Prime Minister Robert Menzies created the Department of Territories, with oversight of the UN Trust Territories of Nauru and Papua and New Guinea, as well as Norfolk Island, the Cocos Islands, and the Northern Territory.[24] Menzies appointed the West Australian historian Paul Hasluck as the Minister for Territories.[25] In response to the push toward political advancement of trust territories in the General Assembly, the Administration moved to further bureaucratise the role played by the Nauruan Council of Chiefs. The Council of Chiefs was renamed the 'Nauru Local Government Council' by ordinance, and reconstituted as a publically elected municipal council with legal personality and a secretariat.[26] The *NLGC Ordinance of 1951* stipulated rules of procedure for the Council, delegated a limited set of administrative powers - including

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[21] *Political Advancement of Trust Territories,* GA Res 320, UN GAOR, 240th plen mtg (15 November 1949); and *Economic Advancement in Trust Territories*, GA Res 322, UN GAOR, 40th plen mtg (15 November 1949) ('*Economic Advancement in Trust Territories*, *Resolution 322*').

[22] Ibid.

[23] *Economic Advancement in Trust Territories*, *Resolution 322*.

[24] Commonwealth of Australia, *The Progress of the Australian Territories 1950–1956* (Canberra: A J Arthur, Commonwealth Government Printer, 1957). The Cocos Islands were transferred from British control as part of the Colony of Singapore to Australian control in 1955. Ibid 8.

[25] On the influence of Paul Hasluck on Australian foreign policy in the mid-twentieth century, see Geoffrey Bolton, *Paul Hasluck: A Life* (UWA Publishing, 2014); and on Australian policy on Aboriginal peoples, see Paul Hasluck, *Shades of Darkness: Aboriginal Affairs 1925–1965* (Melbourne University Press, 1988) and Anna Haebich, 'The Formative Years: Paul Hasluck and Aboriginal Issues during the 1930s' in Tom Stannage, Kay Saunders, Richard Nile (eds) *Paul Hasluck in Australian History: Civic Personality and Public Life* (Queensland University Press, 1998), 95–105.

[26] *Nauru Local Government Council Ordinance No. 2 of 1951*, cited in Parliament of the Commonwealth of Australia, *Report to the General Assembly of the United Nations on the Administration of the Territory of Nauru from 1st July 1951 to 30th June 1952* (L F Johnson, Government Printer, 1952), 12.

powers of the appointment of Nauruan district constables and managerial control of the Nauru Co-operative Store - and provided for funding of the NLCG from the Nauru Phosphate Royalty Trust.[27] However, the NLGC's role with respect to legislative, executive and judicial decisions of the Administrator remained advisory only, and subject to disallowance.[28] Throughout the 1950s, the Trusteeship Council repeatedly queried the Administration's annual refrain that the limited powers of the NLGC represented progress toward political advancement; and in response, Australia maintained that the *NLGC Ordinance* provided for substantive administrative powers, but the members of the NLGC lacked the capacity to understand or fully exercise them.[29]

In response to Trusteeship Council questions on economic advancement, the Administration developed a practice of reporting incremental increases in the royalty payable by the BPC to Nauruan landowners and into the two Trust Funds, whilst insisting that as a market price for Nauruan phosphate was not calculable due to the tripartite monopoly, the royalties were calculated according to the 'needs' of the Nauruan people, as opposed to the profits of the BPC.[30] Despite its questioning on Article 76 obligations regarding political and economic advancement, the Trusteeship Council did not in the 1950s dispute Australia's assertion that independence was inappropriate for the Nauruan people; in fact, it openly endorsed this interpretation, as well as the inevitability of resettlement.[31] The 1953 Trusteeship Council Visiting Mission to the Territory of Nauru reported that there was 'no alternative to resettlement of the population elsewhere'; and that it was 'imperative to observe that the Nauruan people cannot be regarded as more than a small community, and in no case as a potential state'.[32]

As the international political momentum toward decolonisation gathered pace over the 1950s and found expression via the increased powers of the Trusteeship Council, the Australian strategy of reading down its trusteeship obligations on political and economic advancement

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[27] *Nauru Local Government Council Ordinance No. 2 of 1951*; also Nancy Viviani, *Nauru: Phosphate and Political Progress* (Australian National University Press, 1970), 104–106.
[28] *Nauru Local Government Council Ordinance No. 2 of 1951*; also Viviani, above n 27, 104–106.
[29] Viviani, above n 27, 106.
[30] *Report of the Trusteeship Council 1952–53*, UN GAOR, 8th sess, supp no 4, 112–113; also Viviani, above n 27, 110.
[31] *United Nations Visiting Mission to Trust Territories in the Pacific 1953: Report on Nauru*, UN Trusteeship Council Official Records, 12th sess, UN Doc T/1054 (26 May 1953) 2 ('*Trusteeship Council Report 1953 on Nauru*'); also Macdonald, above n 18, 41.
[32] *Trusteeship Council Report 1953 on Nauru*, UN Doc T/1054, 2; also Macdonald, above n 18, 41.

in Nauru via the caveat of local circumstance gradually lost legitimacy. In 1956, Hammer DeRoburt of Boe was elected Head Chief of the NLGC. DeRoburt had attended the Gordon Institute of Technology in Geelong in the 1930s, and had been interned on Truk Atoll by the Japanese during the war.[33] On his return, he had worked in the Nauruan administration under the Director of Education, was appointed to the NLGC in 1951, and in 1953 led a four-month strike of the Nauru Workers Organisation that had succeeded in securing increased wages and training for Nauruans working in the Administration.[34] In his role as Head Chief, DeRoburt made good use of the power of the Trusteeship Council to accept petitions directly under Article 87(b) of the Charter, formally raising issues with each Visiting Mission. These ranged from the calculation of phosphate royalties, to the absence of secondary education on Nauru, and the lack of Administration investment in subsidiary industries.[35] In 1957, DeRoburt sent a letter directly to the BPC in his capacity as Head Chief of the NLGC, openly disputing the assertion that the interests of the Nauruan people were not affected by the strip-mining of the island's central plateau:

> '(t)here is a prevailing belief which is born of distorted facts remaining unchallenged for many years concerning the hinterland area that the Nauruans never used this land…It was from this area that half his normal foods were grown: pandanus and almond trees; roots and greens he obtained mostly from this area…He turned to this area for preserved foods for drought. Materials for a house were from the hinterland (Tomano and pandanus)…In short, it was this area which afforded him and his children their means of livelihood. You removed his and his posterity their means of living, when you deprived him of this area'.[36]

With this letter, DeRoburt directly challenged the premise on which the partner governments had relied to justify the exploitation of Nauruan phosphate under mandatory and then trusteeship rule.

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[33] For colloquial accounts of Hammer DeRoburt's place in Nauruan politics, see Don Chambers, *'Boss' Hurst of Geelong and Nauru* (Hyland House, 1994), 150–151, 167–168; and Viviani, above n 27, 107–108.

[34] Macdonald, above n 18, 38.

[35] *Petition 324 ('Petitions from the Nauruan Council of Chiefs concerning Nauru')*, *Trusteeship Council Report 1951 on Nauru*, UN TCOR, 342nd mtg, UN Doc T/877 (15 March 1951) 25–27, and *Petition 325 ('Petition from the Chiefs of Yarren and Boe concerning Nauru')*, *Trusteeship Council Report 1951 on Nauru*, UN TCOR, 342nd mtg, UN Doc T/878 (15 March 1951) 27–28; Macdonald, above n 18, 38.

[36] *Letter from the Nauru Local Government Council to the British Phosphate Commissioners dated 30 May 1957*, reproduced in Macdonald, above n 18, 40.

3. Trusteeship, decolonisation and the South West Africa cases

The increasing ability of the NLGC under DeRoburt to formally articulate its protest against exploitation of Nauru in the language of international principle took place in the broader context of the post-war movement toward decolonisation. As had been the case in the Dutch East Indies, the European empires had struggled to re-establish administrative control after the war in many erstwhile colonial territories, where the administration had either been ousted by hostile occupation, or heavily stripped back during the war. Local independence movements in Indonesia, French Indochina, Iran and Egypt moved to take advantage both of the political fact of weakened rule and the juridification of principles of self-government in the Charter to declare independence and resist the re-establishment of European administrative control.[37] At the same time, the removal of differentiated status for the C Mandates placed the administrative structure that had developed in Nauru, New Guinea, South West Africa and the former Japanese mandated islands under the increasing scrutiny of the Trusteeship Council and the General Assembly to which it reported. The scrutiny of the General Assembly and the Trusteeship Council reflected legal and political shifts that occurred in the reconstitution of the international legal order after the war. Charter principles of trusteeship and 'self-government or independence' were increasingly juridified on the basis of the more detailed text given in Chapters XI, XII and XIII of the Charter and the growing body of jurisprudence that developed in interpretation of that text. At the same time, the 'political fact' of imperial administrative rule lost legitimacy as the international political dominance of the European imperial powers was eroded, principally by the United States but also by the USSR and China.[38] As the institutional formalisation of the balance of power shifted in the transition from the Europe-dominated Council of the League to the Security Council, the reconstitution of the General Assembly with increased scope of activity and power institutionalised the participation of former colonies and protectorates in decision-

[37] For an account of the contributions of African and Asian lawyers and statesmen toward the anti-colonial movement via the interpretation of Charter provisions on trust and non-self-governing territories, see Yassin Al-Ayouty, *The United Nations and Decolonization: The Role of Afro-Asia* (Martinus Nijhoff, 1972); and of international law more generally, see R P Anand, 'Role of the 'New' Asian-African Countries in the Present International Order' (1962) 56 *American Journal of International Law*, 383–406. For a general account of the decolonization period, see Raymond F Betts, *Decolonization: The Making of the Contemporary World* (Routledge, 1998).

[38] See Melvyn P Leffler, 'The Emergence of an American Grand Strategy, 1945–1952' and Shu Guang Zhang, 'The Sino-Soviet Alliance and the Cold War in Asia, 1954–1962' in Melvyn P Leffler and Odd Arne Westad (eds), *Cambridge History of the Cold War* (Cambridge University Press, 2010), 67–89 and 353–375.

making processes that had only decades previously been reserved to the rooms of Versailles.[39]

The tension between the juridification of international principles of trusteeship and self-government and the political fact of continued imperial administrative rule came to a head in the protracted dispute between South Africa and the United Nations over the post-war status of South West Africa. In response to the formalisation of obligations of trusteeship as positive international law, South Africa began to articulate its refusal to recognise the shift in status of the C Mandates to trust territories, and its attempt to perfect the annexation that Smuts had made effective in 1919, in terms of international legal procedure.[40] South Africa submitted a final report on South West Africa to the United Nations in 1947, purporting to meet the obligations listed under Article 73 of the Charter, which applied to non-self-governing territories, not trust territories, which all of the former mandates were expected to become.[41] Echoing submissions made in 1945 by the South African delegation to the General Assembly, the report insisted that the Mandate for South West Africa, as a treaty between South Africa and the Allied Powers made in December 1920, continued on foot and could not be revoked without South African consent. [42] At the same time, South Africa insisted that as it had not voluntarily submitted to the trusteeship system, the United Nations wielded no powers of oversight over its administration of South West Africa.[43] Despite South Africa's refusal to acknowledge trusteeship obligations, in 1948 the General Assembly resolved to submit South Africa's report to the Trusteeship Council for review.[44] The Trusteeship Council's report on South West Africa was strongly critical of South Africa's administration, even after moderation at the insistence of the Australian representative.[45] It criticised the absence of a franchise or any administrative representation of the indigenous population; minimal expenditure on indigenous education; state-supported monopolisation of arable land by the European population of the territory; and the physical segregation of

[39] See generally Ruth Russell, *A History of the UN Charter* (The Brookings Institute, 1958); and Evan Luard, *A History of the United Nations, Volume 2: The Years of Decolonisation 1955–1965* (Macmillan, 1982).
[40] On the political deployment of procedural law as a means of maintaining imperial control, see Sundhya Pahuja and Cait Storr, 'Rethinking Iran and International Law: The *Anglo-Iranian Oil Company Case* Revisited' in James Crawford, Abdul G Koroma, Alain Pellet & Said Mahmoudi, *The International Legal Order: Current Needs and Possible Responses. Essays in Honour of Djamchid Momtaz* (Martinus Nijhoff, 2017), forthcoming.
[41] Gail-Maryse Cockram, *South West African Mandate* (Juta and Company Limited, 1976), 233–235.
[42] T D Gill, *South West Africa and the Sacred Trust 1919–1972* (T M C Asser Institut, The Hague, 1984), 24–25; Cockram, above n 41, 233–235.
[43] Gill, above n 42, 24–25; Cockram, above n 41, 233 – 235.
[44] Slonim, above n 3, 86–90.
[45] Ibid 94–95.

indigenous Africans in 'native reserves'.[46] In a barely veiled criticism of South African domestic policy, the Trusteeship Council insisting that racial segregation was 'to be deplored in principle'.[47]

From the late 1940s, international response to the continued administrative occupation of South West Africa was thus strongly related to the statutory institutionalisation of *apartheid* in South Africa by the right wing National Party coalition following its election in 1948.[48] Unable to achieve legal annexation of South West Africa at the international level, the National Party executive legislated domestically for representation of the white population of South West Africa in the South African Parliament, and the extension of *apartheid* legislation to the territory.[49] In July 1949, the government sent a letter to the United Nations advising that no further reports on South West Africa would be submitted, as the Trusteeship Council's critical response to its 1947 report had had 'deleterious effects of the maintenance of the harmonious relations which had hitherto existed and were so essential to successful administration' in the territory.[50] Five months later, the General Assembly resolved to submit the question of the international status of South West Africa to the International Court of Justice with a request for an advisory opinion.[51]

The 1950 *Advisory Opinion on the Status of South-West Africa* was the first of a series of ICJ treatments of the dispute that spanned over the 1950s and 1960s into the 1970s. The South West Africa Cases revealed tensions between the political and legal facilities of the UN system, and between the old imperial powers and the new post-imperial states. In the 1950 *Advisory Opinion*, the ICJ held eight to six that the Charter created no positive legal obligation for Mandatory Powers to submit a draft Trusteeship Agreement as required to bring mandates within the trusteeship system.[52] However, the ICJ opined, the international

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[46] Cockram, above n 41, 236–237.
[47] Cockram, above n 41, 236.
[48] On for an account of *apartheid* policy and practice in South Africa, see Deborah Posel, 'The Apartheid Project, 1948–1970' in Robert Ross, Anne Kelk Nager and Bill Nasson (eds), *Cambridge History of South Africa* (Cambridge University Press), 319–368.
[49] *South West Africa Affairs Amendment Act No. 23 of 1949* (SA); Gill, above n 42, 26.
[50] Cockram, above n 41, 238.
[51] *Question of South West Africa: Request for an Advisory Opinion of the International court of Justice,* UN GAOR, GA Res 338(IV), 4th sess, 269th plen mtg, UN Doc A/RES/338(IV) (6 December 1949) Res 338 (IV).
[52] *International Status of South-West Africa (Advisory Opinion)* [1950] ICJ Rep 128, 140 ('*Advisory Opinion on the International Status of South-West Africa*'). The Court was comprised of Judges Basdevant of France, Guerrero of El Salvador, Alvarez of Chile, Hackworth of the United States, Winiarski of Poland, Zoricic of Yugoslavia, De Visscher of Belgium, McNair of the United Kingdom, Klaestad of Norway, Read of Canada, Hsu Mo of China, and Azevedo of Brazil.

obligations assumed by South Africa with respect to South West Africa were 'of two kinds'; the first arose from the 'sacred trust of civilisation' 'referred to' – as opposed to created - in Article 22 of the Covenant and the text of the Mandate, and the second concerned the 'machinery for implementation' by which 'performance of the trust' was secured'.[53] The Opinion held twelve to two that uncertainty with respect to the correct procedure for succession of international oversight did not affect the first order of mandatory obligation South Africa had assumed in 1920 – a position South Africa had itself adopted in its 1947 report to the UN.[54] As such, in the ICJ's opinion South Africa lacked the power to unilaterally alter the international status of South West Africa without the consent of the UN, and the UN was competent to exercise oversight of mandatory obligations by receiving reports as contemplated in the Covenant of the League.[55]

Unsurprisingly, South Africa rejected the 1950 *Advisory Opinion* on the post-war continuance of mandatory obligations and lack of competence to unilaterally alter the status of South West Africa. Debates over whether and how the UN should take further action in the matter occupied the General Assembly for the following decade. Over the course of the 1950s, the UN divided into two loose blocs on the issue. One comprised the USSR, the new African and Asian states, India, Brazil, Syria and Uruguay, and called for UN intervention in support of South West African independence against South African occupation.[56] The second comprised the former imperial powers including Britain, France, the United States, the Netherlands, Australia and New Zealand, and called for a UN-negotiated transition from mandate to trusteeship.[57] Attempts to negotiate UN supervision of the territory via an *ad hoc* Committee on South West Africa failed, and after a further two ICJ *Advisory Opinions* in 1955 and 1956 on procedural questions, in November 1959 the General Assembly adopted a Resolution that 'drew attention' to the capacity of Member States to bring direct legal action against South Africa in the ICJ under the terms of the 1920 Mandate.[58]

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[53] Ibid 133.
[54] *Advisory Opinion on the International Status of South-West Africa*', 134–135; also Faye Carroll, *South West Africa and the United Nations* (University Press of Kentucky, 1967), 52.
[55] *Advisory Opinion on the International Status of South-West Africa*', 134–144.
[56] Slonim, above n 3, 126.
[57] Cockram, above n 41, 259–263; Slonim, above n 3, 126.
[58] *Legal Action to Ensure the Fulfilment of the Obligations Assumed by the Union of South Africa in Respect of the Territory of South West Africa*, GA Res 1361(XIV), UN GAOR, 14th sess, 838th plen mtg, UN Doc A/RES/1361(XIV) (17 November 1959).

In November 1960, Ethiopia and Liberia filed Applications in the ICJ instituting proceedings against South Africa – six months after the Ovamboland People's Congress was reconstituted as the South West Africa People's Congress or SWAPO, and one month before the United Nations General Assembly passed the 'Declaration on the Granting of Independence to Colonial Countries and Peoples'.[59] The Applications alleged that South Africa had violated the obligation under Article 22 and the Mandate to 'promote the well-being and development' of the indigenous population, firstly through the refusal to subject the administration to UN oversight, and secondly, through the formal institutionalisation of *apartheid* in the territory. The Applications submitted that Ethiopia and Liberia, as Members of the UN (and Ethiopia, of the League before it), had a legal interest in South Africa's 'proper exercise' of the Mandate.[60] In May 1961, South Africa voted by referendum to leave the British Commonwealth and become a Republic, the first of the Dominions to formally sever ties with the British empire.[61] In December 1961, the new Republic of South Africa submitted its Preliminary Objections to the ICJ.[62] South Africa argued that the Mandate was no longer in force due to the dissolution of the League; that if it was, it could not be enforced by Ethiopia or Liberia, as neither continued to be a 'Member of the League' and were therefore incapable of enforcing the Mandate terms; and that both states otherwise lacked standing to bring the action, as neither had established a sufficient material interest in the dispute.[63] The ICJ decided eight to seven against South Africa in its 1962 Judgment on the Preliminary Objections.[64] Consisting of Judges Alfaro (Panama), Badawi (United Arab Republic), Moreno Quintana (Argentina), Wellington Koo (China), Koretsky (Soviet Union), Bustamante (Peru), Jessup (United States) and the Applicants' Judge *ad hoc* Mbanefo (Nigeria), the majority held that despite the dissolution of the League, the dispute resolution provision of the Mandate was still in force, and the ICJ Statute confirmed the Court's

[59] 'Application Instituting Proceedings', *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa),* International Court of Justice, General List, filed 4 November 1960, 4–18 *et seq* (*'South West Africa Cases'*). *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514(XV), GAOR, 15th sess, 947th plen mtg, UN Doc A/RES/1514(XV) (14 December 1960). For accounts of the history of SWAPO, see SWAPO of Namibia Department of Information and Publicity, *To Be Born a Nation: The Liberation Struggle for Namibia* (Zed Books, 1981); and Roger Southall, 'The Evolution of the Liberation Movements' in *Liberation Movements in Power: Party and State in Southern Africa* (University of KwaZulu-Natal Press, 2013), 29–43.

[60] 'Application Instituting Proceedings', *South West Africa Cases,* International Court of Justice, General List, filed 4 November 1960, 4–18 *et seq*. See also Ernest A Gross, 'The South West Africa Case: What Happened?' (October 1966), *Foreign Affairs*, 36–48.

[61] *Republic of South Africa Constitution Act 1961* (SA).

[62] *South West Africa Cases (preliminary objections)* [1961] ICJ Rep 212 (30 November 1961).

[63] Ibid.

[64] *South West Africa Cases (Judgment)* [1962] ICJ Rep 319 (21 December 1962).

jurisdiction to hear the matter.[65] In the minority, Judges Percy Spender of Australia and Gerald Fitzmaurice of the United Kingdom delivered a joint dissenting opinion holding that the Mandate had expired on the dissolution of the League; and that even if mandatory obligation remained on foot, Liberia and Ethiopia were not 'members of the League' given its dissolution and thus did not have standing to enforce the terms of the Mandate.[66]

The 1960 Applications proceeded to hearing. After five years of more than a hundred hearings amounting to over six thousand pages of testimony, the ICJ delivered a judgment in 1966. Whereas in 1962, the Court had held that it had jurisdiction to hear the merits, the 1966 majority declined to do so, holding that Ethiopia and Liberia had not established standing to bring the case.[67] The Court divided evenly on the issue; however Australian Judge Spender, now President, used his casting vote to reject the Applicants' case for the same reasons given in his joint dissent with Fitzmaurice in 1962.[68] In its reasons, the majority applied a strict interpretive approach to the 'judicial function' of the ICJ, holding that – contrary to the 1962 Judgment - the principle of the 'sacred trust of civilisation' could not in and of itself generate binding rights and obligations, particularly given that its scope was 'highly controversial'.[69] Rights and obligations could only be created positively through the text of legal instruments, and on a strict reading of the terms of the Covenant and the Mandate, neither Ethiopia nor Liberia evinced sufficient interest to establish standing.[70] President Spender attached a Declaration to the Judgment, stating that the minority judges in their dissents should not opine on matters not dealt with in the majority judgment – namely, whether the Mandate for South West Africa continued to exist, and if so, whether South Africa had breached its mandatory obligations.[71]

Notwithstanding Spender's reproving Declaration, strident dissenting opinions were given by Judges Wellington Koo of China, Jessup of the United States, Padilla Nervo of Mexico, Forster of Senegal, Tanaka of Japan, Koretsky of the USSR, and Mbafeno of Nigeria.[72] The

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[65] Ibid 329–335.
[66] *South West Africa Cases (Judgment)* [1962] ICJ Rep 319, 465 (Joint Dissenting Opinion of Sir Percy Spender and Sir Gerald Fitzmaurice) (21 December 1962). In addition to Judges Spender and Fitzmaurice, the remainder of the minority comprised Basdevant of France, Judge Winiarski of Poland, Morelli of Italy, Spiropoulos of Greece, and Judge ad hoc van Wyk of South Africa, Morelli of Italy.
[67] *South West Africa Cases, Second Phase (Judgment)*, ICJ Rep 6 (18 July 1966); also Gross, above n 60, 44–45.
[68] *South West Africa Cases, Second Phase (Judgment)*, ICJ Rep 6, 51 (18 July 1966).
[69] Ibid 48–49.
[70] Ibid.
[71] Ibid 51–57 (Declaration of President Spender).
[72] See ibid 239 (Dissenting Opinion of Judge Koretsky); ibid 216 (Dissenting Opinion of Vice-President Wellington Koo); ibid 325 (Dissenting Opinion of Judge Jessup). Also Wolfgang Friedmann, 'The

common arguments in the dissents ranged from the technical to the interpretive to the political. For Koretsky, the majority judgment had breached the principle of *res judicata* in reaching a contradictory conclusion on the same question of jurisdiction and standing that had come before it in 1962.[73] For Wellington Koo, the intention of the mandate system - namely to uphold the 'sacred trust of civilisation' - was directly relevant to the interpretation of the text of the Mandate.[74] For Jessup, the fact that the Court had proceeded to lengthy hearings on the merits only to uphold South Africa's Preliminary Objections on the Applicants' standing undermined the political legitimacy of the Court, and suggested the 'utter futility' of the ICJ itself.[75] Writing on the 'jurisprudential implications' of the 1966 decision, German-American international lawyer Wolfgang Friedmann echoed Judge Tanaka's assessment of the split between the majority and the minority as reflecting a split between 'strict juristic formalism' and a 'sociological' approach to judicial function.[76] Friedmann then moved to consider the political impact of the case on the international reputation of the Court:

> 'the fact is that the International Court of Justice is on record as having rejected the claim of Ethiopia and Liberia. This is what will be remembered by the great majority of nations and especially the African states…the division of representatives (on the Court) between the older and newer countries, or, in a different perspective, between the 'developed' and the 'less-developed' countries that inevitably will be analysed and remembered'.[77]

From August 1966, SWAPO and the South African Defence Force were in open armed conflict in South West Africa.[78] In October 1966, the United Nations General Assembly resolved to determine politically what the ICJ had declined to determine legally. Opening with an affirmation of the 'inalienable right of the people of South West Africa to freedom and independence' as stated in the 1960 Declaration, the General Assembly resolved to declare the Mandate for South West Africa terminated and to revert the power of

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Jurisprudential Implications of the South West Africa Case' (1967) 6 *Columbia Journal of Transnational Law* 1, 7–8; and Gill, above n 42, 70–73.

[73] *South West Africa Cases, Second Phase (Judgment)* [1962] ICJ Rep 6, 239 (Dissenting Opinion of Judge Koretsky). Also Friedmann, above n 72, 7–8; and Gill, above n 42, 70–73.

[74] *South West Africa Cases, Second Phase (Judgment)* [1962] ICJ Rep 6, 216 (Dissenting Opinion of Vice-President Wellington Koo).

[75] Ibid 325 (Dissenting Opinion of Judge Jessup). Friedmann, above n 72, 7–8; and Gill, above n 42, 70–73.

[76] *South West Africa Cases, Second Phase (Judgment)* [1962] ICJ Rep 6, 278 (Dissenting Opinion of Judge Tanaka).

[77] Friedmann, above n 72, 2.

[78] On the liberation struggle, see Lauren Dobell, *Swapo's Struggle for Namibia, 1960–1991: War by Other Means* (P Schlettwein Publishing, 2nd ed, 2000).

administration of the territory to the United Nations in order to prepare the territory for independence.[79] The Security Council, however, took three more years to reach consensus: in March 1969, with Britain and France abstaining, Security Council Resolution 264 recognised the General Assembly's 1966 termination of the Mandate, declared the continued presence of South Africa in Namibia to be an illegal occupation, and called upon South Africa to withdraw from the territory.[80] It took twenty-one more years of armed conflict between SWAPO and SADF for the status of the former South West Africa to be settled as a matter of international law. In March 1990, the Republic of Namibia officially gained independence as a sovereign state - 106 years after Chancellor Bismarck's declaration of the first German protectorate in Angra Pequeña in response to the demands of Bremen tobacco merchant F.A.E. Lüderitz.[81]

4. The Nauru Talks: resettlement, political independence, and control of phosphate

In drawing international attention to the status of the former C Mandates, the South West Africa Cases sharpened the political isolation of Australia in its attempt to maintain paternalistic administrative control over Nauru. The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples undermined the legitimacy of the Administering Authority's interpretation of its trusteeship obligations of promoting political and economic advancement in Nauru as requiring no more than Nauruan participation in the lower levels of administration and the maintenance of the two phosphate royalty funds. The Declaration stated plainly that '(i)nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence' - a direct repudiation of the logic of Article 22 that had grounded the mandate system, and of the Administering Authority's argument that 'local circumstance' rendered independence inappropriate in the Nauruan case.[82] Furthermore, the Declaration insisted that 'peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation', a principle difficult to reconcile with the Administering Authority's practice of calculating phosphate royalties on a needs- as opposed

[79] *Question of South West Africa*, GA Res 2145(XXI), GAOR, 21st sess, 1454th plen mtg, UN Doc A/RES/2145/(XXI) (27 October 1966).
[80] *The Situation in Namibia*, SC Res 264, UN SCOR, 24th sess, 1465th mtg UN Doc S/RES/264(1969) (20 March 1969).
[81] See section 9 'The establishment of German protectorates' in Chapter 2, 'From Trading Post to Protectorate, 1920'.
[82] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514(XV), GAOR, 15th sess, 947th plen mtg, UN Doc A/RES/1514(XV) (14 December 1960).

to market-based rate.[83] The Declaration also effectively contradicted the Trusteeship Council's 1953 position that independence would not be appropriate for the Nauruan people due to the community's size, asserting a 'belief' that the 'process of liberation' was 'irresistible and irreversible', and calling for 'immediate steps' to be taken to 'transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire'.[84] Between 1960 and 1968, the Trusteeship Council and the General Assembly made periodic resolutions in support of Nauruan independence, becoming more and more specific as to terms.[85]

In stark contrast to the protracted armed conflict that characterised South West Africa's recognition as the independent state of Namibia, the shift in the international status of Nauru toward sovereign statehood occurred via a series of business-like negotiations between the Australian Department of Territories and the NLGC, under the oversight of the Trusteeship Council. The negotiations focused on two main issues: the terms of transfer of administrative power on the one hand, and of ownership and control of phosphate on the other. Yet the negotiated transition to independence occurred in almost paradoxical context: both the Australian Department of Territories and the Trusteeship Council continued to presume that, whether or not Nauru became a sovereign state in the meantime, the need for resettlement of the Nauruan population on the exhaustion of the island's phosphate was a foregone conclusion.[86] The shared assumption of resettlement was tolerated by the NLGC into the mid-1960s. Pre-empting Nauruan calls for total political independence, in October 1960 the Minister for Territories proposed to the NLGC that the Nauruan population be resettled via fully funded immigration to any of the three partner states, leaving the island of Nauru under BPC control.[87] The NLGC refused this proposal.[88] In 1962, Hammer DeRoburt attended the Trusteeship Council meeting that followed the 1962 Visiting Mission to Nauru, and made good use of the 1960 Declaration in his representations. DeRoburt submitted that although the need for resettlement was accepted, the people of Nauru 'wished to retain their identity as a race and community, and to control their own affairs, which means

[83] Ibid.
[84] Ibid.
[85] *Question of the Trust Territory of Nauru*, GA Res 211(XX), GAOR, 20th sess, 1407th plen mtg, UN Doc A/RES/211(XX) (21 December 1965); and *Question of the Trust Territory of Nauru*, GA Res 2226(XXI), GAOR 21st sess, 1500th plen mtg, UN Doc A/RES/2226(XXI)(20 December 1966).
[86] Williams and Macdonald, above n 8, 464.
[87] Macdonald, above n 18, 41.
[88] Ibid 41.

sovereign independence'.[89] In consideration of the issue – during which the Soviet representative, Mr Brykin, accused Australia of displaying 'contempt for the UN in general and the Trusteeship Council in particular'[90] - the Trusteeship Council proposed a compromise: resettlement of the Nauruan population as a distinct community within Australia, with some level of local administrative control over their own affairs.[91]

In line with the Trusteeship Council's proposal, in 1962 the Department of Territories proposed a plan for resettlement of the Nauruan population on one of a number of Queensland islands that were already administered under federal control as national parks. Those earmarked for resettlement included Fraser Island, Prince of Wales Island, Curtis Island, and Great Palm Island.[92] An NLGC Resettlement Sub-Committee was formed to tour the proposed islands, and an Australian Director of Nauruan Resettlement was appointed by the Department to negotiate terms.[93] Initial Nauruan interest in Fraser Island, preferred by the NLGC Sub-Committee for its distance of 6km from the coast of Australia which would allow for relative seclusion, was rejected by Minister for Territories Paul Hasluck for the same reason.[94] In February 1963, the NLGC Sub-Committee relayed an interest in Curtis Island to the Director of Resettlement; and in August, terms of a potential resettlement to Curtis Island were negotiated on Nauru.[95] The Director proposed a plan of resettlement as political assimilation into Queensland, including full Australian citizenship, with Nauruan control of a local government council for Curtis Island.[96] In the Director's view, this proposal amounted to the 'self-government' required under the Trusteeship Agreement.[97] The NLGC countered with a proposal for full Nauruan sovereignty over Curtis Island; and in the alternative, full sovereignty over Nauru.[98] On the Minister's rejection of the proposal for Nauruan sovereignty over Curtis, the NLGC resolved to reject resettlement

[89] United Nations, Trusteeship Council, Summary Records of Meetings, 29th session (1962), 54; annexes, 10–11, cited in Macdonald, above n 18, 42.
[90] International Organization, 'Trusteeship Council' (1964) 18(1) *International Organization* 120, 122.
[91] United Nations, Trusteeship Council, Summary Records of Meetings, 29th session (1962), supp no 2, 8–9, cited in Macdonald, above n 18, 42.
[92] Viviani, above n 27, 143–145.
[93] Ibid 143.
[94] Ibid 144–145.
[95] Ibid145.
[96] Ibid 146–147; Macdonald, above n 18, 46.
[97] Viviani, above n 27, 146–147; Macdonald, above n 18, 46.
[98] Viviani, above n 27, 146–147; Macdonald, above n 18, 46.

altogether, and push for sovereign independence on Nauru - including rehabilitation of the island's central plateau at the expense of the tripartite governments.[99]

Over the course of 1965, the prospect of sovereign independence for the Nauruan people on the island of Nauru moved quickly from possibility to probability. Three years earlier in January 1962, the former C Mandate of Western Samoa had been recognised as independent by New Zealand, after which New Zealand had accepted the inevitability of Nauruan independence and distanced itself from Australia's intransigence on the question in the Trusteeship Council.[100] Following the April 1965 Trusteeship Council Visiting Mission to Nauru, the General Assembly took note of the failed resettlement talks, and resolved to support the Nauruan request for independence and for rehabilitation of the central plateau by the Administering Authority.[101] The independence negotiations now known as the 'Nauru Talks' that took place between 1965 and 1967 focused on four points of contention between the NLGC and the Department of Territories: ownership of phosphate and control over the phosphate industry; responsibility for rehabilitation of mined out land; the legal relationship with Australia that was to replace that of UN trusteeship; and a timeline for transition of domestic administrative control.

Negotiations over phosphate ownership and control proved more contentious during the Nauru Talks than did the devolution of political independence. With the separation of public administration and phosphate administration formalised in 1919 in the Nauru Island Agreement still technically on foot, the Australian government's strategy throughout the Nauru Talks was to negotiate on devolution of public administrative power from the Administering Authority to the NLGC, whilst insisting on continued BPC control of the mining operation. To that end, the Department of Territories adopted a corporate bargaining strategy of offering increases to the phosphate royalty and increased Nauruan participation in BPC operations, whilst flatly rejecting Nauruan requests for transfer of phosphate ownership and managerial control of the BPC.[102] At the same time, the BPC responded to NLGC requests to slow the rate of phosphate extraction whilst negotiations took place with plans to significantly increase extraction, arguing that an increased extraction rate under BPC

[99] Williams and Macdonald, above n 8, 475.
[100] Ibid 476–477.
[101] *Question of the Trust Territory of Nauru*, GA Res 211(XX), GAOR, 20th sess, 1407th plen mtg, UN Doc A/RES/211(XX) (21 December 1965); and *Question of the Trust Territory of Nauru*, GA Res 2226(XXI), GAOR 21st sess, 1500th plen mtg, UN Doc A/RES/2226(XXI)(20 December 1966).
[102] Williams and Macdonald, above n 8, 481.

control was to Nauruan benefit, given the increase in royalties proffered by the Department.[103] Yet by 1966, the Department had moved only as far as offering a phosphate royalty based on a world phosphate price in substitution of the fixed rate set by ordinance, and a 'partnership' arrangement of joint ownership of Nauruan phosphate, under the control of the BPC for at least five years after independence.[104] DeRoburt rejected the partnership deal, insisting on sole Nauruan ownership of the phosphate, and offered a counterproposal of a gradual buy-out of the BPC operation and assets over a ten year period by the prospective Nauruan state.[105]

On the question of rehabilitation, the Department responded to NLGC demands by appointing a Nauru Lands Rehabilitation Committee in 1965, charged with 'examining the practicability, costs and usefulness of rehabilitating the mined out areas of the phosphate island of Nauru'.[106] In 1966, the Rehabilitation Committee issued its report, concluding that while 'technically feasible', rehabilitation was 'impracticable' due to prohibitive cost.[107] The Committee further commented on the absence of legal responsibility for rehabilitation, reporting that 'it would seem inconsistent with the general trend in regulatory policies for extractive industries to require such treatment to be a responsibility of the phosphate-extractive industry'.[108] The NLGC rejected the findings of the Rehabilitation Committee, arguing that it had gone beyond its terms of reference in commenting on legal responsibility, and reiterated the Nauruan position maintained throughout negotiations that responsibility for rehabilitation of lands mined from 1920 lay with the governments party to the Nauru Island Agreement.[109] From 1966, with mounting pressure on all three governments in the United Nations, New Zealand made clear it preferred full political independence for Nauru and cessation of all trusteeship responsibilities.[110] In the Trusteeship Council, the United Kingdom indicated it was open to independence for Nauru, but privately expressed concern

[103] Ibid 480.
[104] Ibid 47–48.
[105] Ibid 486.
[106] Minister for Territories of Nauru, 'Nauru Lands Rehabilitation Committee' (media release, 24 Jan 1966).
[107] Nauru Lands Rehabilitation Committee, 'Report by Committee appointed to investigate the Possibilities of Rehabilitation of Mined Phosphate Lands' (Sydney, 1966) ('Nauru Lands Rehabilitation Committee Report'). Also Merze Tate, 'Nauru, Phosphate and the Nauruans' (1968) *Australian Journal of Politics and History* 177, 186–187.
[108] Nauru Lands Rehabilitation Committee Report, above n 107. Also Tate, above n 107, 186–187.
[109] Weeramantry, above n 8, 274–276; Viviani, above n 27, 149.
[110] Macdonald, above n 18, 49–50.

over the repercussions of Nauruan independence for the nearby Gilbert and Ellice Islands, Fiji, and the Solomon Islands, over which it maintained territorial administrative control.[111]

On the matter of the nature of Nauru's future legal relationship with Australia, the Department of Territories moved over the course of the Nauru Talks from a refusal to entertain any definite prospect of sovereign independence, to a proposed arrangement whereby administrative control for local affairs would be devolved to the NLGC, but Australia would retain control over Nauru's external affairs – a strong echo of the classic protectorate form.[112] The NLGC's response was that any such arrangement could only be negotiated after full political independence, on the basis of sovereign equality.[113] With respect to a timeline for transition of administrative power, from 1965 the NLGC insisted upon 31 January 1968 as the date for official independence, to coincide with the anniversary of the 1945 return to Nauru of Nauruans interned on Truk by the Japanese. The Department responded that a date for independence should not be fixed; rather, the NLGC should be gradually prepared for 'political responsibility'.[114] To that end, the Department agreed to the formation of a new Legislative Council and Executive Council to be added to the existing administrative structure.[115] The Legislative Council would consist of the nine members of the NLGC, plus the five Australian heads of department on Nauru, to be chaired by the Administrator; yet in accordance with the Nauru Island Agreement, matters concerning the phosphate industry would be excluded from its remit.[116] An Executive Council consisting of two Nauruan and two 'official' members would be drawn from the Legislative Council, and would also be chaired by the Administrator.[117] The NLGC agreed to the creation of the new Legislative and Executive Councils, yet continued to insisting that full control be devolved to the expanded administration by 31 January 1968.

In December 1965, the *Nauru Act* was passed in the Australian federal Parliament, providing for the establishment of the Nauru Legislative and Executive Councils.[118] The Legislative

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111 Ibid 49–50.
112 On the classic form of the protectorate, see section 7 'The concept of the protectorate' in Chapter 2, 'From Trading Post to Protectorate, 1920'.
113 Williams and Macdonald, above n 8, 488.
114 Viviani, above n 27, 151–152.
115 Ibid; Parliament of Nauru, *Parliamentary Debates*, 'Bill 1965', 2 December 1965 (Minister for Territories Charles Barnes MP, second reading speech).
116 Viviani, above n 27, 151–152; Minister for Territories Charles Barnes MP, 'Nauru Talks' (media release, 10 June 1965).
117 Viviani, above n 27, 151–152; Charles Barnes MP, 'Nauru Talks', above n 116.
118 *Nauru Act 1965* (Cth), ss 6, 26.

Council was vested with the power to make ordinances, subject to disallowance by the Administrator and the Australian Governor-General, and excluding matters of phosphate royalties, ownership and control of phosphate-bearing land, external affairs, and defence.[119] The Executive Council was delegated the function of 'advis(ing) the Administrator' on any matters referred to it by the Administrator.[120] The *Nauru Act* codified in Australian legislation the existing Nauruan judicial structure which had developed via executive ordinance, including the District Court, Central Court (formerly the Supreme Court), and Court of Appeal, from which a right of appeal to the Australian High Court would lie.[121] The Legislative and Executive Councils were inaugurated on 31 January 1966. However, the Department of Territories continued to maintain that a date for independence should not be established until the new Legislative Council had gained 'practical experience' of administration and its 'political progress' could be appreciably observed.[122] With respect to phosphate, the Department of Territories continued to maintain that ownership and control of Nauruan phosphate remained legally vested in the BPC.[123]

Australian intransigence on both full independence and transfer of ownership and control of phosphate was finally rendered politically untenable in December 1966 by a General Assembly resolution in support of the NLGC's position on all points of contention.[124] Head Chief Hammer DeRoburt had insisted that documentation of the Nauru Talks be submitted to the Trusteeship Council for review, subjecting Australia's conduct during negotiations to international oversight.[125] Two months after it resolved to terminate the Mandate for South West Africa, the General Assembly acted on the advice of the Trusteeship Council and recommended that the Administering Authority fix a date for Nauruan independence not later than 31 January 1968, as insisted upon the NLGC; that ownership in phosphate and control over the phosphate industry be transferred to the 'Nauruan people'; and that the Administration take 'immediate steps, irrespective of the cost involved, towards restoring the island of Nauru for habitation by the Nauruan people as a sovereign nation'.[126] By the end

[119] Ibid s 26.
[120] Ibid s 43.
[121] Ibid, Part VII 'The Judicial System'.
[122] *Report of the Trusteeship Council 1964–1965*, UN GAOR, 20th sess, supp no. 4, 37–38.
[123] Minister for Territories, 'Nauru Talks', above n 116.
[124] *Question of the Trust Territory of Nauru*, GA Res 2226(XXI), GAOR 21st sess, 1500th plen mtg, UN Doc A/RES/2226(XXI)(20 December 1966).
[125] Williams and Macdonald, above n 8, 483–484.
[126] *Question of the Trust Territory of Nauru*, GA Res 2226(XXI).

of 1966, the Department of Territories' protracted attempt to maintain BPC ownership and control of Nauruan phosphate by trading off increased Nauruan self-government had failed.

In April 1967, four months after the General Assembly's resolution in favour of Nauru, another round of negotiations was held in Canberra, this time attended not only by the Department of Territories and the new Nauru Legislative Council, but by representatives of the New Zealand government and the UK Foreign Office.[127] Also in attendance was New Zealand historian James Wightman Davidson, Chair in Pacific History at the Australian National University in Canberra, as constitutional adviser to Nauru.[128] The Department proposed a final agreement whereby full political independence would be transferred to the Nauru Legislative Council and Executive Council; property in phosphate would vest in Nauruan landowners; and ownership and control of the BPC operation would be bought by the Nauruan administration progressively over a three year transition period, to be vested in a substitute entity, the Nauru Phosphate Corporation.[129] In return, Nauru would be required to guarantee phosphate supply to the BPC at 1967 levels for at least three years, and to indemnify Australia and the partner governments from any future claims for rehabilitation of the island.[130] Having lost its attempt to maintain control over the phosphate industry, the Department focused its energy on arguing that legal responsibility for rehabilitation was not owed as a matter of mining law; and that with respect to trusteeship obligations, the Long Term Investment Fund established in 1947 by the Administering Authority and funded entirely by sequestered Nauruan phosphate royalties was sufficient to meet the cost of rehabilitation.[131] The NLGC delegation agreed to the substantive terms of the proposal, agreeing to buy out the BPC between 1968 and 1971 at a cost of AUD$21 million, in exchange for full ownership and control over phosphate and BPC assets. However, the Nauruan delegation refused to accept that the agreement implied indemnity from future claims for rehabilitation.[132]

[127] Viviani, above n 27, 167–169; Williams and Macdonald, above n 8, 488–490.
[128] Viviani, above n 27, 167–169; Williams and Macdonald, above n 8, 488–490.
[129] Macdonald, above n 18, 55; Viviani, above n 27, 165–166.
[130] Macdonald, above n 18, 55; Viviani, above n 27, 165–166.
[131] Macdonald, above n 18, 55; Viviani, above n 27, 163.
[132] Macdonald, above n 18, 55; Weeramantry, above n 8, 274–275.

5. Independence Day: Nauru becomes a Republic

In the negotiated transition to Nauruan independence, administrative control and control over the phosphate industry passed separately, as had been the case in the transition from protectorate to mandate in 1919. On 15 June 1967, the Nauru Phosphate Agreement was signed by the NLGC and the Department of Territories, transferring control of the phosphate operation; and in October 1967, the *Nauru Independence Act* was passed in the Australian federal Parliament, providing for the independence of the Nauruan administration.[133] The Nauru Phosphate Agreement provided that the NLGC would purchase the assets of the BPC over a three year period on an agreed basis of valuation, with ownership of phosphate, the phosphate mining right, and property in plant and equipment vesting in a new Nauru Phosphate Corporation.[134] Phosphate would continue to be supplied exclusively to the BPC at an agreed volume and price, rather than on the open market, with cessation of supply requiring twelve months' notice.[135] On its terms, the Nauru Phosphate Agreement did not deal with the question of rehabilitation; still, the Australian government maintained that the 'settlement' represented in the Agreement was sufficient to meet the costs of rehabilitation, and therefore released the partner governments from liability.[136] After the 1967 Agreement was signed, Head Chief DeRoburt again expressly rejected Australia's claim that the Agreement somehow constituted an indemnity against a future rehabilitation claim. [137]

By late 1967, the shift in the international status of Nauru from UN Trust Territory to sovereign state remained to be approved by the United Nations. In November 1967, a special session of the Trusteeship Council was called to consider the terms of Nauruan independence provided in the Nauru Phosphate Agreement and the *Nauru Independence Act*, in order to decide whether the Trusteeship Agreement had been determined in accordance with the Charter and Trusteeship Council procedure.[138] Head Chief Hammer DeRoburt attended the meeting, and reported that full agreement had been reached between the Department of Territories and the NLGC on all matters except rehabilitation; yet requested

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[133] *Nauru Phosphate Agreement*, 15 June 1967; Minister for Territories of Nauru, 'Nauru Phosphate Agreement' (media release, 15 June 1967). *Nauru Independence Act 1967* (Cth).
[134] Na*uru Phosphate Agreement*, 15 June 1967; Weeramantry, above n 8, 267–271.
[135] *Nauru Phosphate Agreement*, 15 June 1967; Weeramantry, above n 8, 267–271; Viviani, above n 27, 165–166.
[136] Weeramantry, above n 8, 273.
[137] Ibid 274–280.
[138] Ibid 280.

that while the outstanding disagreement on rehabilitation was to be placed on UN record, the issue of liability for rehabilitation should not be regarded as grounds for delaying the termination of the Trusteeship Agreement.[139] DeRoburt's statement to the Trusteeship Council deployed the language of trusteeship to expert effect:

> 'I hope that the Council will have reached the conclusion that we are now ready to take the great step forward which is the deeply cherished aim of all dependent peoples – to move from tutelage to sovereign independence. We ourselves have no doubts. We face our future with the anxieties that are common to all people and Governments in this troubled world, but with confidence that we can acquit ourselves creditably, handle our affairs efficiently, and demonstrate that the responsibilities of independence were not placed on our shoulders before the time was ripe. Nauru will be the smallest of the world's nations; but it will be one, we deeply believe, that will bring no discredit to the world community'.[140]

Australia's obduracy on the matter of responsibility for rehabilitation was explicitly criticised by the Liberian Chair, Angie Brooks, and the Soviet representative, P.F. Shlakov, both of whom supported the Nauruan claim for full rehabilitation at the cost of the partner governments.[141] Despite these reservations, the Trusteeship Council resolved to approve the determination of the Trusteeship Agreement and the accession of Nauru to independence on 31 January 1968.[142]

The question of the administrative form to be adopted by an independent Nauru was dealt with hurriedly during the Nauru Talks. With the assistance of Professor Davidson, the Nauruan delegation had in June 1967 produced the Statement on the Constitutional Future of Nauru.[143] Professor Davidson had acted as constitutional adviser to Western Samoa prior to independence from New Zealand in 1962, and to the Cook Islands, a New Zealand Trust Territory which had opted for self-government within New Zealand.[144] The Nauruan Statement proposed a Republic taking the form of a government 'based on the British parliamentary system', as had occurred in Western Samoa, and expanding on the existing

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[139] Weeramantry, above n 8, 281.
[140] Head Chief Hammer DeRoburt, statement to the United Nations Trusteeship Council, 1323rd meeting, 22 November 1967, reproduced in Eric White Associates, *Republic of Nauru: Independence Day, January 31, 1968* (Sydney and Melbourne Publishing Co Pty Ltd, 1968).
[141] Weeramantry, above n 8, 274–280, 392–399.
[142] *The Future of Nauru*, TC Res 2149(S-XIII), UN TCOR, 13th sess, 22 November 1967; Viviani, above n 27, 173.
[143] Department of Territories, 'Documents relating to the Constitutional Future of Nauru' (22 June 1967); Minister for Territories, 'Constitutional Development in Nauru' (media release, 15 June 1967).
[144] Macdonald, above n 18, 52–53; Viviani, above n 27, 168–169.

administrative structure of Nauru.[145] On the question of external affairs, the Statement reiterated that any prospective treaty relationship with Australia would be negotiated as sovereign equals after the devolution of full political independence to Nauru.[146] The new constitution would provide for the protection of fundamental rights and freedoms of Nauruan citizens; and citizenship would be defined by Nauruan descent, rather than naturalisation, to limit the acquisition of citizenship rights by emigrant workers in the phosphate industry.[147]

The Nauruan Statement went on to propose a government consisting of a Legislative Assembly of 'around fifteen', with members elected by each of the nine constituencies represented in the NLGC, an extension of the existing Legislative Council; a President, elected by the Legislative Assembly, to take over executive authority from the Administrator; an Executive, consisting of the President in capacity as Chief Minister and a Cabinet of three or four Ministers appointed by the President, a reframing of the existing Executive Council; a Judiciary, consisting of a District Court, a Supreme Court and a right of appeal to the High Court of Australia, with the Magistrates of the District Court and the Judge of the Supreme Court to be appointed by the President; and a public service, overseen by a Head of Department, appointed by the President.[148] The public service itself would be streamlined from the existing administration in order to create four ministerial portfolios for the four Ministers that would comprise the Executive.[149] In the proposed reconstitution of the existing administration as a Republic, the office of President would comprise both head of state and head of government, and exercise powers of appointment with respect to both the judiciary and the public service. The Nauruan Statement explicitly addressed this concentration of power in the office of President, reasoning that the size of Nauru meant that a stronger separation of offices would be excessive. To balance the risk of abuse of office, the Statement proposed a mechanism of executive accountability to the Legislative Assembly, whereby the Assembly would be empowered to remove the President and the Cabinet from office via a motion of no confidence.[150] The Statement strongly advocated for

[145] Department of Territories, above n 143, 10.
[146] Ibid 2–3.
[147] Ibid 2, 10–11.
[148] Ibid 2–7.
[149] Ibid 12.
[150] Ibid 3–4.

the adoption of this constitutional structure by a Constitutional Convention elected from the Nauruan people, rather than by an instrument of the Australian Parliament.[151]

The administrative form of the new Republic was settled rapidly over the following months. In October 1967, the *Nauru Independence Act* was passed in the Australian federal Parliament. Consisting of four sections only, the *Independence Act* vested in the Nauru Legislative Council the power to make 'an Ordinance establishing a convention for the purpose of establishing a constitution for Nauru'. [152] It provided that on the 'expiration of the day preceding' 31 January 1968, the *Nauru Act* that only two years previous established the Legislative and Executive Councils would cease to operate; and that 'on and after' 31 January 1968, 'Australia shall not exercise any powers of legislation, administration or jurisdiction in and over Nauru'.[153] On 19 December 1967, an election was held in Nauru to appoint three members of each constituency to the Constitutional Convention, the balance of which would consist of the nine sitting members of the Legislative Council.[154] The Convention met in January 1968 to settle the text of the constitution drafted by Professor Davidson and Victorian lawyer Rowena Armstrong.[155] Elections for the eighteen positions on the new Legislative Assembly were held on 26 January 1968, consisting of two positions for each of the nine represented constituencies.[156] All nine members of the erstwhile Legislative Council were elected as members of the new Legislative Assembly.[157] On 29 January 1968, the Convention unanimously adopted a text for the Constitution as described in the Statement produced during the Nauru Talks in 1967, to be enacted after independence.[158] Two days later on 31 January 1968, the Republic of Nauru celebrated its Independence Day. During a ceremony attended by UN Under-Secretary General Issoufou Saidou-Djermakoye of Niger and the Australian Governor-General Baron Richard Casey, Head Chief Hammer DeRoburt was voted President by the new Legislative Assembly.[159] DeRoburt and the Governor-General

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151 Ibid 9–10.
152 *Nauru Independence Act 1967* (Cth), s 2.
153 *Nauru Independence Act 1967* (Cth), ss 3, 4.
154 Viviani, above n 27, 173.
155 Ibid 173.
156 Ibid 176.
157 Ibid.
158 Ibid.
159 Australian Associated Press, 'Guns Boom and People Grave as Nauru is 'Born'', *Canberra Times* (Canberra) 1 February 1968; Macdonald, above n 18, 60.

Casey signed the Proclamation of Independence, and Nauru formally became a sovereign state.[160]

6. The Constitution of the Republic of Nauru

In May 1968, the Constitution of the Republic of Nauru came into effect.[161] Transitional provisions preserved the existing administrative structure, subject to the express terms of the Constitution. Article 85(1) provided that the all existing laws remained in force; and Article 86 provided that any reference in an existing law to the Australian Governor-General, the Minister of Territories or the Administrator should be read as a reference to the President, unless the context required otherwise. Article 87 provided that, with the exception of the Administrator, all other administrative officeholders remained in their positions.[162] The powers of the Legislative Assembly, Executive and President were codified as proposed in the 1967 Statement. Article 24 empowered the Legislative Assembly to remove a Cabinet including the President by a vote of no confidence passed by at least nine of the eighteen members of Parliament – not a majority, but an even half. With respect to economic structure, Article 58 provided that all revenue raised and not payable into another fund was to be paid into a Treasury Fund, accessible in 'accordance with law'. Article 62(1) codified the existence of the Long Term Investment Fund established in the early years of the trust period, and provided for investments from the fund in accordance with law. Article 63 empowered the Legislative Assembly to create a royalty trust fund, but did not codify the terms of management of the Nauru Landowners Phosphate Royalty Fund, established in the early years of the mandate period and excluded from international oversight. With respect to phosphate operations, Article 93 provided that the Nauru Phosphate Agreement of 1967 entered into by the NLGC would bind the Government of the Republic of Nauru. Beyond this, the Constitution provided only minimal codification of the phosphate operation, omitting from its purview the constitution of the new Nauru Phosphate Corporation formed to take over from the BPC. Article 83(1) vested the right to mine phosphate, previously held by the BPC as purportedly purchased from the Pacific Phosphate Company in 1919, in the

[160] Australian Associated Press, above n 159.
[161] *Constitution of Nauru 1968* (incorporating the alterations made by the Constitutional Convention of Nauru under Article 92 on 17 May 1968).
[162] Article 87 excluded the Public Service Commissioner and Official Secretary from continuation in office.

Republic of Nauru; and Article 83(2) explicitly exempted the Republic of Nauru from liability for rehabilitation of land mined prior to the enactment of the Nauru Phosphate Agreement.

The 1968 Constitution thus codified central elements of the administrative structure that had developed in Nauru over an eighty year period, through transitions in status from protectorate to mandate to trust territory to state. Although providing for further bureaucratisation in the delineation of official powers and functions, in the expanded Legislative Assembly, addition of an Executive Cabinet, and codification of administrative appointment processes, the Constitution concentrated considerable executive power in the new office of President. Legislative and judicial powers, devolved to minor degree during the trusteeship period to the NLGC and the District and Supreme Courts, remained subject to significant executive influence. Ownership and control of the phosphate operation remained formally outside the purview of public administration, although indirectly incorporated via the reference to the Nauru Phosphate Agreement as binding the new Republic. As such, the Constitution included no express provision for financial transparency of the phosphate operation, nor of disposition of trust fund moneys - despite the phosphate operation and the Royalty Trusts constituting the exclusive revenue base of the new Republic. The body of domestic law that had been developed for Nauru by executive ordinance over the preceding eighty year period, and the legal rights and obligations it had created, remained in effect. As Nauru celebrated its first year of sovereign independence, the Nauruan people moved to occupy an administrative structure that did not dismantle but further expanded upon an imperial form of relations established for the primary purpose of facilitating corporate extraction of natural resources from the island.

7. Conclusion: the ironies of Nauruan independence

The transition in international status from trust territory to sovereign statehood was an astounding achievement of the Nauruan people, as represented by the NLGC under Head Chief Hammer DeRoburt. The recognition of Nauruan ownership and control of phosphate was perhaps a greater achievement still, given the intransigence of the Australian Department of Territories and its adoption of a corporate bargaining strategy with respect to its Trust Territory's accession to the independence Australia had ostensibly undertaken to promote. However, international recognition of Nauruan independence, as urged by the Trusteeship Council and the General Assembly, was in many respects profoundly ironic. The presumption of the inevitable uninhabitability of the island on the exhaustion of phosphate

was widely shared, and the accession to sovereign statehood was regarded at the international level less as the inauguration of a viable state, than as a principled means by which the Nauruan people would be free to determine for themselves how to respond to that uninhabitability.

The push toward international recognition of Nauruan sovereignty was to a large extent a result of the juridification of the obligations of trusteeship after the second World War, propelled by the elaboration of the trust relationship in the Charter of the United Nations, and the efforts of the representatives of post-colonial and anti-imperial states on the Trusteeship Council and in the General Assembly. In the Nauruan case at least, the language of trusteeship proved a far more effective a tool for negotiating devolution of political control to the local population than it did for protecting the territory from vigorous economic and environmental exploitation. Since independence, the environmental harm wrought on the island of Nauru has become an infamous fable of unsustainable resource exploitation.[163] The exploitation of Nauru correlated directly to the immense financial benefit that flowed to Australia under the Nauru Island Agreement, and to a lesser extent to New Zealand and the United Kingdom. The scale of that benefit is difficult to estimate, although the political significance of Nauruan phosphate supply in Australia is telling; as historian David Goldsworthy has noted of Australian attitudes, 'the principle of cheap [phosphate] was embedded in the political and economic order, and threats to it were not to be countenanced'.[164]

As significant as the shift in the international status of Nauru was, the administrative structure codified in the 1968 Constitution of the Republic of Nauru was not a novel institution, but a palimpsest of administrative forms that had accreted under eighty years of imperial rule. The Constitution of the Republic of Nauru was drafted, adopted and ratified in less than twelve months. Despite further expansion of the legislature and judiciary, the concentration of executive power in the office of President echoed the concentration of power in the office of Administrator, mitigated only by a blunt mechanism of no confidence

[163] See for example Carl N. McDaniel and John M. Gowdy, *Paradise for Sale: A Parable of Nature* (Berkeley: University of California Press, 2000); and Naomi Klein, *This Changes Everything: Capitalism vs The Climate* (London: Allen Lane, 2014), 161–170.

[164] David Goldsworthy, 'British Territories and Australian Mini-Imperialism in the 1950s' (1995) 41 *Australian Journal of Politics and History* 3, 356–372 at 357. Also Gregory T. Cushman, *Guano and the Opening of the Pacific World: A Global Ecological History* (Cambridge: Cambridge University Press, 2013), 129–132; and Weeramantry, above n 8, 361–362.

motions passable by a simple half of the Legislative Assembly. Despite the phosphate industry comprising the only planned source of revenue, the structure of the Nauru Phosphate Corporation was left outside the purview of the Constitution, leaving the issue of financial transparency between the administration and the phosphate industry to legislative control. The management and disposition of royalty trust funds was similarly left to legislative control, and thus left susceptible to significant executive intervention. All existing laws were left on foot until repealed or amended by the Legislative Assembly; all existing administrative offices were left in place, to be occupied by Nauruans; and all references to the Administering Authority were replaced with references to the President. In 1968, the Nauruan people secured their sovereign independence, and the status of Nauru shifted from trust territory to sovereign state in international law, a moment easily associated with clean beginnings and political promise. Yet a focus on the story of international status at the expense of an attentiveness to administrative form works to obscure a far more burdened transition. The administrative structure to which Nauru's sovereign status attached was built on the foundations of an arrangement struck eighty years previous between a trading company and a reluctant empire.

Chapter 6

Conclusion: Nauru and the histories of international law

1. Summary of argument

This thesis has offered an historical account of how the tiny island of *Naoero* in the Western Pacific ocean became the Republic of Nauru in 1968, the smallest sovereign state by area and by population, excluding the Holy See. Departing from an intuition that Nauru is not anomalous to but somehow representative of the international order, this history has adopted a method of critical redescription in order to focus on administrative practice in an apparently 'marginal' place as a key site of international legal formation. This close reading of the history of Nauru as an object of international legal administration reveals an element of the relationship between imperialism and international law that historical accounts that focus on the articulation of legal concepts in apparently 'central' sites of international law do not: in the post-independence era, the legacies of colonialism and imperialism persist in the administrative forms of the postcolonial state. To be more specific, the shift to sovereign status for Nauru and the expansion of the existing trusteeship administration into a 'British-style parliamentary system' did not dismantle the forms of power relation that had developed under eighty years of imperial rule, but further expanded upon those relations in an accretive way. As such, the notorious post-independence 'flaws' in the Nauruan state identified by the Constitutional Convention in the mid-2000s – the concentration of executive power in a single office, the imbrications of public and private power established under imperial rule, the financial dependence of public administration and services on corporate profit from natural resource exploitation, and the lack of financial transparency or accountability around phosphate profit, royalty calculation and trust fund disposition – are better understood not as peculiar to independence-era administration, but as directly continuous of imperial administrative forms of relation.

In tracing the continuities in administrative form from the late nineteenth century through to independence, this thesis has sought to make two related arguments, one specific to the history of Nauru, the other a general point about histories of international law. The first argument is that while the status of Nauru in international law has shifted – from

protectorate, to mandate, to trust territory, to sovereign state – the forms of relation at the level of local administration have not shifted, but accreted. Throughout the series of shifts in status traced in this project, the administrative form applied to the island has not radically changed structure so much as undergone a process of internal bureaucratisation and external restatement according to the prevailing concepts of the period. The key implication, then, is that the shift in the international status of Nauru from trust territory to state in 1968 was not a departure from but a stage in the bureaucratisation of an imperial administrative form instantiated in the late nineteenth century.

The second argument concerns the relation between this insight and histories of international law more generally. It is an effect of fixing Nauru at the centre of the narrative that the history of international law from the late nineteenth century to decolonisation in the 1960s can be read as the steady bureaucratisation of an administrative form originally set up to facilitate imperial extraction of resources without regard for place or people. Yet this extended observation of the effect on historical perspective of fixing one place over another as central to the construction of narrative is in many respects the fundamental argument this thesis attempts to make. *All* histories of international law require narrative choices that centralise certain sites of international legal formation over others, whether they are made consciously or not. This privileging of place necessarily affects the historical narrative that is constructed, perhaps as significantly as does ideological presumption. The wager that this thesis has made is that the presumption that the received 'centres' of international law – Berlin, Versailles, San Francisco, The Hague, and New York – are self-evidently the sites that should take centre stage in the construction of the history of international law erases as much about the international legal order as it reveals.

What emerges from this attempt to hold Nauru – a marginal outpost of a marginal empire - at the centre of a narrative about the relationship between imperialism and international law from the late nineteenth century through to the independence era is a sense of the distinction between 'the' history of international law as a mode of conceptual reasoning or an ideal framework for governing the world, and the *histories* of international law as actually practised in place. This re-orientation emphasises different historical associations than are otherwise privileged in accounts of the relationship between imperialism and international law. Firstly, the centralisation of Nauru necessitates an engagement with the economic activity of the Hanseatic firms, and the relationship between the Hanseatic firms and the imperial policies

of the new German Reich. This engagement with the complex relations between the Hanseatic companies, German federalism and imperial expansion sheds light on an empire that has been habitually marginalised in histories of imperialism, at least in English. It also casts a web of historical and political associations over the globe that would otherwise be difficult to see: between Nauru, Hamburg and Berlin; between Nauru, Namibia and New Guinea; between Nauru, Banaba and Peru. The connections between the complex political and economic difficulties faced in many of the former German colonies and the inherited administrative forms developed accretively under imperial rule – a group that includes Nauru, New Guinea, Samoa, the Marshall Islands, the Federated States of Micronesia and Namibia, Rwanda, Burundi, Tanzania, Togo and Cameroon – warrant closer consideration than has been possible in this project. More generally, analysis of the former C Mandates as a group remains a matter for future research.

Secondly, the focus on the western Pacific also reveals elements of the internal relations of the British empire, and particularly between the Dominions and the Imperial government. Juridical attempts to taxonomise the British empire, and the position of the white settler colonies of Australia, South Africa, New Zealand and Canada within it, reveal the extent to which claims for greater autonomy and control over external affairs and defence powers were related to the Dominions' 'sub-imperial' aspirations. With respect to Australia, the extent to which German imperialism - and British acquiescence toward Germany's formation of a Pacific 'sphere of influence' - influenced the push in the Australian colonies toward federation is often sidelined in more triumphalist accounts of Australia's protracted path to sovereign independence. So too is the relationship between the recognition of Australian sovereignty at the international level, and the Australian government's sub-imperial policies regarding Nauru and New Guinea. The resonances in this regard between the Australian and South African paths to international personality and their assumption of control over their respective C Mandates are notable, a connection frequently overshadowed by the open violence of *apartheid* and South Africa's annexationist aggression in South West Africa. The Nauruan story gestures toward a close historical relationship between imperialism and constitutionalism in both German and British empires, a relationship that remains to be more productively understood.

Thirdly, the centralisation of Nauru requires that phosphate be taken seriously, not only as the physical heart of Nauru's central plateau but as a geological phenomenon and as an

exhaustible global commodity. The commodification of phosphate had a significant impact not only on modes of imperial expansion into the Pacific, but also on the rapid industrialisation of agricultural production across the world. Not only has the use of phosphate as a fertiliser dramatically altered patterns of food production and land use, it has had devastating impact on the ecosystems in which it has been extensively used. From an Australian perspective, it bears pointing out that it is not only Nauru's environment that has been irrevocably altered by the aggressive mining practices of the tripartite BPC. Subsidised access to superphosphate, insulated entirely from world price fluctuations for over sixty years, facilitated the rapid development of Australia's wheat, sugar and dairy industries in areas that would otherwise not have been arable. The long term effects of the exploitation of Nauruan phosphate on Australian land use practices – and indeed on Australian cultural identity - deserves greater attention, as does the status of phosphate as an exhaustible global resource.[1]

To summarise, this thesis is offered as a contribution to the field of histories of imperialism and international law, and aims to offer insight not only into the Nauruan case, but into the way that writing from a specific place 'up' to international law, as opposed to writing from international law 'down' to the world, radically reconfigures the construction of international law that emerges. The political intention in this move is to suggest that in uncritically privileging certain places over others as of formative importance to international law as discipline and practice, *all* histories of international law are affected by the geographic parochialism that is consciously performed in this project. As such, a more nuanced understanding of - and therefore resistance to - the Eurocentricity of the discipline might be achieved through a greater awareness of the effect on historical narrative of presuming that the received sites of international legal power are necessarily co-extensive with sites of analytical value. Even within the confines of disciplinary practice, which obliges an epistemological Eurocentricity in its insistence on certain modes of knowledge production, there is much to be gained from consciously grounding historical narratives of 'international law' in 'marginal', 'unimportant', or 'anomalous' places. Not only is it easier to perceive the

[1] On peak phosphorous, see Stuart White and Dana Cordell, 'Peak Phosphorus: Clarifying the Key Issues of a Vigorous Debate about Long-Term Phosphorus Security' (2011) 3(10) *Sustainability* 2027; and Sarah M McGill, "Peak' Phosphorous? The Implications of Phosphate Scarcity for Sustainable Investors' (2012) 2 *Journal of Sustainable Finance and Investment* 222.

gaps between the concepts of international law and the practices those concepts are assumed to inform, it is easier to understand how and why those gaps occur.

In this project, I have endeavoured to maintain focus on Nauru by borrowing firstly from jurisdictional thinking to construct an account of how law was used and understood by a succession of German, British and Australian administrations to authorise the imperial exploitation of Nauru; and secondly from Weber, to relate the development of that law to the actual form of the Nauruan administration. What becomes visible in this history of international law at the periphery that is obscured in accounts of international law at the centre is that while international status shifts, administrative form accretes; in the independence era, the legacies of imperialism persist in the structure of the postcolonial state. However, this is not to suggest that the focus on administrative practice developed in this project is the only means by which a history of international law might be grounded in place. In this regard, this thesis is offered as an invitation to international lawyers to consider how assumptions about the centrality of certain places over others might be undone, and the effect this might have on accounts of the relation between the theory and practice of international law.

2. Concluding comments: *Nauru v Australia* and the issue of rehabilitation

Within the discipline of international law, the history of Nauru is often refracted through the case brought by Nauru against Australia in the International Court of Justice in 1989. Although it is not the intention here to summarise the case or its outcomes, some comment is necessary. In May 1989, twenty years after independence, Nauru lodged an application instituting proceedings against Australia in the International Court of Justice, seeking resolution of the issue that remained outstanding on the negotiated transition to independence from Australia in 1968: liability for rehabilitation of mined-out lands on the central plateau of the island.[2] In a section entitled 'Background to the Dispute', the Application summarises in fourteen paragraphs a version of the story presented in this thesis. Running through the protectorate, mandate, and trust territory periods, and ending with independence in 1968, the Background lists the principal legal instruments and events of war that have affected the international status of Nauru, and the claimed chain of title of Nauruan

[2] Application Instituting Proceedings, *Nauru v Australia (Phosphate Lands Case)*, International Court of Justice, General List, 19 May 1989.

phosphate: the agreement between the Bismarckian Reich and the *Jaluit Gesellschaft*, which included a concession to mine guano; the transfer of the concession from the *Jaluit Gesellschaft* to the Pacific Phosphate Company under German administration; the occupation of Nauru by Australian forces in 1914; the creation of the Mandate for Nauru under Article 22 of the Covenant of the League, conferred upon 'His Britannic Majesty', frustrating Australia's ambit for annexation; the Nauru Island Agreement, in which Britain, Australia and New Zealand agreed on terms of the tripartite state monopoly over Nauruan phosphate and the 'provision for exercise of the said Mandate' by an Administrator with executive powers limited only by the right of the new British Phosphate Commissioners (BPC) to mine phosphate without administrative intervention; the occupation of Nauru by Japanese forces in 1942; the resumption of Australian administration immediately after the war, and accession to UN trusteeship oversight in the Trusteeship Agreement for Nauru of 1947; the creation under trusteeship of the Nauru Local Government Council and then the Legislative and Executive Councils of Nauru, and the limited power exercised by them; the resolutions of the Trusteeship Council and the General Assembly on the satisfaction of trusteeship obligations; the Nauru Phosphate Agreement of 1967; and the independence of Nauru in 1968.[3]

In its Application to the ICJ, Nauru submitted that the 1967 Phosphate Agreement did not include settlement of the issue of liability for rehabilitation, and that repeated attempts in the interim to secure an admission of liability from Australia had failed.[4] As such, Nauru requested from the ICJ a declaration of Australia's liability for rehabilitation, and an order for restitution.[5] In its Preliminary Objections, Australia repeated its decades-old position that all claims relating to the administration of Nauru during the mandate and trusteeship periods were settled in the 1967 Nauru Phosphate Agreement.[6] Australia also contested the jurisdiction of the Court and admissibility of the case on various grounds.[7] In its judgment on the Preliminary Objections, the ICJ held there was no evidence that the pre-independence Nauruan authorities had waived the claim for rehabilitation, and rejected Australia's alternative arguments.[8]

[3] Ibid 4–12.
[4] Ibid 24–28.
[5] Ibid 30–32.
[6] Preliminary Objections, *Nauru v Australia* ('*Phosphate Lands Case*') International Court of Justice, General List, December 1990.
[7] Ibid.
[8] '*Nauru v Australia* ('*Phosphate Lands Case*'), (*Judgment on the Preliminary Objections)* [1992] ICJ Rep 240, 247–250.

Following the submission by both parties of exhaustive memorials on the merits, the case between Nauru and Australia settled in August 1993.[9] The 'Nauru Australia Compact of Settlement' (NACOS) comprised a sum of AUD$107 million, to be paid by Australia to Nauru in a series of upfront payments with the balance paid in instalments over a twenty year period, and made 'without prejudice to Australia's long-standing position that it bears no responsibility for the rehabilitation of the phosphate lands worked out before 1 July 1967'.[10] In exchange, Nauru agreed to discontinue its ICJ action and to indemnify Australia, New Zealand and the United Kingdom from any future action 'arising out of or concerning the administration of Nauru during the period of the Mandate or Trusteeship or the termination of that administration, as well as any matter pertaining to phosphate mining, including matters pertaining to the British Phosphate Commissioners, their assets or the winding up thereof'.[11] The Settlement further provided that the annual payment of AUD$2.5 million would disposed of by agreement between the parties.[12]

In a revealing indication of Australia's attitude toward the ICJ settlement, payments made in satisfaction of the Nauru Australia Compact of Settlement (NACOS) have been included in Australia's annual reports of development aid paid to Nauru.[13] That the Department of Foreign Affairs and Trade categorised the NACOS payments as 'aid' - as opposed to damages for the sustained exploitation of Nauru to Australian advantage - is an almost poetic indictment of the post-independence paradigm of development.[14] Yet the potential poetry of this observation is blunted by an appreciation of the purposes to which the NACOS 'aid' funds have been put. As well as having nominal responsibility for rehabilitation, The Nauru

[9] '*Nauru v Australia (Phosphate Lands Case')*, *(Order of 13 September 1993)* [1993] ICJ Rep 322.
[10] 'Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning Certain Phosphate Lands in Nauru' *Nauru v Australia* ('*Phosphate Lands Case*') [1993] ICJ Pleadings, vol III, 511, art 1 ('*NACOS*').
[11] Ibid art 3.
[12] Ibid art 1(d).
[13] See Department of Foreign Affairs and Trade, 'Australian Agency for International Development Annual Reports 1998–2013' (Commonwealth of Australia), <http://dfat.gov.au/about-us/publications/corporate/annual-reports/pages/annual-reports.aspx>; and Department of Foreign Affairs and Trade, 'Nauru Aid Program Performance Reports 2012–2016' (Commonwealth of Australia), <http://dfat.gov.au/geo/nauru/development-assistance/Pages/development-assistance-in-nauru.aspx>.
From 2001–2007, the first era of offshore detention of asylum seekers on Nauru under the Howard government, payments to Nauru in relation to the regime were described as 'additional aid' and 'development assistance' and included in total aid funds. See for example, Department of Foreign Affairs and Trade, 'AusAID Annual Report 2001–2002' (Commonwealth of Australia), 44, 54.
[14] On the continuities between imperialism and the post-independence development paradigm, see Gilbert Rist, *The History of Development: From Western Origins to Global Faith* (Patrick Camiller trans, Zed Books, 1997); Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003); and Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011).

Rehabilitation Corporation set up after the settlement now mines phosphate.[15] In 2012-2013, the final year of the twenty year settlement, the Department of Foreign Affairs and Trade produced its annual Aid Program Performance Report for Nauru, which reported that the NACOS funds were put primarily toward phosphate mining, and that progress on rehabilitation had been 'limited'.[16] The DFAT report states that the failure of the rehabilitation program is mitigated by the benefits to Nauru of continued mining:

> '(t)his is balanced to some extent by the economic and social benefits provided by Nauru's more prosperous mining industry, including higher dividends for land owners and government and increased employment opportunities. Funds provided under NACOS represent a significant proportion of the operational budget for the Nauru Rehabilitation Corporation's work on mining and land rehabilitation. It is as yet unclear how the corporation plans to fund these operations once the final payment due under the NACOS treaty is made in 2013–14'.[17]

The Memorandum of Understanding that re-established Australia's 'Regional Processing Centre' in Nauru for the detention of asylum seekers who arrive in Australian waters by sea was signed in August 2012, in anticipation of the determination of the NACOS Settlement.[18] Although the precise financial arrangement between the Australian and Nauruan governments has not been made public, between mid-2012 and mid-2015, over AUD$27,000,000 had been paid under the Memorandum to Nauru for its role in Australia's offshore detention regime.[19] On DFAT's own statistics given in its 'Aid Investment Plan' for Nauru, the revenue of the Republic has increased by over 500% due to the re-opening of the Regional Processing Centre, from AUD $20 million in 2010-2011 to AUD$115 million in 2015-2016.[20] DFAT's assessment of the benefit to Nauru of this rapid increase in revenue is a deft exercise in euphemism, sidestepping the notorious abandonment of the rule of law

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[15] See Republic of Nauru, 'National Sustainable Development Strategy 2005–2025' (Revised 2009) 24, <https://www.adb.org/sites/default/files/linked-documents/cobp-nau-2016-2018-nsds.pdf>.
[16] Department of Foreign Affairs and Trade, 'Aid Program Performance Report 2012–13 Nauru', Commonwealth of Australia, <http://dfat.gov.au/about-us/publications/Documents/nauru-appr-2012-13.pdf>, 19.
[17] Ibid.
[18] 'Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues', signed 29 August 2012.
[19] High Court of Australia, *Plaintiff M68 v Minister for Immigration and Border Protection* [2016], 327 ALR 369, 415–416.
[20] Department of Foreign Affairs and Trade, 'Aid Investment Plan: Nauru 2015–16 to 2018–19', Commonwealth of Australia, 2, <http://dfat.gov.au/about-us/publications/Documents/nauru-aid-investment-plan-2015-19.pdf>.

that the Nauruan executive has engaged in since 2013:[21] 'Nauru continues to face capacity challenges to utilise those resources to achieve human development outcomes and build economic resilience in the medium to longer term'.[22]

3. The past in the present: Nauru and the contemporary international order

In conclusion, it is crucial to reiterate that this thesis does not purport to offer a history of the island of *Naoero* and the Nauruan people. What it does offer is an account of the formation of 'Nauru' as an object of international law, constructed using a particular methodology, applied to a particular set of legal sources. What I have sought to do, as an Australian international lawyer of German and British lineage, is to redescribe the actions of Europeans who presumed themselves to be justified in imposing administrative control on Nauru, and the ways in which law was used as a means of authorising imperial rule. The project seeks to demonstrate one way that those of us who inherit both Eurocentric narratives of international law and the responsibility of colonial lineage in a postcolonial place might better understand the continuities between imperial administration and the various administrative and disciplinary practices that happen today under the broad banner of international law. To that end, I have avoided offering representations of Nauruan experiences of and perspectives on imperialism and sovereign independence, other than those that appear in the set of administrative sources considered. I have done so in order to leave space for Nauruan accounts of the period of imperial rule and its effects on the contemporary state. The aim of this thesis is emphatically not to undermine the significance of the political struggle undertaken by the Nauruan people to achieve sovereign status, or to secure Nauruan occupation of the highest levels of administration. It is rather to suggest that recognition of sovereign status at the international level can only ever be a partial response to the complex effects of imperial administration. The imperial past continues to shape

[21] See Melissa Clarke, 'Nauru Expels Australian Magistrate Peter Law, Bars Chief Justice Geoffrey Eames from Returning to Country', Australian Broadcasting Corporation, 20 January 2014 <http://www.abc.net.au/news/2014-01-20/nauru-sacks-deports-australian-magistrate-chief-justice/5207600>; Australian Associated Press, 'Nauru Suspends Two More Opposition MPs Ahead of Budget Hand Down', *The Guardian* (online), 5 June 2014 <https://www.theguardian.com/world/2014/jun/05/nauru-suspends-two-more-opposition-mps>. For the Nauruan government's position, see Republic of Nauru Government Information Office, 'Nauru Government Sets the Record Straight' (media release, 25 January 2014) <http://www.naurugov.nr/government-information-office/media-release/nauru-government-sets-the-record-straight.aspx>; and Republic of Nauru Government Information Office, 'Supreme Court has Deemed Suspension of MPs Lawful', (media release, 11 December 2014) <http://www.naurugov.nr/government-information-office/media-release/supreme-court-has-deemed-suspension-of-mps-lawful.aspx>.

[22] Department of Foreign Affairs and Trade, 'Aid Investment Plan' above n 20, 2.

contemporary administrative form in ways that needs to be better understood, if the decolonial project is to continue to advance.

This project does not deal in any depth with the independence period, and a detailed treatment of the history of the Republic of Nauru from 1968 to the present that resists the journalistic tendency to turn the island's history into a dystopic fable remains to be written. Nevertheless, a few observations that flow from the analysis offered in this thesis might be useful here. Attempts to explain the particularity of the Nauruan state have seen it included in various political and developmental categories, including as a small island developing state (SIDS), and even as the 'first Pacific failed state'.[23] In presuming the anomalousness of the Republic of Nauru, such accounts reinforce the notion that there is a 'normal' state, and a 'normal' way a state should conduct itself within the international order. Such presumptions work to obscure the myriad historical causes for 'deviations' from that supposed norm, and create a sense that the post-independence struggles of states formerly under imperial rule constitute some kind of inherent dereliction.

There is a sense, however, in which the apparent dysfunction of the Republic of Nauru as a sovereign state can be viewed as a particular sort of functionality within the international order. The Nauru Local Government Council's experience with the United Nations Trusteeship Council throughout the 1950s and 1960s laid the foundations for what has proved a canny record of international activity in diplomacy and institutionalised agreement making. Nauru has maintained strong diplomatic relations not only with Australia, but also with the Russian Federation and Japan, as well as with the Republic of China (Taiwan) and the Republic of Cuba. Under its Non-Project Aid Program, Japan supplies Nauru with the diesel fuel required to run the electricity plant, and therefore much of the island; and Nauru votes with Japan in the International Whaling Commission.[24] In continuity with the relationship established through Soviet support of Nauruan independence in the Trusteeship Council, Nauru's relations with the Russian Federation have proven particularly inventive.

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[23] Republic of Nauru, *Nauru National Assessment Report for the Third International Conference on Small Island Developing States (SIDS)* (Report, 17 May 2013) <http://www.sids2014.org/content/documents/224NAURU%20National%20Assessment%20Report%20for%20Third%20SIDS%20Conference%202013.pdf>. John Connell, 'Nauru: The First Failed Pacific State?' (2006) 95(383) *The Round Table: Commonwealth Journal of International Affairs* 47.

[24] 'Early Win for Anti-Whaling Lobby at IWC', *ABC News* (online) 20 June 2005 <http://www.abc.net.au/news/2005-06-20/early-win-for-anti-whaling-lobby-at-iwc/1596878>; 'Japan 'Bullying' Countries to Back Whaling', *Sydney Morning Herald* (online) 20 June 2005 <http://www.smh.com.au/news/National/Japan-bullying-countries-to-back-whaling/2005/06/20/1119119762974.html>.

Although the source of the information is unknown, it is rumoured that over US$92 billion was laundered through Nauru from the USSR in the two years following its collapse. In 2009, Nauru recognised the independence of the Georgian provinces of Abkhazia and South Ossetia, announcing at the same time an estimated US$50 million aid deal with the Russian Federation.[25] In 2015, Nauru voted with Israel and the United States in the United Nations against a set of resolutions protecting the non-member observer status of Palestine.[26] So too did the Republic of the Marshall Islands (RMI), the Federated States of Micronesia (FSM), and Palau, formerly the western chain of the Caroline Islands, together formerly known as the Islands North of the Equator under Japanese mandatory rule, and then the Trust Territory of the Pacific Islands under US rule.[27] That slip in perception I experienced one evening in Nauru, watching a container ship disappear over the horizon, was really just a realisation of my own parochialism. If the presumption of the centrality of certain places over others is undone, it is simply from the place in which you stand that the international order unfolds itself.

[25] 'Tiny Nauru Recognises Georgia's Other Rebel Enclave', *Reuters* (online) 16 December 2009 <http://www.reuters.com/article/idUSLDE5BF1LU>; and Luke Harding, 'Tiny Nauru Struts World Stage by Recognising Breakaway Republics', *The Guardian* (online) 15 December 2009 <https://www.theguardian.com/world/2009/dec/14/nauro-recognises-abkhazia-south-ossetia>.
[26] United Nations, 'Traditional Voting Pattern Reflected in General Assembly's Adoption of Drafts on Question of Palestine, Broader Middle East Issues' (media release, 24 November 2015) <https://www.un.org/press/en/2015/ga11732.doc.htm>.
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