

**‘IMPERIUM IN IMPERIO’:  
SUB-IMPERIALISM AND THE FORMATION OF  
AUSTRALIA AS A SUBJECT OF INTERNATIONAL LAW**

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*This article retraces the role of sub-imperialism in the formation of the Australian state as a subject of international law. The discourse of sub-imperialism developed in the late nineteenth and early twentieth centuries as a means of characterising the British self-governing Dominions’ uncertain status in the international order, and drew explicitly on the United States Monroe Doctrine. The article revisits the significance of sub-imperialist posturing at two critical junctures in the historical formation of the Commonwealth of Australia. The first is the formalisation in the early 1880s of the movement toward federation of the Australasian colonies as a response to perceived British acquiescence to German imperialism in the Western Pacific. The second is the Commonwealth government’s attempt during the Versailles negotiations of 1919 to annex to its territory the occupied German Pacific territories of New Guinea and Nauru. The principal argument made in this article is that attempts to establish an Australian sub-empire in the Western Pacific were fundamental both to the federation movement and the recognition of Australian sovereignty in international law. The article concludes that Australian sub-imperialism warrants greater attention both in accounts of the history of Australia’s transition from self-governing Dominion to sovereign status in international law, and in accounts of contemporary Australian foreign policy in the Pacific region.*

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## I INTRODUCTION

Nations, like men, have often to face a great crisis before the secret of their being becomes revealed to the world and to themselves, and it was not until the outbreak of the war, which has jeopardized the very existence of the British Empire, that Australia began fully to realize that Empire's meaning, and the high and responsible part she has been called to play in it. During the last few years her sense of Imperial responsibility has been deepened and quickened by two things — the creation of her national Navy, and the *imperium in imperio* established by her possessions in the Pacific.<sup>1</sup>

This paper retraces the role of sub-imperialism in the formation of the Australian Commonwealth as a subject of international law. The discourse of sub-imperialism developed in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries as a means of characterising the British self-governing Dominions' uncertain status in the international order.<sup>2</sup> Australian sub-imperialism drew explicitly on the Monroe Doctrine asserted by United States President James Monroe in 1823, and posited a self-evident right of the Australian colonies to regional supremacy in the Western Pacific.<sup>3</sup> This paper revisits the significance of sub-imperialist posturing at two critical junctures in the historical formation of the Commonwealth of Australia. The first is the formalisation in the early 1880s of the movement

<sup>1</sup> F W Eggleston, 'Australia' (1914) 5 *Round Table: A Quarterly Review of the Politics of the British Empire* 447, 447. *The Round Table: A Quarterly Review of the Politics of the British Empire* was founded in 1910. The journal was renamed *A Quarterly Review of British Commonwealth Affairs* after World War II, and then the *Commonwealth Journal of International Affairs* in 1983. The phrase '*imperium in imperio*' is used here in the sense of 'empire within an empire', and this is the sense in which it considered in this discussion. However, it is noteworthy that *Imperium in Imperio: A Study of the Negro Race Problem* was also the title of a utopian novel by African American author and activist Sutton E Griggs, published in 1899. The novel imagines the existence of a militant underground African American state headquartered in Waco, Texas, and is a literary excoriation of white supremacy. See Sutton E Griggs, *Imperium in Imperio: A Study of the Negro Race Problem* (1899).

<sup>2</sup> On Australian sub-imperialism, see Roger C Thompson, *Australian Imperialism in the Pacific: The Expansionist Era 1820–1920* (Melbourne University Press, 1980). On Dominion status over the later 19<sup>th</sup> and early 20<sup>th</sup> century, see H Duncan Hall, *The British Commonwealth of Nations: A Study of its Past and Future Developments* (Methuen & Co, 1920); P J Noel Baker, *The Present Juridical Status of the British Dominions in International Law* (Longmans, Green and Co, 1929); Arthur Berriedale Keith, *The Sovereignty of the British Dominions* (Macmillan, 1929).

<sup>3</sup> For a general history of the Monroe Doctrine, see Jay Sexton, *The Monroe Doctrine: Empire and Nation in Nineteenth-Century America* (Hill and Wang, 2011). Drafted by John Quincy Adams, the relevant sections of the speech given by Monroe in 1823 provided as follows, at 2:

The occasion has been judged proper for asserting as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers ... We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety.

On the Australian adoption of Monroeism with respect to the Western Pacific, see J Macmillan Brown, 'Australasian Monroeism' (1921) 12 *Journal of International Relations* 192; Merze Tate, 'The Australasian Monroe Doctrine' (1961) 76 *Political Science Quarterly* 264.

toward federation of the Australasian colonies as a response to perceived British acquiescence to German imperialism in the Western Pacific. The second is the Commonwealth government's attempt during the Versailles Peace Conference of 1919 to annex to its territory the occupied German Pacific territories of Nauru and German New Guinea. The principal argument made in this paper is that attempts to establish an Australian sub-empire in the Western Pacific were fundamental both to the federation movement and the recognition of Australian sovereignty in international law. Just as British acquiescence to German Imperial expansion in the Western Pacific in the early 1880s had consolidated the federation movement in the Australasian colonies, the tension between the Commonwealth government's determination to annex Nauru and German New Guinea and the Imperial government's public support of internationalisation of those same territories spurred Prime Minister William Morris Hughes' demands for a seat at the table during the Paris Peace Conference.<sup>4</sup> Australia's prosecution of its own case for territorial expansion during negotiations over the terms of the *Treaty of Versailles*, which established the League of Nations, was mirrored by the General Jan Smuts' campaign to annex German South West Africa to the territory of the Union of South Africa.<sup>5</sup> As a question of international law, it was the Dominion delegations' self-representation during the Versailles negotiations and subsequent recognition as members of the League of Nations that cemented their shift toward international legal personality and the assumption of external sovereignty. Although, as Lassa Oppenheim observed, the status of the Dominions in international law 'defie[d] exact definition' after Versailles, it was 'none the less real for being hard to reconcile with precedent'.<sup>6</sup>

The subsidiary argument is that Australia's thwarted attempts to establish a formal sub-empire in the Pacific after the First World War contributed to the institution of a form of international administration that straddled the threshold between the high imperialism of the late 19<sup>th</sup> century and the dawning internationalism of the 20<sup>th</sup> century: the 'C' class mandate.<sup>7</sup> The C mandate resulted from a diplomatic compromise reached at Versailles between the annexationist Dominions of Australia and South Africa on the one hand, and advocates of internationalisation of occupied territories, led by US President Woodrow Wilson, on the other. While Hughes and Smuts failed to achieve the

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<sup>4</sup> W M Hughes, *The Splendid Adventure: A Review of Empire Relations within and without the Commonwealth of Britannic Nations* (Ernest Benn, 1929) 99–102.

<sup>5</sup> Colin Newbury, 'Spoils of War: Sub-Imperial Collaboration in South West Africa and New Guinea 1914–20' (1988) 16 *Journal of Imperial and Commonwealth History* 86.

<sup>6</sup> L Oppenheim, *International Law: A Treatise* (Longmans, Green and Co, first published 1905, 1920 ed) vol 1, 169–70. On the emergence of Australia's international legal personality, see Anne Twomey, 'International Law and the Executive' in Brian R Opeskin and Donald R Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 69, 69–74; Melissa Conley Tyler, Emily Crawford and Shirley V Scott, 'Australia's International Personality: Historical, Legal and Policy Perspectives' in Donald R Rothwell and Emily Crawford (eds), *International Law in Australia* (Thomson Reuters, 3<sup>rd</sup> ed, 2017) 1, 2–8.

<sup>7</sup> 'High imperialism' is used in this piece to refer to the era of formalised European competition for Imperial territory, which marked the later 19<sup>th</sup> century through to the War of 1914–18. See J A Hobson, *Imperialism: A Study* (James Nisbet & Co, 1902); Wm Roger Louis, 'The Colonial Empires in the Late Nineteenth and Early Twentieth Centuries' in *The Ends of British Imperialism: The Scramble for Empire, Suez, and Decolonization* (IB Tauris, 2006) 35–50.

outright annexation of Nauru, New Guinea and South West Africa, succeeding only in being appointed mandatory powers, their attempts at these occupied territories left a peculiar mark on the *Covenant of the League of Nations*. Article 22 of the *Covenant* singled out ‘South-West Africa and certain of the South Pacific Islands’ to be ‘administered under the laws of the Mandatory as integral portions of its territory’.<sup>8</sup> This blurring of the distinction between territorial annexation and international administration left the C mandates, including Nauru, New Guinea and South West Africa, open to severe environmental exploitation and political oppression by their mandatory powers, all under nominal international oversight of the Permanent Mandates Commission of the new League. The discussion concludes that the history of Australian sub-imperialism deserves attention not only in accounts of Australia’s transition from self-governing Dominion to sovereign status in international law, but in assessments of contemporary Australian foreign policy.<sup>9</sup>

Part II of the paper revisits the period of high imperial competition in the early 1880s and retraces the relationship between the federation movement in the Australian colonies and the formalisation of German Imperial interests in the Pacific in the later 19<sup>th</sup> century. Disquiet in the colonies over the perceived acquiescence of the British Imperial government toward the operation of German trading firms in the Western Pacific provided significant impetus to the push for federation as a means of gaining control over the colonies’ external affairs.

Part III moves to 1919 to consider the relationship between the new Commonwealth government’s insistence that it represent its own sub-imperialist aspirations in the post-war Pacific at Versailles and the recognition of Australian sovereignty in international law. Mirrored by similar campaigns by General Jan Smuts of the Union of the South Africa and Prime Minister William Massey of New Zealand, the self-governing Dominions’ self-representation at Versailles is commonly held to have crystallised their movement toward external sovereignty and independence in external affairs.

Part IV considers the effects of the Dominions’ self-representation in the creation of the C mandate as a hybrid form of Imperial and international administration. The Dominions’ shared conviction that they had a right to territorial annexation of the German Imperial territories they had occupied on behalf of the British Empire during the war forced a diplomatic compromise with the advocates of internationalisation led by US Prime Minister Woodrow Wilson with respect to Nauru, New Guinea and South West Africa. The ambiguity in C mandate status undermined attempts in the second half of the 20<sup>th</sup> century to establish legal responsibility for exploitation and oppression under mandatory rule in the *South West Africa Cases* of the 1960s brought by Liberia and Ethiopia

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<sup>8</sup> *Treaty of Peace between the Allied and Associated Powers and Germany*, signed 28 June 1919, 225 ConTS 188 (entered into force 10 January 1920) pt I (‘*Covenant of the League of Nations*’) art 22. On the C mandates, see George H Blakeslee, ‘The Mandates of the Pacific’ (1922) 1 *Foreign Affairs* 98; Luther Harris Evans, ‘Are “C” Mandates Veiled Annexations?’ (1927) 7 *Southwestern Political and Social Science Quarterly* 4, 381. For a general history of the mandate system, see Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press, 2015).

<sup>9</sup> For a parallel revival of the concept of sub-imperialism as a useful way of understanding the emergence of the BRICS (Brazil, Russia, India, China, South Africa), see Adrián Sotelo Valencia, *Sub-Imperialism Revisited: Dependency Theory in the Thought of Ruy Mauro Marini* (Brill, 2017).

against South Africa, and in the case brought by Nauru against Australia in the International Court of Justice in 1989.<sup>10</sup>

Part V concludes that retracing the relationship between Australian sovereignty and sub-imperialism opens at least two avenues for further work on the place of Australia in the international legal order: first, it offers a means of narrating from the Australian context the transition from imperialism to international law as a means of ordering the world. Secondly, it offers a useful framework for assessing contemporary Australian foreign policy in the Pacific region.

## II FEDERATION OF THE AUSTRALIAN COLONIES AND IMPERIAL COMPETITION IN THE PACIFIC

This Part considers the role of sub-imperialist sentiment in a crucial moment in the formation of the Australian state, revisiting the often overlooked relationship between the federation movement in the Australian colonies and the formalisation of German imperialism in the Pacific in the later 19<sup>th</sup> century. The Bismarckian Reich, itself federated only in 1871, was famously late to the fray of high imperial competition in the Pacific.<sup>11</sup> Hanseatic trading firms from northern Germany moved west from Chile into the Pacific in the mid-19<sup>th</sup> century, seventy years after the British Imperial government had established formal colonies across the Australian continent, moving into New Zealand in 1840 and Fiji in 1874.<sup>12</sup> The other European empires had already established formal presence in the region: the French in Tahiti to the east of Samoa and New Caledonia; the Spanish in the Philippines and the Caroline Islands; and the US in Samoa and the Sandwich Islands (later Hawaii). By the time the Hanseatic trading firms arrived, the Portuguese, Spanish, Dutch and then British and French empires had not only developed trading links, plantations and commercial infrastructure across the Pacific Ocean, but they had legally formalised those interests through the official declaration of protectorates, colonies and other iterative forms of Imperial administration.<sup>13</sup> The peculiar shape the German Empire then came to take — comprising disparate territories in the Pacific Islands, East Asia and Africa — followed the activity of the trading

<sup>10</sup> *South West Africa (Ethiopia v South Africa) (Preliminary Objections)* [1962] ICJ Rep 319; *South West Africa (Ethiopia v South Africa) (Second Phase)* [1966] ICJ Rep 6; ‘Application Instituting Proceedings’, *Certain Phosphate Lands in Nauru (Nauru v Australia)* International Court of Justice, General List No 80, 19 May 1989.

<sup>11</sup> On German imperialism and foreign policy, see Hans-Ulrich Wehler, *The German Empire 1871–1918* (Kim Traynor trans, Berg Publishers, 1985) [trans of: *Das Deutsche Kaiserreich 1871–1918* (first published in 1973)]; Erich Brandenburg, *From Bismarck to the World War: A History of German Foreign Policy 1870–1914* (Annie Elizabeth Adams trans, Oxford University Press, 1927) [trans of: *Von Bismarck zum Weltkriege* (first published in 1924)]. See generally John A Moses and Paul M Kennedy (eds), *Germany in the Pacific and the Far East, 1870–1914* (University of Queensland Press, 1977).

<sup>12</sup> On Hanseatic firms in the Pacific, see Stewart Firth, ‘German Firms in the Western Pacific Islands, 1857–1914’ (1973) 8 *The Journal of Pacific History*, 10. On Hanseatic firms in general, see Philippe Dollinger, *The German Hansa* (Routledge, 1999) vol 1. On the British Empire of the 19<sup>th</sup> century, see generally Andrew Porter (ed) *Oxford History of the British Empire* (Oxford University Press, 1999) vol 3.

<sup>13</sup> For a survey of colonial presence in the Pacific in the earlier 19<sup>th</sup> century, see Jean Ingram Brookes, *International Rivalry in the Pacific Islands 1800–1875* (University of California Press, 1941).

networks established over the 19<sup>th</sup> century by the Hanseatic firms, around the edges of already established spheres of influence of the European empires.<sup>14</sup>

This discussion focuses on the activities of two closely related Hanseatic trading firms from Hamburg that proved instrumental in the declaration of German protectorates in the Western Pacific: Godeffroy & Sohn, which from the mid-1850s operated across the Pacific Islands, and the various commercial enterprises established in north-eastern New Guinea by prominent Prussian banker Adolph von Hanseemann.<sup>15</sup> The first agent of Godeffroy & Sohn, August Unshelm, was installed at Apia Bay in Samoa in 1857.<sup>16</sup> Unshelm's brief was to set up as many Godeffroy agents as possible across the smaller islands of the Western Pacific, including islands that already had a European presence.<sup>17</sup> 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.<sup>18</sup> Godeffroy's main Pacific trade was in copra.<sup>19</sup> The firm's Pacific agents quickly built up lines of supply across the Pacific by demonstrating a kiln-based drying technique to local Islanders, and trading arms and alcohol for the dried copra produced.<sup>20</sup> Exports were sent out in three directions: to Hamburg in the new federated Germany, to Valparaiso in Chile and to Sydney in the British colony of New South Wales.<sup>21</sup>

In the decade following German federation in 1871, the Hanseatic firms operating in the Pacific received little to no official support. The prospect of extraterritorial support of commercial activity was politically unpalatable to both Chancellor Bismarck and the new Reichstag.<sup>22</sup> The Franco-Prussian War of 1870–71 had occurred during a depression that had only deepened for Germany after constitutional federation, and Bismarck's focus was on consolidating German territorial integrity along its expanded French borders.<sup>23</sup> Bismarck's early stance against Imperial enterprise has been well documented.<sup>24</sup> His view that Imperial activity outside of the new German federation was of little use to the project of German federation-building, in that it benefited only 'a handful of

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<sup>14</sup> Sebastian Conrad, *German Colonialism: A Short History* (Sorcha O'Hagan trans, Cambridge University Press, 2012) 36–65 [trans of: *Deutsche Kolonialgeschichte* (first published 2008)].

<sup>15</sup> Firth, 'German Firms in the Western Pacific Islands', above n 12, 10–11; Florence Mann Spoehr, *White Falcon: The House of Godeffroy and Its Commercial and Scientific Role in the Pacific* (Pacific Books, 1963) 4; Stewart Firth, *New Guinea under the Germans* (Melbourne University Press, 1983) 8–13.

<sup>16</sup> Firth, 'German Firms in the Western Pacific Islands', above n 12, 11.

<sup>17</sup> A E Bollard, 'The Financial Adventures of J C Godeffroy and Son in the Pacific' (1981) 16 *Journal of Pacific History* 3, 3–4.

<sup>18</sup> *Ibid* 4.

<sup>19</sup> Firth, 'German Firms in the Western Pacific Islands', above n 12, 12.

<sup>20</sup> Bollard, above n 17, 5–6.

<sup>21</sup> Brookes, above n 13, 290.

<sup>22</sup> Helmuth Stoecker (ed), *German Imperialism in Africa: From the Beginnings until the Second World War* (Bernd Zöllner trans, C Hurst & Company, 1986) 15–18 [trans of *Drang nach Afrika* (first published 1977)].

<sup>23</sup> A J P Taylor, *Germany's First Bid for Colonies 1884–1885: A Move in Bismarck's European Policy* (Macmillan, 1938) 17–18.

<sup>24</sup> See generally Bruce Waller, *Bismarck at the Crossroads: The Reorientation of German Foreign Policy after the Congress of Berlin 1878–1880* (Athlone Press, 1974).

merchants and manufacturers',<sup>25</sup> had been established long before federation in 1871.<sup>26</sup> In the 1870s and early 1880s, securing official support for German commercial enterprise — whether in terms of formal legal protection or state subsidies — had proven difficult not only for Godeffroy & Sohn and Hansemann in the Pacific, but also for the various German firms operating in Africa.<sup>27</sup> Bismarck's early distaste for public expenditure on Imperial enterprise resulted in his initially negative responses to requests for official recognition from Carl Peters in East Africa, from Gustav Nachtigal in Togo and the Cameroons, and from Bremen tobacco merchant Frantz Lüderitz in the port of Angra Pequena, to the north of the Cape Colony.<sup>28</sup> Refused official support in 1880, Hansemann proceeded to raise the private equity to refinance Godeffroy interests via the incorporation of a new firm, the *Deutsche Handels- und Plantagen-Gesellschaft* ('DHPG'), only later managing to secure a modest shipping subsidy for the DHPG's Pacific activity via personal representations to Bismarck.<sup>29</sup>

Yet the attitude of both Bismarck and the Reichstag toward official protection of German commercial activity outside of Europe rapidly shifted in tone over the early 1880s. In November 1884, Bismarck himself convened the Berlin West Africa Conference on the Congo, suggesting that in a few short years, the Reich had reconsidered involvement in Imperial competition outside of Europe — and participation in diplomatic debates over the legal rules of acquisition and occupation of foreign territory in Africa and the Pacific — not as a distraction from European realpolitik, but as a means of consolidating the strength of the new German federation.<sup>30</sup> There were complex reasons for this shift from informal to formal empire.<sup>31</sup> First, on the domestic front, the prospect of German Imperial expansion had attracted champions in the form of Carl Peters'

<sup>25</sup> 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'. See Alfred Zimmerman, *Geschichte der deutschen Kolonialpolitik* [History of German Colonial Policy] (Ernst Sigfried Mittler und Sohn, 1914) 6–7, quoted in W O Henderson, *The German Colonial Empire 1884–1919* (Frank Cass, 1993) 32.

<sup>26</sup> 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.

<sup>27</sup> Stoecker, above n 22, 15–18.

<sup>28</sup> Paolo Giordani, *The German Colonial Empire: Its Beginning and Ending* (Gustavus W Hamilton trans, G Bell and Sons, 1916) [trans of: *L'impero coloniale tedesco: come nacque e come finisce* (first published 1915)] 18; William Osgood Aydelotte, *Bismarck and British Colonial Policy: The Problem of South West Africa 1883–1885* (Russell & Russell, 2nd ed, 1970) 27; Wehler, above n 11, 175.

<sup>29</sup> Mary Evelyn Townsend, *Origins of Modern German Colonialism 1871–1885* (Columbia University Press, 1921) 115–16.

<sup>30</sup> Taylor, above n 23, 59; Wehler, above n 11, 174–5; Brandenburg, above n 11, 17–18.

<sup>31</sup> On the utility of distinctions between formal and informal empire, see Ann Laura Stoler, 'On Degrees of Imperial Sovereignty' (2006) 18 *Public Culture* 125, 136–40; Philip J Stern, 'The Ideology of the Imperial Corporation: "Informal" Empire Revisited' in Emily Erikson (ed), *Chartering Capitalism: Organising Markets, States and Publics* (Emerald Insight, 2015) 15. Many thanks to Sundhya Pahuja and Dan Danielsen for the latter reference.

*Gesellschaft für Deutsche Kolonisation* ('Society for German Colonisation') and Friedrich Fabri's *Deutscher Kolonialverein* ('German Colonial Society').<sup>32</sup> The colonial societies framed German imperial expansion as in the interests not only of the 'handful of merchants and manufacturers' that Bismarck had dismissed a decade previous, but also of the German working classes displaced by the industrialisation of agriculture and the long depression that followed the Franco-Prussian War.<sup>33</sup> The motivations of the colonial societies were, at least in Peters' case, more mercantilist than proletarian. What they sought was monopolisation of European trade in the areas in which they had established themselves in Africa and the Pacific, and were willing — at least in the early 1880s — to take on the responsibilities of territorial administration in exchange for public protection of their private interests.<sup>34</sup>

#### A *The 'Monroe Doctrine for the Pacific' and the Australian Federation Movement*

The push toward formalisation of the German Empire, and the abrupt volte-face of Bismarck on the matter in 1884, is often associated with both these internal political pressures and the realpolitik of the 1884 Berlin Conference on the Congo which 'divided up' central Africa.<sup>35</sup> The formalisation of German Empire in the Pacific, however, has received comparatively less attention.<sup>36</sup> This discussion, however, emphasises a regional factor in German policy toward formalisation of Germany's Pacific empire: the push in 1883 in the Australasian colonies for territorial annexation of New Guinea. The activity of the Hanseatic firms in the Pacific was a matter of great consternation in the Australasian colonies. By the 1880s, New South Wales, Queensland, South Australia, Tasmania and Victoria had been granted self-governing status with respect to internal affairs.<sup>37</sup> However, all external affairs powers remained with the

<sup>32</sup> Conrad, above n 14, 23–7.

<sup>33</sup> Henderson, above n 25; 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. See also Theodore S Hamerow, *Social Foundations of German Unification 1858–1871* (Princeton University Press, 1969) vol 1, 40–1.

<sup>34</sup> Stoecker, above n 22, 21–38; Firth, 'German Firms in the Western Pacific Islands', above n 12, 16. For a detailed archival record of correspondence between the Reich and the DHPG over the administration of Nauru, see 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, Divisions of Pacific and Asian History, Australian National University, 1992) [trans of: *Nauru 1888–1900 dargestellt an Hand von Aktenstücken der Kolonialabteilung des Auswärtigen aus den Beständen des Deutschen Zentralarchivs in Potsdam*].

<sup>35</sup> On the Berlin Conference on the Congo, see 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 1884–1885 and the Onset of Partition* (Oxford University Press, 1988) 347; 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.

<sup>36</sup> Cf Moses and Kennedy, above n 11; Firth, 'German Firms in the Western Pacific Islands', above n 12, 15, 19.

<sup>37</sup> Keith, above n 2, 40.

Imperial government.<sup>38</sup> The issue of control over external affairs powers in the Pacific proved to be the major point of legal and political instability within the British Empire of the late 19<sup>th</sup> and early 20<sup>th</sup> century.<sup>39</sup> The Australasian colonial governments regarded Hanseatic commercial activity in the Western Pacific, and particularly the activities of Hansemann in north-eastern New Guinea, as a subterfuge for German aspirations to formal empire in the region.<sup>40</sup> The Imperial government's laissez faire attitude toward German commercial activity in the Western Pacific was, it is argued, an aggravation crucial to the development of sub-imperialist discourse in the Australasian colonies.<sup>41</sup> A key turning point in the consolidation of Australian sub-imperialism came in 1883, when the Colony of Queensland attempted to annex to its territory the entire eastern part of the island of New Guinea, Holland having long claimed the western part.<sup>42</sup> When Queensland requested that British Colonial Secretary Lord Derby confirm the annexation, however, the request was famously refused.<sup>43</sup> Derby responded that taking on the expense of Queensland's attempted territorial expansion into New Guinea was unnecessary, given the Bismarckian Reich's avowed lack of interest in formally acquiring territory in the region. In Lord Derby's opinion, there was simply 'no reason for supposing that the German government contemplates any scheme of colonisation'.<sup>44</sup>

The Australasian colonial governments were collectively outraged at the Imperial government's refusal to acquiesce to Queensland's request. This public slight unified the colonies and provided the principal impetus behind the convening of the first Federal Council of Australasia.<sup>45</sup> The first convention was titled the 'Australasian Convention on the Annexation of Adjacent Islands and the Federation of Australasia' and took place in Sydney in November and December 1883.<sup>46</sup> In July 1883, the Premier of Queensland, Thomas McIlwraith, sent a memorandum to the other colonies on the matter, and drew an 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

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<sup>38</sup> Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (Stevens & Sons, 1966) 248.

<sup>39</sup> Robert MacGregor Dawson (ed), *The Development of Dominion Status 1900–1936* (Frank Cass, 1965) 5–17; Royal Institute of International Affairs, *The British Empire: A Report on Its Structure and Problems by a Study Group of Members of the Royal Institute of International Affairs* (1937) 215–18.

<sup>40</sup> See, eg, *The Melbourne Argus*, 29 December 1884, cited in J L Whitaker et al (eds), *Documents and Readings in New Guinea History: Pre-History to 1899* (Jacaranda Press, 1975) 479.

<sup>41</sup> Tate, above n 3, 264.

<sup>42</sup> Whitaker et al, above n 40, 475–7.

<sup>43</sup> *Ibid* 478.

<sup>44</sup> *Ibid*.

<sup>45</sup> Thompson, above n 2, 68–86.

<sup>46</sup> See Parliament of Victoria, *Australasian Convention on Annexation of Adjacent Islands and the Federation of Australasia*, Parl Paper 48 (1883).

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.<sup>47</sup>

The other colonies supported McIlwraith's position, expressing unrest at the Imperial government's lack of interest in protecting Australian regional interests and agreeing that the German threat proved the need to formalise the movement toward federation.<sup>48</sup>

The resolutions of the 1883 Convention centred around the first collaborative statement by the Australasian colonies of a foreign policy toward the Pacific, illustrating the intimate connection between the federation movement and sub-imperial posturing in the region. In both intent and tone, the 1883 statement mimicked the 1823 US policy of regional supremacy known as the 'Monroe Doctrine'.<sup>49</sup> The Monroe Doctrine asserted that any European attempts at territorial acquisition in Central and South America would be regarded as hostile toward the US.<sup>50</sup> The Australian adoption of a similar policy of regional ascendancy was hailed in both popular and official discourse as a 'Monroe Doctrine for the Pacific'.<sup>51</sup> The first resolution of the 1883 Convention stated that

further acquisition of dominion by any Foreign Power in any of the islands of the Western Pacific, would be highly detrimental to the future safety and well-being of the British possessions in Australasia, as well as injurious to the interests of the whole Empire.<sup>52</sup>

The second resolution dealt specifically with New Guinea, resolving that

Having regard to the geographical position of the island of New Guinea ... this Convention, while fully recognising that the responsibility of extending the boundaries of the Empire belongs to the Imperial Government, is emphatically of the opinion that such steps should be immediately taken as will most conveniently and effectively secure the incorporation with the British Empire of so much of New Guinea as is not claimed by the Government of Holland.<sup>53</sup>

One day later, the convention adopted the following resolution on federation: '[t]hat a Committee be appointed to consider and report upon the best mode of constituting a Federal Australasian Council, and the definition of its functions and authority'.<sup>54</sup> Colonial Secretary Lord Derby responded to the Sydney

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<sup>47</sup> Ibid 6.

<sup>48</sup> 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).

<sup>49</sup> Dexter Perkins, *The Monroe Doctrine, 1867-1907* (Johns Hopkins Press, 1937). See generally Sexton, above n 3.

<sup>50</sup> Sexton, above n 3, 2.

<sup>51</sup> Thompson, above n 2, 45-8; Tate, above n 3, 274.

<sup>52</sup> Parliament of Victoria, *Australasian Convention, 1883: Report of the Proceedings of the Convention of Delegates from All the Colonies of Australasia, Held in Sydney, in November and December, 1883, to Consider the Subjects of the Annexation of Neighbouring Islands and the Federation of Australasia*, Parl Paper 25 (1884) 10.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid 12.

convention resolutions with equanimity in public and disdain in private.<sup>55</sup> In a letter to Prime Minister Gladstone in December 1883, Derby described the Convention resolutions as ‘mere raving’, indicative of the ‘colonial self-esteem’; however, he counselled Gladstone that were the resolutions not taken seriously, the ‘Australians would threaten secession’.<sup>56</sup> Gladstone responded that the Australasian proposal to declare a British protectorate over eastern New Guinea was ‘preposterous’ and refused to entertain the colonies’ demands.<sup>57</sup>

### B *Formalisation of the German Pacific Empire and Australian Colonial Responses*

It was not only the Imperial government that was unimpressed with the resolutions of the 1883 Convention. The Sydney resolutions were met with exasperation by the Hanseatic firms operating in the Pacific and by the Reich itself, albeit for different reasons. The firms continued to demand extraterritorial protection of their Pacific interests; the Reich continued to disavow any intention to give it. In January 1884, German Foreign Officer Moritz Busch expressed his frustration to the German Ambassador in London, Count Münster, over the Sydney resolutions and negative coverage in Australian newspapers of German commercial activity:

on the one hand, the existence of German commercial interests is wilfully denied, and on the other non-existent German projects of annexation are asserted to exist, in order to further the desires of Australia to annex the independent islands of the South Sea.<sup>58</sup>

Australian suspicions were not, however, without cause. Busch’s disavowal of official plans to formalise a German Empire in the region took place as the Hanseatic firms renewed their campaign for legal protection of their Pacific interests in response to the Australasian colonies’ sub-imperial posturing. Hanseatic elders Godeffroy and Hansemann both personally entreated German Consul-General Dr Stuebel for formal protection of their commercial interests in the Western Pacific, and the tide began to turn in their favour.<sup>59</sup> In August 1883, Stuebel relayed his growing support for the firms’ position to Bismarck, noting that ‘[w]hatever confidence we had in the management of the [DHPG], we might yet doubt, whether a Commercial Company, however powerful, would permanently ensure German interests in the South Sea’.<sup>60</sup>

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<sup>55</sup> Letter from Lord Derby to Prime Minister Gladstone, 7 December 1883, reproduced in Aydelotte, above n 28, 13–14. See also Tate, above n 3, 277–8.

<sup>56</sup> Aydelotte, above n 28, 13–14.

<sup>57</sup> *Ibid* 14–15.

<sup>58</sup> 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) 33.

<sup>59</sup> Cait Storr, *Nauru: Imperial Form, International Status and the Histories of International Law* (PhD Thesis, The University of Melbourne, 2017) 12, 22.

<sup>60</sup> Parliament of Victoria, *German Interests in the South Sea*, above n 58, 32. As Hansemann redoubled his efforts in 1883 to secure official protection of his Pacific interests, his efforts were mirrored by German firms in Africa. Lüderitz continued to petition the Reich to protect his interests in the southwestern port town of Angra Pequena, and Carl Peters, his interests in the Great Lakes region of East Africa. Stoecker, above n 22, 21–34.

In 1884, the firms' persistent entreaties to the German Foreign Office were finally met with a positive response.<sup>61</sup> By June, the German government had altered its position on formal empire so significantly that Bismarck himself advocated for official protection for German commercial interests in Africa and the Pacific on the floor of the Reichstag. He presented the sudden change in policy as a direct response to the ongoing requests for protection from the Hanseatic firms:

We were first induced, owing to the enterprise of the Hanseatic people — beginning with land purchases and leading to requests for Imperial protection — to consider whether we could promise protection to the extent desired'.<sup>62</sup>

In his presentation of plans for the formalisation of German Empire, Bismarck sought to minimise the seeming contradiction with his long-held personal views against it by distinguishing between a colony and a protectorate, and making his preference for the latter clear.<sup>63</sup>

The original German iteration of the '*Schutzgebiet*' or protectorate form that would be used to formalise empire was ambitiously minimalist: the only public aid to be provided to the new protectorates would be official declaration by the Reich of a specific firm's monopoly trading rights within a given region, and the threat of enforcement via German warship should such declarations be ignored by other Europeans.<sup>64</sup> Firms that received official recognition in this manner would be 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 in situ for the resolution of disputes.<sup>65</sup> Two months later in August 1884, three months before the Berlin Conference on the Congo, the first German protectorate was declared: in capitulation to Bremen tobacco merchant Franz Lüderitz's repeated requests for official protection of his interests in Angra Pequena, Bismarck issued a declaration designating the port and surrounding areas claimed by Lüderitz as under the 'protection' of the German Reich.<sup>66</sup> The first German protectorate — originally named *Lüderitzland*, following a brief dalliance with the idea of declaring Lüderitz

<sup>61</sup> Letter from Herr von Hansemann and Baron Bleichröder to Prince Bismarck, 27 June 1884, reproduced in Parliament of Victoria, *German Interests in the South Sea*, above n 58, 37.

<sup>62</sup> Theodore S Hamerow (ed), *The Age of Bismarck: Documents and Interpretations* (Harper & Row, 1973) 305–6.

<sup>63</sup> Bismarck presented the policy change in the following terms:

I am energetically opposed to the creation of colonies, according to an idea that I hold it wrong to acquire a territory, to place officials and a garrison there, and then invite colonists to come and take up their abode. The question is altogether different when it is one of ascertaining whether it is the duty of the Imperial Government to accord its protection; it is then claimed by subjects who have taken the risk of colonial enterprises, in which the overflow of the German population will find its natural outlet.

Quoted in Giordani, above n 28, 18.

<sup>64</sup> Woodruff D Smith, *The German Colonial Empire* (University of Carolina Press, 1978) 43. On the unstable distinction between colony and protectorate status in the international law of the late 19<sup>th</sup> century, see Storr, above n 59, 58–61.

<sup>65</sup> Fabricius, above n 34, 166.

<sup>66</sup> Aydelotte, above n 28, 121; Smith, above n 64, 28.

himself sovereign, as had occurred with King Leopold in the Congo — was named *Deutsch-Südwestafrika*, German South West Africa.<sup>67</sup>

Within weeks of the South West Africa declaration, the official position on the formalisation of the entire German commercial empire was reversed.<sup>68</sup> The areas claimed by Hansemann in north-eastern New Guinea were declared subject to the new protectorate of *Deutsch-Neuguinea*, German New Guinea, and renamed ‘Kaiser Wilhelmsland’ and the ‘Bismarck Archipelago’.<sup>69</sup> Bismarck personally notified Hansemann of the decision in a telegram.<sup>70</sup> In the *Schutzbrief* or ‘letter of protection’ granted to Hansemann in respect of his New Guinea interests, the Reich purports to assume the external sovereignty of the territory, leaving the internal sovereignty to Hansemann’s *Neuguinea-Kompagnie*.<sup>71</sup> Hansemann himself was appointed judicial officer of the new protectorate, in addition to his role of ‘Commercial Councillor’.<sup>72</sup> A colleague subsequently remarked of Hansemann that he ‘governed New Guinea in the morning hours before he came into the bank’.<sup>73</sup>

<sup>67</sup> Aydelotte, above n 28, 121. See generally Richard A Voeltz, *German Colonialism and the South West Africa Company, 1894–1914* (Ohio University Center for International Studies, 1988).

<sup>68</sup> Secretary of State Count Hatzfeld sent a memorandum to the German Ambassador in London, Count Münster, relaying the shift:

Our 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 ... We desire not merely to come to an understanding with Great Britain as to the geographical limits of our respective spheres of interest, but also as to the principles in accordance with which either of us would act within our protected territories.

Memorandum sent by German Secretary of State Count Hatzfeld to German Ambassador to Count Münster, 2 August 1884, reproduced in Parliament of Victoria, *German Interests in the South Sea*, above n 58, 40.

<sup>69</sup> Firth, ‘German Firms in the Western Pacific Islands’, above n 12, 21–2.

<sup>70</sup> Bismarck’s telegram to Hansemann gave the following undertaking: ‘The 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’. Parliament of Victoria, *German Interests in the South Sea*, above n 58, 42.

<sup>71</sup> The *Schutzbrief* provided as follows:

Having in August 1884 promised our protection to a society of German subjects and citizens (*Reichsangehörige*), 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 maintaining 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.

‘Charter of the German New Guinea Company’, *The Argus* (Melbourne) 24 July 1885, 10.

<sup>72</sup> *Ibid* 10. See also Firth, ‘German Firms in the Western Pacific Islands’, above n 12, 23–4. 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* (Dymphna Clark and Peter Sack trans, Australian National University Press, 1979).

<sup>73</sup> Firth, ‘German Firms in the Western Pacific Islands’, above n 12, 23.

After German New Guinea followed German East Africa: in February 1885, the Protectorate of German East Africa was declared and the *Deutsch-Ostafrikanische Gesellschaft* or German East Africa Company was incorporated by Carl Peters to take on its administration.<sup>74</sup> The Marshall Islands in the Western Pacific were to follow in August 1885. Various Hanseatic interests in the Marshall and Providence Islands were brought under the protection of the new German protectorate of the Marshall Islands; and in April 1886, on the request of the DHPG, the firm financed by Hansemann to take on the Pacific interests of failed firm Goddefroy & Sohn, the island of Naoero — ‘Pleasant Island’ in English, and ‘Nauru’ in German — was declared to be part of the Marshall Islands protectorate.<sup>75</sup>

The Australian colonies regarded the declaration of German protectorates over north-eastern New Guinea and the Marshall Islands as evidence of the British Imperial government’s complicity in German imperial expansion in the Pacific, and further proof of Australia’s need to gain control over external affairs.<sup>76</sup> Despite Gladstone’s distaste for the Sydney resolutions of 1883, it was clear that some form of response to the German declarations was required from the Imperial government to placate the colonies. In a series of diplomatic negotiations over 1884 and 1885, the Imperial government and the Reich reached a formal agreement on the boundaries of their respective spheres of influence in the Western Pacific, without the involvement of the Australasian colonies.<sup>77</sup> Signed in Berlin in April 1886, the *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* (‘1886 Anglo–German Demarcation Agreement’) plotted a line that bisected eastern New Guinea and cut out into the Western Pacific Ocean, with the north allocated to the German Empire and the south to the British.<sup>78</sup> Both the Imperial government and the Reich undertook ‘not to make acquisitions of territory, accept Protectorates, or interfere with the extension of ... influence’ of the other empire within its allocated sphere of influence.<sup>79</sup> In a few short years, it is argued, the interplay between the Australasian colonies’ sub-imperial federalism and the Hanseatic firms’ corresponding demands for imperial protection of their commercial interests in the region had resulted in the formalisation of empire across the Western Pacific region.

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<sup>74</sup> Henderson, above n 25, 57. Henderson notes that Peters’ requests were denied in November 1884, only to be granted a few months later.

<sup>75</sup> Fabricius, above n 34, 188–9; Storr, above n 59, 81–91.

<sup>76</sup> Whitaker et al, above n 40, 474–6.

<sup>77</sup> Ibid 57–63.

<sup>78</sup> For a map, see Doug Munro and Stewart Firth, ‘Towards Colonial Protectorates: The Case of the Gilbert and Ellice Islands’ (1986) 32 *Australian Journal of Politics & History* 63, 64.

<sup>79</sup> *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*, House of Commons Paper No C 4656, Session 1886 (1886) (signed and entered into force 6 April 1886) (‘1886 Anglo–German Demarcation Agreement’).

### III AUSTRALIA'S EXTERNAL SOVEREIGNTY AND THE PUSH FOR ANNEXATION OF THE GERMAN PACIFIC TERRITORIES

This Part considers the role of sub-imperialism in a second key moment in the formation of the Australian state: the recognition of Australia's external sovereignty in international law. Federation of the Australian colonies occurred in 1901, albeit without New Zealand, as had been contemplated in the first convention of 1883.<sup>80</sup> As is well known, as a question of international law, federation did not mark the accession of Australia to sovereign status.<sup>81</sup> International jurist Oppenheim wrote in 1905 that as the new Commonwealth remained bound by treaties signed by the Imperial government without its consent, it remained a sub-entity of the British Empire with 'no international position whatever': 'they are, from the standpoint of the Law of Nations, nothing else than colonial portions of the mother country, although they enjoy perfect self-government, and may therefore in a sense be called States'.<sup>82</sup> Australia's international status, however, was to change significantly over the early decades of the 20<sup>th</sup> century. This discussion now moves to consider how the new Commonwealth government's sub-imperial posturing toward the Pacific over the early decades of the 20<sup>th</sup> century led to its self-representation during the Versailles negotiations in 1919. That self-representation had two significant effects. First, Australia's participation in the peace treaty negotiations culminated in recognition of its international personality, alongside the other British Dominions of South Africa, New Zealand and Canada.<sup>83</sup> Secondly, Prime Minister William M Hughes' aggressive bid during the Versailles negotiations to annex New Guinea and Nauru to Australian territory forced the compromise creation of the C class mandate in the mandate system instituted by the new League of Nations to administer the occupied German and Ottoman territories after the war.

Even with the official protection they had secured in the 1880s, German commercial interests in the Pacific and in Africa failed to thrive as protectorates.<sup>84</sup> Only fifteen years later in 1898, Hansemann's New Guinea Company had to be rescued from bankruptcy by an agreement with the Reich, now under Kaiser Wilhelm II, in which the Reich paid out the ailing company and assumed direct administration of the region.<sup>85</sup> In the same year, the ad hoc regime of tripartite rule of Samoa by the British, German and US empires also came to an end.<sup>86</sup> The 'condominium' arrangement had been brokered by Bismarck in the Berlin Samoan Conference of 1889 on the basis of equality of

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<sup>80</sup> E J Tapp, 'New Zealand and Australian Federation' (1952) 5 *Historical Studies: Australia and New Zealand* 244, 246–7.

<sup>81</sup> Twomey, above n 6, 69.

<sup>82</sup> L Oppenheim, *International Law: A Treatise* (Longmans, Green and Co, 1905) vol 1, 102–3.

<sup>83</sup> Conley Tyler, Crawford and Scott, above n 6, 5; Hall above n 2, 187–94.

<sup>84</sup> Wehler, above n 11, 175.

<sup>85</sup> Firth, 'German Firms in the Western Pacific Islands', above n 12, 21. See also Conrad, above n 14, 54. On the accession of Wilhelm II, see E Malcolm Carroll, *Germany and the Great Powers 1866–1914: A Study in Public Opinion and Foreign Policy* (Archon Books, 1966) 274.

<sup>86</sup> 'Message of the President of the United States, on the Opening of Congress — Washington, December 5, 1899' (1899) 91 *British and Foreign State Papers* 1253, 1272–3.

the three empires' commercial interests in the Samoan Islands.<sup>87</sup> Yet shared administration of Samoa had come to irritate the Reich, at least in part due to the island's prominence in domestic political discourse as the idyllic exemplar of German Empire.<sup>88</sup> 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 US, the eastern islands; and Britain, exclusive control of the Solomon Islands to the west as compensation.<sup>89</sup> 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.<sup>90</sup>

Over the 1890s and 1900s, the German experiment in company protectorates steadily unravelled, and formal imperial rule took its place. As the Wilhelmine Reich consolidated its 'New Course' in foreign and in colonial policy, shifting toward the militarisation of the Reich's intervention in Africa, the financial failure of many of the German colonial companies prompted the assumption of direct administrative control over the protectorates.<sup>91</sup> Whilst the term *Schutzgebiet* continued to be used to refer to German Imperial administrations in Africa and the Pacific, the substance of the arrangements to which the term referred altered greatly over this period, shifting from ad hoc company administration to direct administrative control supported by military force.<sup>92</sup> In April 1906, the Marshall Islands protectorate, including Nauru, was subsumed under the administration of German New Guinea.<sup>93</sup> By the mid-1900s, the German experiment in company protectorates had failed both in the Pacific and in Africa, and the Reich had taken over direct administrative control of its piecemeal empire.

The Wilhelmine Reich's adoption of the New Course and the transition from company protectorate to direct administrative rule in the German territories of the Pacific was keenly followed in the Australian colonies. The unpopularity of the *1886 Anglo-German Demarcation Agreement* continued to irk the Commonwealth as a prime illustration of the problem with the Imperial government's lack of legal obligation to consult with the self-governing Dominions on external matters which directly affected their regional interests in

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<sup>87</sup> 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. See also 'Message of the President of the United States, on the Opening of Congress — Washington, December 5, 1899' (1899) 91 *British and Foreign State Papers* 1253, 1272–3.

<sup>88</sup> Kennedy, above n 88, 101.

<sup>89</sup> *Ibid* 109–10. See also Wm Roger Louis, *Great Britain and Germany's Lost Colonies 1914–1919* (Clarendon Press, 1967) 27.

<sup>90</sup> See Storr, above n 59, 52–5.

<sup>91</sup> See Stoecker, above n 22, 39–113.

<sup>92</sup> L H Gann and Peter Duignan, *The Rulers of German Africa 1884–1914* (Stanford University Press, 1977) 45–51.

<sup>93</sup> *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.

both commerce and defence.<sup>94</sup> As the German Empire shifted in form toward direct colonial administration, the architecture of the British Empire and the legal status of its constituent parts came under increasing scrutiny from within. According to H Duncan Hall in his historical account of the issue in 1920s, ‘the core of the problem of Dominion status’ was how to ‘reconcile the “absolute equality of nationhood” and the constitutional independence, demanded by the Dominions, with the maintenance of the formal unity of the Empire’, which was ‘equally desired by them’.<sup>95</sup> In 1887, the first Colonial Conference met in London, commencing a series of meetings between the Imperial and the Dominion governments that continued for over twenty years without clearly resolving the basic question that had prompted it: namely, the international status of the self-governing Dominions.<sup>96</sup>

Within the British Empire of the late 19<sup>th</sup> century, administrative forms in place were so diverse as to be unified only by the identity of the Imperial power under which they were contrived.<sup>97</sup> Over two centuries, the British Empire had through corporate, military, diplomatic and administrative means evolved into a supposedly unitary entity of extraordinary internal diversity.<sup>98</sup> In contrast to the German context, the British protectorate was but one of a multiplicity of designations given to imperial administrative arrangements that from the 16<sup>th</sup> 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’.<sup>99</sup> As with the protectorate, these designations lacked consistent legal definition in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries. This mutability of terminology reflected the iterative nature of British imperialism in the 19<sup>th</sup> century. As Welsh lawyer and historian Charles Prestwood Lucas wrote in 1891:

The 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.<sup>100</sup>

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 self-governing Dominions, those demands developed not so much as demands for total

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<sup>94</sup> 1886 *Anglo-German Demarcation Agreement*. See also Fabricius, above n 34, 299–307. On unrest in the Australian colonies, see Whitaker et al, above n 40, 475.

<sup>95</sup> Hall, above n 2, 3 (emphasis in original).

<sup>96</sup> *Ibid* 94–121.

<sup>97</sup> See, eg, Sir Henry Jenkyns, *British Rule and Jurisdiction Beyond the Seas* (Clarendon Press, 1902) 1–9; F J C Hearnshaw, *King's College Lectures on Colonial Problems* (G Bell & Sons, 1913) 5–9.

<sup>98</sup> On the formation of the British Empire, see generally Sarah Stockwell (ed), *The British Empire: Themes and Perspectives* (Wiley-Blackwell, 2008); 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.

<sup>99</sup> Jenkyns, above n 97, 1–8. For a 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.

<sup>100</sup> Charles Prestwood Lucas (ed), ‘Introduction’ in George Cornwall Lewis, *An Essay on the Government of Dependencies* (Clarendon Press, first published 1841, 1891 ed) vii, lxiii.

independence from the British Empire, so much as for greater autonomy within it. The issue of power over external affairs proved to be the major fault line. From the mid-19<sup>th</sup> century, self-government over internal affairs had been devolved progressively by subject matter to the Australasian, Canadian and Southern African colonies.<sup>101</sup> By the 1890s, jurisdiction over immigration and emigration, internal commerce and trade and taxation and expenditure had all been devolved to the Dominion governments.<sup>102</sup> Yet the question of power over the external affairs of the Dominions continued to be contentious well into the early 20<sup>th</sup> century. The Imperial government regarded its retention of power over external affairs — including the power to enter into agreements concerning external commerce and trade, and to enter into defence treaties — as fundamental to its authority and thus to the maintenance of the Empire. At the colonial Conference of 1899, however, it was forced to decide between the two, and opted to grant the Dominions autonomy with respect to regional commercial treaties, in order to ensure that the power to enter into defence and territorial treaties remained with Britain.<sup>103</sup> Thus, while the Imperial government had 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 of defence and alliance signed by the Imperial government continued to bind the Dominions.<sup>104</sup>

As a result, the newly federated Australian Commonwealth continued to be bound well into the 20<sup>th</sup> century by the *1886 Anglo-German Demarcation Agreement*.<sup>105</sup> The Reich's assumption of direct rule in New Guinea in 1898 further exacerbated consternation in Australia over perceived British acquiescence to German imperialism in the Pacific.<sup>106</sup> The tension was now acute: as the Reich had taken over the administration of German New Guinea from Hansemann's New Guinea Company in 1898, in 1902 the new Commonwealth government had taken over the administration of the protectorate of British New Guinea. In 1905, the protectorate was renamed the Territory of Papua.<sup>107</sup> From 1902, then, the Australian Commonwealth and the German Reich shared a land border that bifurcated the eastern half of New Guinea, with German New Guinea to the north, and the Australian Territory of Papua to the south; yet still, the British Imperial government was not legally obliged to consult with the Commonwealth on matters of Imperial defence. At the Colonial Conference of 1907, Australia demanded a solution to this situation,

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<sup>101</sup> See Keith, above n 2, 29–177.

<sup>102</sup> W W Willoughby and C G Fenwick, *Types of Restricted Sovereignty and of Colonial Autonomy* (Scholarly Resources, first published 1919, 1974 ed) 16–17.

<sup>103</sup> Noel Baker, above n 2, 43–4.

<sup>104</sup> *Ibid* 44–7.

<sup>105</sup> Storr, above n 59, 108–9.

<sup>106</sup> See Seaforth Simpson Mackenzie, 'The Australians at Rabaul: The Capture and Administration of the German Possessions in the Southern Pacific' in C E W Bean (ed), *Official History of Australia in the War 1914–1918* (Angus and Robertson, 6<sup>th</sup> ed, 1921–1942) vol 10, 144.

<sup>107</sup> *Papua Act 1905* (Cth) s 5; 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, 1922) 217.

now with the support of the other Dominions.<sup>108</sup> Together, the Dominions demanded direct representation on the Committee of Imperial Defence, established after the Boer War in 1902.<sup>109</sup> The Imperial government proposed a compromise. The Defence Committee would consult with the Dominions on matters of defence in their respective regions; however, the Committee itself was to remain ‘purely a consultative body, having no executive powers or administrative functions’ with respect to the actual exercise of external affairs powers.<sup>110</sup> As complete as their internal self-government may have been, the inability of the British Dominions to determine their own foreign policy determined the question of their status in international law.<sup>111</sup>

#### A *Tension between the Dominions and the Imperial Government over External Affairs*

During the 1900s, the *laissez faire* diplomatic relations between the German and British Empires with respect to their Imperial interests soured.<sup>112</sup> Yet the darkening shadow of European *realpolitik* took time to reach the Pacific. The European empires largely maintained amicable commercial relations in the Pacific right up until August 1914, despite growing hostility in Europe between the triple alliance of the Reich, the Austro-Hungarian Empire and Italy on one hand, and the British, French and Russian empires on the other.<sup>113</sup> Unlike in the African protectorates, where the shift toward direct colonial rule was accompanied with the creation of the *Schutztruppe* or colonial armed guard, the Reich kept no military troops in the German Pacific and maintained only minimal police forces in New Guinea and Samoa.<sup>114</sup> No official instructions were received by the administration of German New Guinea as to conduct in the event of war.<sup>115</sup>

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.<sup>116</sup> As the European empires clashed over territorial claims and spheres of influence in northern Africa and eastern Europe, the Monroeist discourse of sub-empire gained renewed momentum in Australia.<sup>117</sup> Australian supremacist anxieties were exacerbated further by the growing recognition of Meiji Japan as a ‘Great Power’ in the first decades of the 20<sup>th</sup> century.<sup>118</sup> In

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<sup>108</sup> Commonwealth of Australia, ‘Memorandum as to the Functions of the Committee of Imperial Defence’, reproduced in Great Britain Colonial Office, *Papers Laid before the Colonial Conference, 1907* (Eyre and Spottiswoode, 1907) 15, 15–16.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.* 15; Noel Baker, above n 2, 41–3, 47.

<sup>111</sup> Noel Baker, above n 2, 51–2.

<sup>112</sup> Brandenburg, above n 11, 154–81.

<sup>113</sup> *Ibid.* 514–17; Hermann Joseph Hiery, *The Neglected War: The German South Pacific and the Influence of World War I* (University of Hawai’i Press, 1995) 11–12.

<sup>114</sup> Gann and Duignan, above n 92, 104–36; Hiery, above n 113.

<sup>115</sup> Hiery, above n 113, 20–1; Albert Harding Ganz, ‘The German Navy in the Far East and Pacific: The Seizure of Kiautschou and After’ in John A Moses and Paul M Kennedy (eds), *Germany in the Pacific and the Far East, 1870–1914* (University of Queensland Press, 1977) 131.

<sup>116</sup> Hiery, above n 113, 19.

<sup>117</sup> See generally Thompson, above n 2; Tate, above n 3.

<sup>118</sup> See Brown, above n 3, 195–203.

addition to established anti-German sentiment, the discourse of Australian Monroeism developed a new anti-Japanese inflection.<sup>119</sup> Japanese commercial expansion in the Pacific was increasingly discussed as an existential threat not only to Australia's expansionist aspirations, but to the realisation of the Commonwealth's White Australia policy.<sup>120</sup>

Yet Australia's increasingly bellicose self-positioning as the '*imperium in imperio*' of the western Pacific continued to be undermined by its lack of autonomy with respect to defence treaties.<sup>121</sup> As a result, Australia was not consulted by the Imperial government regarding its entry into the Anglo-Japanese Alliance of 1907, further aggravating the issue.<sup>122</sup> At the Imperial Conference in 1907, the Dominions accepted that on British declaration of war, they too would be automatically regarded in international law as belligerents, yet questioned the extent of their legal obligations to give military assistance to the Empire where no consultation had taken place.<sup>123</sup> Four years later at the Imperial Conference of 1911 in London, the tension between the self-governing status of the Dominions and Imperial control over external affairs was debated at length.<sup>124</sup> Australian Prime Minister Andrew Fisher, a vociferous proponent of Australian sub-imperialism, openly demanded prior consultation on entry into treaties that purported to bind the Dominions.<sup>125</sup> Fisher pinpointed the limitations on the Dominions' external sovereignty with respect to non-commercial treaty obligations as the 'weak link in the chain of our common interests'.<sup>126</sup>

### B *Dominion Occupation of the German Imperial Territories*

Following the declaration of war in Europe in July 1914, the tension between Australia's sub-imperial aspirations in the Western Pacific and its lack of independence in foreign affairs was palpable in official communications between the Commonwealth and the Imperial government. On 6 August 1914, two days after Britain's declaration of war on Germany, the Secretary of State for the Colonies, Viscount Lewis Harcourt, sent a carefully worded telegram to Australian Governor-General Ronald Ferguson:

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<sup>119</sup> 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 & Company, 1935). On the development of Australian policy toward Japanese Imperial expansion in the Pacific, see 'Naval Policy and the Pacific Question' (1914) 4 *Round Table: A Quarterly Review of the Politics of the British Empire* 39, 393–410.

<sup>120</sup> See, eg, 'Japan and White Australia', *Southern Cross* (Adelaide), 7 April 1905, 223; 'Congested Japan: The Danger to Australia — Why White Immigration is Imperative', *The Daily Telegraph* (Sydney), 5 July 1907, 7. Cf "'White Australia" and Japan', *The Queenslander*, (Brisbane), 13 August 1904, 3. For a general account of the development of the White Australia policy with respect to Japan, see Marilyn Lake and Henry Reynolds, *Drawing the Global Colour Line: White Men's Countries and the Question of Racial Equality* (Melbourne University Press, 2008) 137–65.

<sup>121</sup> 'Australia' (1914) 5 *Round Table: A Quarterly Review of the Politics of the British Empire* 447, 447.

<sup>122</sup> Noel Baker, above n 2, 47–8.

<sup>123</sup> *Ibid* 48–9.

<sup>124</sup> Great Britain Colonial Office, *Minutes of Proceedings of the Imperial Conference 1911* (Eyre and Spottiswoode, 1911) 97–116.

<sup>125</sup> *Ibid* 98 (Mr Fisher, Prime Minister of the Commonwealth).

<sup>126</sup> *Ibid*.

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 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.<sup>127</sup>

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.<sup>128</sup> The 1914 election was a contest between the Commonwealth Liberal party under incumbent Prime Minister Joseph Cook, and the Labor party under professed imperialist Andrew Fisher.<sup>129</sup> In the high rhetoric of the election campaign, on 12 August *The Age* newspaper 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 of 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 ...<sup>130</sup>

Against such public clamouring, and in memory of Queensland's attempt at territorial annexation of New Guinea 24 years previously in 1883, a further telegram from Harcourt reiterated that the requested occupation of German interests in the Pacific should not be understood as a pretext for any unilateral attempt by Australia at territorial annexation:

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.<sup>131</sup>

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.<sup>132</sup> On 14 September, the Acting Governor of

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<sup>127</sup> Telegram from German Secretary of State to Governor-General of Australia, 6 August 1914, reproduced in Great Britain Colonial Office, *Correspondence respecting Military Operations against German Possessions in the Pacific* (His Majesty's Stationery Office, 1915) No 1.

<sup>128</sup> C E W Bean, 'Australia's Position at the Outbreak' in C E W Bean (ed), *Official History of Australia in the War 1914–1918* (Angus & Robertson, 11<sup>th</sup> ed, 1941) vol 1, 1, 13.

<sup>129</sup> Thompson, above n 2, 204.

<sup>130</sup> 'Melbourne, Wednesday, 12th August 1914', *The Age* (Melbourne), 12 August 1914, 8.

<sup>131</sup> Telegram from German Secretary of State to Governor-General of Australia, 6 August 1914, reproduced in Great Britain Colonial Office, *Correspondence respecting Military Operations against German Possessions in the Pacific* (His Majesty's Stationery Office, 1915) No 3.

<sup>132</sup> Telegram from Commonwealth Naval Board of Administration to Admiralty, 9 September 1914, reproduced in Great Britain Colonial Office, *Correspondence respecting Military Operations against German Possessions in the Pacific* (His Majesty's Stationery Office, 1915) No 4; Mackenzie, above n 106, vol 10, 145.

German New Guinea, Eduard Haber, still without instructions or standing troops, surrendered Herbertshöhe and Rabaul to the Australian officers of the HMAS *Sydney*.<sup>133</sup> 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 British-owned Pacific Phosphate Company, which under German concession had established and run the Nauruan phosphate mining operation since 1902.<sup>134</sup> The Pacific Phosphate Company would continue phosphate operations under an Australian military administration and provision the island for the duration of the occupation.<sup>135</sup> On 6 November 1914, 66 Australian troops arrived on the Pacific Phosphate Company steamer to occupy Nauru, dutifully hoisting the British flag as requested.<sup>136</sup> From mid-1917, however, the idea that the Commonwealth should be granted possession of Nauru in recompense for war losses had gained significant popular traction in Australia, and the likely worth of Nauruan phosphate to Australian economic development became a matter of common speculation.<sup>137</sup> 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.<sup>138</sup>

The *Sunday Times* in Sydney, for its part, spruiked the potential benefit to Australia of annexing Nauru 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'.<sup>139</sup>

The Dominions' push for territorial annexation of the occupied German colonies was debated in London at the next Imperial Conference in 1917, 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 the 1917 federal election that dealt with the controversial question

<sup>133</sup> Mackenzie, above n 106, vol 10, 51–2.

<sup>134</sup> Telegram from High Commissioner of the Western Pacific to Secretary of State, 14 October 1914, reproduced in Great Britain Colonial Office, *Correspondence respecting Military Operations against German Possessions in the Pacific* (His Majesty's Stationery Office, 1915) No 8; Storr, above n 59, 115–25.

<sup>135</sup> Telegram from the High Commissioner of the Western Pacific to the Secretary of State, 14 October 1914, reproduced in Great Britain Colonial Office, *Correspondence respecting Military Operations against German Possessions in the Pacific* (His Majesty's Stationery Office, 1915) No 8; Storr, above n 59, 115–25.

<sup>136</sup> Harold B Pope, *Nauru and Ocean Island: Their Phosphate Deposits and Workings* (Albert J Mullett, Government Printer, 1920) 24–5; Mackenzie, above n 106, vol 10, 144.

<sup>137</sup> 'Nauru Island — Great Wealth in Phosphatic Rock', *The Sunday Times* (Sydney), 20 May 1917.

<sup>138</sup> 'The Riches of Nauru', *Daily Post* (Hobart) 19 May 1917.

<sup>139</sup> 'Nauru Island — Great Wealth in Phosphatic Rock', above n 137.

of conscription.<sup>140</sup> In the absence of Australian representation, the Imperial Conference adopted a resolution on the ‘Constitution of the Empire’.<sup>141</sup> Despite its grand title, the resolution deferred the question of control over the Dominions’ external affairs, asserting 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’.<sup>142</sup> However, some ground was gained by the Dominions in 1917 on the issue of external affairs. At the urging of Lieutenant General Jan Smuts, the South African Minister for Defence, and William Massey, the Prime Minister of New Zealand, the 1917 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 India to an adequate voice in foreign policy and in foreign relations’.<sup>143</sup> The final thread that tethered the Dominions to the international personality of the British Empire had begun to fray. In the Imperial War Cabinet of 1917, established by Lloyd George as a means of giving the Dominions a forum on British foreign strategy, Smuts and Massey explicitly pushed for territorial annexation of the occupied German colonies by the Dominions after the war, proposing that South West Africa be handed over to South Africa, and the Pacific colonies to New Zealand and Australia.<sup>144</sup> Although Australia, South Africa and New Zealand differed in their prosecution of the case, the conviction that Dominion status conferred natural rights to regional supremacy was as self-evident to Smuts and Massey as it was to Hughes.<sup>145</sup>

### C *Annexation versus Internationalisation: The Development of the Mandatory Principle*

The Dominions’ annexationist aspirations conflicted directly with the growing movement for internationalisation of the occupied German and Ottoman territories that emerged from the British labour movement during the war.<sup>146</sup> Proposals for some form of internationalised administration of the occupied territories as an alternative to outright territorial annexation by sovereign powers emerged as early as 1915 from within the British Labour Party, from public intellectuals associated with the Fabian Society including H G Wells and Leonard Woolf, and from socialist alliances, including the Inter-Allied

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<sup>140</sup> L F Fitzhardinge, *William Morris Hughes: A Political Biography* (Angus and Robertson, 1964) vol 1, 45.

<sup>141</sup> Great Britain Colonial Office, *Imperial War Conference 1917: Extracts from Minutes of Proceedings Laid Before the Conference* (His Majesty’s Stationery Office, 1917) 5.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> Louis, *Great Britain and Germany’s Lost Colonies*, above n 89, 82–5.

<sup>145</sup> *Ibid.* 80–2; Newbury, above n 5, 101–4.

<sup>146</sup> On the rise of the internationalist movement, see generally Glenda Sluga, *Internationalism in the Age of Nationalism* (University of Pennsylvania Press, 2013); Mark Mazower, *Governing the World: The History of an Idea* (Penguin Press, 2012); Oona A Hathaway and Scott J Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster, 2017).

Conference of Labour and Socialist Organisations.<sup>147</sup> Advocates of internationalised administration of the occupied territories converged in asserting that European imperial competition had been the primary cause of the war and that any attempts at territorial aggrandisement after the war should therefore be rejected.<sup>148</sup> In a significant blow to the Dominions' aspirations, the US government declared its support for the internationalist movement on its entry into the war in April 1917, after three years of avowed neutrality.<sup>149</sup>

Yet despite the growing rhetorical popularity of internationalisation of the occupied territories as a peaceable modern alternative to the outmoded realpolitik of territorial annexation, details on how internationalised administration would actually work in practice remained vague. Various proposals for internationalised administration circulated.<sup>150</sup> Conservative proposals for internationalisation 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.<sup>151</sup> Even British conservative politicians including Lord Robert Cecil advocated this commercially-oriented brand of internationalisation, arguing that an international structure to guarantee economic liberalisation in the former German and Ottoman territories was the only means by which international political stability could be re-established.<sup>152</sup> Progressive proposals for internationalised administration grounded in political concepts of national self-determination rather than economic concepts of free trade emerged from the left of British politics, including from economist John Hobson and journalist Henry Noel Brailsford.<sup>153</sup> In January 1918, Lloyd George, in a speech to the British Trades Union Congress, later labelled his 'War Aims' speech, broadly advocated the adoption of a principle of self-determination in any internationalised peace settlement, defining 'self-determination' as 'government by the consent of the governed'.<sup>154</sup> Without explicitly ruling out territorial annexation, Lloyd George declared that 'government with the consent of the governed must be the basis of any territorial settlement in this war'.<sup>155</sup> The President of the US Wilson did not go so far as to adopt even this weak version

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<sup>147</sup> See, eg, J A Hobson, *Towards International Government* (George Allen & Unwin, 1915); L S Woolf, *International Government: Two Reports by L S Woolf Prepared for the Fabian Research Department* (Brentano's, 1916); E D Morel, *Africa and the Peace of Europe* (National Labour Press, 1917).

<sup>148</sup> See, eg, H G Wells, *In the Fourth Year: Anticipations of a World Peace* (MacMillan Company, 1918) 62.

<sup>149</sup> Woodrow Wilson, 'Address of the President of the United States' (Speech delivered at the Congress of the United States, Washington DC, 2 April 1917).

<sup>150</sup> See Sluga, above n 146, 36–43.

<sup>151</sup> See, eg, Morel, above n 147. See also the proposal put forward (and later abandoned) by the British Labour Party in its 'Memorandum of War Aims': British Labour Party and Trades Union Congress, 'Memorandum of War Aims' (Memorandum, 28 December 1917).

<sup>152</sup> Robert Cecil, 'Memorandum on Proposals for Diminishing the Occasion of Future Wars', reproduced in Robert Cecil, *A Great Experiment: An Autobiography of Viscount Cecil [Lord Robert Cecil]* (Jonathan Cape, 1941) 353–6.

<sup>153</sup> Hobson, *Towards International Government*, above n 147; Henry Noel Brailsford, *A League of Nations* (MacMillan, 2<sup>nd</sup> ed, 1917).

<sup>154</sup> Lloyd George, 'War Aims' (Speech delivered at Trades Union Congress, Caxton Hall, London, 5 January 1918).

<sup>155</sup> *Ibid.*

of self-determination as a basis for internationalisation of the occupied territories. In his 'Fourteen Points' address delivered to a joint session of Congress three days later on 8 January 1918, Wilson instead advocated for an internationalisation that reconciled Imperial claims to annexation with 'the interests of the populations concerned'.<sup>156</sup> Wilson's Fifth Point purported to adopt a neutral middle ground between the annexationists and the internationalists, calling 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.<sup>157</sup>

With both Lloyd George and Wilson broadly adopting internationalist rhetoric but sidestepping pragmatic questions of administrative control of the occupied territories after the war, it was the sub-imperialist Smuts whose plan for internationalisation gained the most traction in the lead up to the Versailles negotiations. In his influential 1918 manifesto on the subject, titled *A League of Nations: A Practical Suggestion*, Smuts purported to adopt the principle of internationalisation of the occupied territories; yet in the detail of his proposal, the Dominions' claims to territorial annexation in the Pacific and Africa remained intact.<sup>158</sup> In Smuts' version of the post-war order, the new League would function as 'the successor to the Empires'.<sup>159</sup> Both principles of open door trade and national 'self-determination' as consent of the governed would inform the new international regime. In contrast to Lloyd George and Wilson, Smuts described precisely how the occupied German and Ottoman territories should be administered after the war. In Smuts' view, it was simply a pragmatic truth that any new international body or League of Nations would not have the necessary experience to take on direct administrative control of the occupied territories, as had been advocated by Brailsford and other internationalists.<sup>160</sup> Whilst territorial annexation by adjacent states was perhaps not ideal, Smuts submitted that it was only existing states — and not the new League — that would have the experience and capacity to successfully manage the task of extraterritorial administration:

The 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

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<sup>156</sup> Woodrow Wilson, 'The Program of the World's Peace' (Speech delivered at the Congress of the United States, Washington DC, 8 January 1918), reproduced in John Randolph Bolling et al, *Chronology of Woodrow Wilson: Together with His Most Notable Addresses, a Brief Description of the League of National, and the League of Nations Covenant* (Frederick A Stokes, 1927) 251–8.

<sup>157</sup> *Ibid* 256.

<sup>158</sup> See J C Smuts, *A League of Nations: A Practical Suggestion* (Hodder and Stoughton, 1918).

<sup>159</sup> *Ibid* 26.

<sup>160</sup> *Ibid* 19.

making use of the administrative organisation of individual States for the purpose.<sup>161</sup>

Smuts is often thereby credited as the original proponent of the mandatory principle that was subsequently adopted by the Allied Powers during the Versailles negotiations with respect to the fate of the occupied territories.<sup>162</sup> Yet from the outset, Smuts advocated mandatory administration for all occupied territories *except* German South West Africa and the German Pacific — precisely those territories claimed as their sub-imperial right by the Dominions. In response to Lloyd George's notion of self-determination as 'government by the consent of the governed',<sup>163</sup> Smuts formulated yet another ground for territorial annexation of South West Africa and the German Pacific by the British Dominions. In addition to questions of regional security and of the comparative barbarism of German imperialism, Smuts asserted that the native peoples of these territories were singularly incapable of comprehending their own interests and thus of giving the necessary consent to external administration, as the proponents of 'self-determination' proposed:

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.<sup>164</sup>

Wilson's Fifth Point, as noted above, had left open the possibility of territorial annexation. On Wilson's terms, all it required was an 'impartial adjustment of all colonial claims' that balanced the interests of the local population against the 'equitable title' of the occupying government.<sup>165</sup> On Smuts' reckoning, obtaining the consent of the governed in the German colonies of Africa and the Pacific was simply 'impracticable'; and by implication, the only principle that remained to be 'balanced' was the Dominions' sub-imperial claims to equitable title.<sup>166</sup>

In contrast to Smuts' deft manipulations of the political moment, Australian Prime Minister Hughes did not bother himself with niceties of principle in the debate over the occupied territories. Instead, Hughes applied the old blunt logic of *realpolitik*. Against the discourse of internationalisation as external administration in the interests of the local population, broadly adopted by Britain and the US, Hughes simply asserted that the Dominions and the Imperial War

<sup>161</sup> Ibid.

<sup>162</sup> Mark Mazower, *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, Melbourne Law School, forthcoming).

<sup>163</sup> Lloyd George, 'War Aims' (Speech delivered at Trades Union Congress, Caxton Hall, London, 5 January 1918).

<sup>164</sup> Smuts, above n 158, 15. See also Louis, *Great Britain and Germany's Lost Colonies*, above n 89, 81–5.

<sup>165</sup> Bolling et al, above n 156, 256.

<sup>166</sup> Smuts' reasoning resonated with jurist James Lorimer's racial division of 'humanity' into 'civilised', 'barbarous' and 'savage': Smuts, above n 158, 15. See James Lorimer, *Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (William Blackwood and Sons, 1883) vol 1, 101–3.

Cabinet had ‘decided definitely’ in July 1918 that German New Guinea, Samoa and South West Africa ‘must be ceded to the Dominions’.<sup>167</sup> Pushed to consider the matter as a question of internationalist principle, Hughes maintained that even if a mandatory system was to be adopted in which individual powers would administer occupied colonies under some form of international oversight, it should not be applicable to the German Pacific territories. Not only did the ‘primitive stage of civilisation’ of the natives of New Guinea and Nauru make the principle of self-determination inapplicable, as Smuts had argued, but the mandatory proposal was ‘incompatible’ with the ‘great policy of a White Australia’, which demanded freedom from the intervention of other imperial powers in the Pacific.<sup>168</sup> In Hughes’ view, the policy of Pacific sub-imperialism was a self-evident extension of the policy of white supremacy.

#### D *The Paris Peace Conference and the Covenant of the League of Nations*

Despite the rise to prominence of Smuts and Hughes in the debate over the fate of the occupied territories, 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.<sup>169</sup> In the Imperial War Cabinet convened immediately after the Armistice, Hughes demanded that the Dominion governments be directly represented at the planned Peace Conference, so that they could ‘state their aspirations’ plainly.<sup>170</sup> Faced with the demands of Hughes — and similar calls from Smuts, Massey and Canadian Prime Minister Robert Borden for self-representation in Conference proceedings — the Imperial War Cabinet was forced to concede that the Dominions would be permitted to ‘be present’ at all sessions of the Peace Conference on the same footing as the ‘smaller Allied states’ like Belgium, Romania and Serbia.<sup>171</sup>

The inclusion of the Dominion delegations in official Conference proceedings was understood, then as now, as marking a fundamental shift in Dominion status not only within the British Empire, but in international law, even as the precise nature of that shift remained contentious.<sup>172</sup> In the third edition of his *International Law: A Treatise* published in 1920, Lassa Oppenheim asserted that in legal terms, the international status of the Dominions had undergone a ‘fundamental change’ after the Great War.<sup>173</sup> According to Oppenheim, the Dominions’ self-representation at Versailles ‘g[ave] them a position in International Law’; although it ‘defie[d] exact definition’, it was ‘none the less

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<sup>167</sup> Hughes, above n 4, 83. See generally L F Fitzhardinge, ‘Hughes, Borden and Dominion Representation at the Paris Peace Conference’ (1968) 49 *Canadian Historical Review* 160.

<sup>168</sup> Hughes, above n 4, 100.

<sup>169</sup> Maslyn Williams and Barrie MacDonald, *The Phosphateers: A History of the British Phosphate Commissioners and the Christmas Island Phosphate Commission* (Melbourne University Press, 1985) 126; Alma Luckau, *The German Delegation at the Paris Peace Conference* (Columbia University Press, 1941) 140–3.

<sup>170</sup> See Hughes, above n 4, 93–5, 101. On the position of Canadian Prime Minister Borden, see Fitzhardinge, ‘Hughes Borden and Dominion Representation at the Paris Peace Conference’, above n 167, 160–9.

<sup>171</sup> Hughes, above n 4, 102; Keith, above n 2, 315–17.

<sup>172</sup> Keith, above n 2, 327; Twomey, above n 6, 71–2.

<sup>173</sup> Oppenheim, above n 6, 169–70.

real for being hard to reconcile with precedent'.<sup>174</sup> Sir Philip Noel-Baker, Assistant to Lord Robert Cecil, agreed; writing later in 1926, Noel-Baker concluded 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'.<sup>175</sup> Australia's determination to assert its own interests as the sub-imperial power in the Western Pacific had catalysed its accession to sovereignty in international law.

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 delegations of 32 nations negotiated the terms of the peace agreements, the future of the occupied territories and the terms and functions on which a League of Nations would be instituted.<sup>176</sup> As the mandatory principle articulated by Smuts gathered strength as the principle on which internationalisation of the occupied territories would take place, the self-governing Dominions continued to maintain that while the principle properly applied to occupied territories in the Middle East and North Africa, it should not apply to the German colonies of South West Africa, New Guinea or Samoa.<sup>177</sup> In open conflict with Wilson, Hughes reiterated the unacceptability to Australia of German New Guinea and Nauru passing to any other imperial power.<sup>178</sup> Hughes' intransigence on the issue of annexation appears consistently throughout contemporaneous accounts of the Versailles negotiations, as does his railing against the Japanese proposal that the *Covenant*

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<sup>174</sup> Ibid 170.

<sup>175</sup> Noel Baker, above n 2, 56.

<sup>176</sup> For contemporaneous accounts of the Paris Peace Conference, see, from the US perspective, Edward Mandell House and Charles Seymour (eds), *What Really Happened at Paris: The Story of the Peace Conference, 1918–1919, by American Delegates* (Hodder & Stoughton, 1921); Charles Homer Haskins and Robert Howard Lord, *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, 1938) vol I; John Maynard Keynes, *The Economic Consequences of the Peace* (Harcourt, Brace and Howe, 1920) 27–55. 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. See, eg, Margaret MacMillan, *Peacemakers: The Paris Conference of 1919 and Its Attempt to End War* (John Murray, 2002); Alan Sharp, *The Versailles Settlement: Peacemaking after the First World War, 1919–1923* (Palgrave Macmillan, 2<sup>nd</sup> ed, 2008). The historical significance of the frustrated attempts of non-European politicians and jurists to engage in the process has more recently gained much needed attention. See, eg, Fleur Johns and Thomas Skouteris and Wouter Werner, 'The League of Nations and the Construction of the Periphery — Introduction' (2011) 24 *Leiden Journal of International Law* 797. 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*. On Faisal, see Ali A Allawi, *Faisal I of Iraq* (Yale University Press, 2014). 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 Pedersen, above n 8, 77–103; Louis, *The Colonial Empires in the Late Nineteenth and Early Twentieth Centuries*, above n 7, 251–78.

<sup>177</sup> David Lloyd George, *The Truth about the Peace Treaties*, above n 176, 129–31.

<sup>178</sup> Hughes, above n 4, 100; David Lloyd George, *The Truth about the Peace Treaties*, above n 176, 515–22, 542.

of the new League include an explicit statement of equal treatment of nationals of all League members without discrimination on the basis of race.<sup>179</sup>

#### IV ARTICLE 22 AND THE CREATION OF THE C MANDATES

Yet even as the Dominions' self-representation at Versailles cemented their shift into sovereignty in international law, when the terms of the new international order took shape it became clear that Hughes and Smuts had failed in their respective attempts to secure outright annexation of German New Guinea and Nauru, and South West Africa. Part I of the *Treaty of Versailles* comprised the draft *Covenant of the League of Nations*, and art 22 articulated the position reached by the Conference on the future of the occupied German and Ottoman territories.<sup>180</sup> In heavily negotiated language, art 22 sketched out the basis of the new regime of mandatory administration under international oversight. The long article attempted to reconcile three contradictory imperatives that had emerged toward the end of the war with respect to administration of the occupied territories: first, internationalisation on the basis of weak national self-determination; secondly, internationalisation on the basis of open door trade; and thirdly, the exceptional treatment of South West Africa and the German Pacific.<sup>181</sup> The article framed the mandatory principle in the following terms:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust to civilisation and that securities for the performance of this trust should be embodied in this *Covenant*.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who, by reason of their resources, their experience, or their geographical position, can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.<sup>182</sup>

The impact of Smuts' and Hughes' respective campaigns is evident in the second half of the article. Article 22 goes on to provide for differential application of the mandatory 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'.<sup>183</sup> It first distinguishes '[c]ertain communities formerly belonging to the Turkish Empire' as having 'reached a stage of development where their existence as independent nations can be provisionally recognised, subject to the rendering of administrative advice and assistance by a

<sup>179</sup> David Lloyd George, *The Truth about the Peace Treaties*, above n 176, 541–2, 633–5; H W V Temperley, *History of the Peace Conference of Paris* (Henry Frowde and Hodder & Stoughton, 1924) vol 6, 500–23; Keith, above n 2, 321.

<sup>180</sup> *Covenant of the League of Nations* art 22.

<sup>181</sup> For a contemporaneous account of the settlement of art 22, see Temperley, above n 179, 500–23; Pedersen, above n 8, 27–35.

<sup>182</sup> Temperley, above n 179, 501.

<sup>183</sup> *Covenant of the League of Nations* art 22.

Mandatory'.<sup>184</sup> Secondly, it distinguishes '[o]ther peoples, especially those of Central Africa', as being 'at such a stage that the Mandatory must be responsible for the administration of the territory'.<sup>185</sup> Finally, art 22 goes on to codify 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.<sup>186</sup>

The precise meaning of 'administration 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 art 22 subsequently became known as the 'A', 'B' and 'C' mandates.<sup>187</sup> The C class included only the former German colonies in the Pacific and South West Africa. The mandatory administrations of the C mandates would be free to administer their mandates as 'integral portions of their territory' and exempted from complying with both internationalist principles of free trade and political self-determination in their mandated territories.<sup>188</sup> Precisely how C mandate status differed from territorial annexation, however, remained unclear. In 1920, the lack of clarity in the legal obligations owed by mandatory administrations with respect to C mandates prompted the new League to commission Belgian statesman and international lawyer Paul Hymans to advise on the legal obligations falling under art 22 to Mandatories and to the new Permanent Mandates Commission.<sup>189</sup> Hymans' advice was unedifying. With respect to the B and C class mandates, the mandatory power appointed 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 art 22; but 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'.<sup>190</sup> The Permanent Mandates Commission established by the League to oversee the mandate system continued

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<sup>184</sup> Ibid.

<sup>185</sup> Ibid.

<sup>186</sup> Ibid. On the influence of Smuts in the drafting of art 22, see Aaron M Margalith, *The International Mandates* (Johns Hopkins Press, 1930) 25–6.

<sup>187</sup> Huntington Gilchrist, *Imperialism and The Mandates System* (Margaret C Peabody Fund, 1928); Margalith, above n 186.

<sup>188</sup> *Covenant of the League of Nations* art 22; Elizabeth van Maanen-Helmer, *The Mandates System in Relation to Africa and the Pacific Islands* (P S King & Son, 1929) 53–61.

<sup>189</sup> 'Procès-Verbal of the Eighth Session of the Council of the League of Nations' [1920] *League of Nations Official Journal* 334, 337 (Paul Hymans). The relevant section is entitled 'Obligations Falling upon the League of Nations under the Terms of Article 22 of the Covenant (Mandates)'.

<sup>190</sup> Ibid 337; Pedersen, above n 8, 204, 212.

to maintain that the distinction between C mandate status and territorial annexation was real; but it was slight, and it remained ambiguous.<sup>191</sup>

#### A *Allocation of Mandates within the British Empire*

As the terms of the *Covenant* of the new League were finalised, the British Empire conducted its own internal negotiations on how mandatory powers bestowed on the Empire as a whole would be divided up. In February 1919, Colonial Secretary Lord Milner held a separate meeting with the Dominion delegates. Seeking to satisfy both Dominion claims to sub-imperial supremacy and the Anglo–Japanese Alliance of 1907 signed without their consent, Milner proposed that the Pacific be split in two at the equator. Occupied German Pacific territories that lay substantially south of the equator would be allocated internally amongst the British Empire, with German Samoa to New Zealand, German New Guinea to Australia, while those substantially north of the equator, including the Marshall Islands, which had under German administration included Nauru, would be offered to Japan.<sup>192</sup> Milner, anticipating Australia’s designs on Nauru, made a separate gambit for British control of the phosphate rich island, proposing that it be separated from both the Marshall Islands and New Guinea administrative units and be allocated to the British High Commissioner for the Western Pacific. Hughes agreed to the arrangement with Japan, having long proposed the equator as the boundary of Australian sub-empire.<sup>193</sup> But he pushed back vociferously against Milner’s proposal for Nauru.<sup>194</sup> In March, Hughes reiterated his position in writing to the British and Dominion delegates, demanding outright annexation of Nauru as Australia’s due for losses sustained during the war.<sup>195</sup> Massey disputed Hughes’ claim to exclusive title over Nauru, arguing that New Zealand had both similar need for phosphate and a comparable sub-imperial claim to control of the German Pacific territories.<sup>196</sup> Milner’s diaries record over twenty meetings about Nauru during the Conference: nine with Hughes; six with Massey; and eight with Sir Alwyn Dickinson, the Director of the Pacific Phosphate Company, with Lord Balfour present at three in his capacity as company chairman.<sup>197</sup>

The compromise reached between Britain, Australia and New Zealand regarding Nauru was that all three governments would hold rights to Nauruan phosphate via a new tripartite entity, the British Phosphate Commission.<sup>198</sup> The

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<sup>191</sup> Evans, above n 8; T Baty, ‘Protectorates and Mandates’ (1921–22) 2 *British Yearbook of International Law* 109, 118; A H Charteris, ‘The Mandate over Nauru Island’ (1923–24) 4 *British Yearbook of International Law* 137, 148–51.

<sup>192</sup> Williams and Macdonald, above n 169, 126.

<sup>193</sup> Fitzhardinge, *William Morris Hughes: A Political Biography*, above n 140, 164.

<sup>194</sup> Williams and Macdonald, above n 169, 126.

<sup>195</sup> Williams and Macdonald, above n 169, 127; Christopher Weeramantry, *Nauru: Environmental Damage under International Trusteeship* (Oxford University Press, 1992) 43.

<sup>196</sup> ‘Treasure Island — Australia’s Claim for Golden Atoll: Bright Jewel in Germany’s Crown — Triangular Battle Between Milner, Hughes and Massey’, *The Sun* (Sydney), 17 March 1919.

<sup>197</sup> Williams and Macdonald, above n 169, 129.

<sup>198</sup> *Nauru Island Agreement*, United Kingdom–Australia–New Zealand, signed 2 July 1919 (entered into force 28 October 1919) (*‘Nauru Island Agreement’*). The *Agreement* is reproduced as the Schedule to the *Nauru Island Agreement Act 1919* (Cth).

*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*.<sup>199</sup> The agreement was the subject of parliamentary debate over the following year, as art 15 required ratification of all three parliaments. Reflecting Hughes' belief that the real significance for Australia of the Versailles settlement was Australia's sub-imperial expansion, 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.<sup>200</sup> In his second reading speech on 24 September 1919, the annexationist Hughes managed to frame the *Nauru Island Agreement* as the more important agreement of the two. On his account, the mandatory arrangements provided for in the *Covenant* of the new League were of minor import compared to the securing of Nauruan phosphate for Australian agricultural use.<sup>201</sup> According to Hughes, the mandatory principle was simply 'the tenure under which the sovereignty of the island is held at present'.<sup>202</sup>

On 17 December 1920, the Council of the League of Nations settled the allocation of the C class mandates. The language of the mandatory conferrals reflects the delicate temporary balance struck within the British Empire as the Dominions assumed international status. 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' and 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'.<sup>203</sup> 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'.<sup>204</sup> Japan's international status as an Imperial power was recognised in the allocation of mandates. The former German protectorate of the Marshall Islands, minus Nauru, was allocated to Japan along with the Caroline Islands and the Mariana Islands as a new amalgamated C mandate; the 'Mandate for the Former German Possessions in the Pacific Ocean Lying North of the Equator' was conferred upon 'His Majesty the Emperor of Japan'.<sup>205</sup>

While Hughes had succeeded in gaining administrative control of the north-east of New Guinea in addition to the south-east already under Australian administration, his attempt to annex Nauru to Australian territory had, at least on

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<sup>199</sup> *Nauru Island Agreement*.

<sup>200</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 18 September 1919.

<sup>201</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 1919, 12678 (William Morris Hughes, Prime Minister and Attorney General).

<sup>202</sup> *Ibid.*

<sup>203</sup> Council of the League of Nations, 'Constitution of the Permanent Mandates Commission' [1921] *League of Nations Official Journal* 1, 89–90, 91–2.

<sup>204</sup> Council of the League of Nations, 'Constitution of the Permanent Mandates Commission' [1921] *League of Nations Official Journal* 1, 85–6.

<sup>205</sup> Council of the League of Nations, 'Constitution of the Permanent Mandates Commission' [1921] *League of Nations Official Journal* 1, 87–8. See also George H Blakeslee, 'Japan's New Island Possessions in the Pacific: History and Present Status' (1921) 12 *Journal of International Relations* 173.

paper, failed.<sup>206</sup> The argument made in this discussion, however, is that while the Australian and South African governments failed at Versailles to achieve their goal of annexation of the occupied German territories, through the process of asserting themselves as sub-imperial powers they had achieved two significant outcomes. First, they had precipitated a shift in the status of the self-governing Dominions toward sovereign subjects of international law. Secondly, they had forced the creation of the C class mandate, a legally ambiguous form of international administration that straddled the transition from the Imperial order of the 19<sup>th</sup> century and the international legal order of the 20<sup>th</sup> century.<sup>207</sup>

## V CONCLUSION: REMEMBERING AUSTRALIAN SUB-IMPERIALISM IN THE CONTEMPORARY INTERNATIONAL MOMENT

More than ever, Australia must be sovereign, not reliant. We must take responsibility for our own security and prosperity while recognising we are stronger when sharing the burden of leadership with trusted partners and friends. This Foreign Policy White Paper shows Australia to be focused on our region, determined to realise a secure, open and prosperous Indo-Pacific, while also strengthening and diversifying partnerships across the globe. It shows how we are meeting the challenges of an uncertain future with confidence, open to the world and its opportunities, while resolutely resisting threats to our way of life.<sup>208</sup>

This paper has retraced the significance of sub-imperialism in the formation of the Australian state as a subject of international law. It has argued that both the movement toward federation of the Australian colonies in the late 19<sup>th</sup> century and the development of the external sovereignty of the Australian Commonwealth in the early 20<sup>th</sup> century were intimately related to attempts to formalise an Australian sub-empire in the Pacific. The purpose of the paper is to invite further consideration of the sub-imperial project both in legal histories of the Australian state, and in accounts of Australia's engagement with international law more generally. Retracing the relationship between Australian sovereignty and sub-imperialism gestures toward at least two avenues for further work on the place of Australia in the international legal order which, although beyond the

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<sup>206</sup> Hughes maintained that this failure was not his but his Cabinet's. See Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 2 July 1920 (William Morris Hughes, Prime Minister and Attorney General) 2522.

<sup>207</sup> For Nauru, the ambiguity of the C mandate form allowed Australia as Administering Authority to evade mandatory obligations to 'further the development' of the Nauruan people, and the tripartite British Phosphate Commission to mine Nauruan phosphate in open expectation of the eventual uninhabitability of the island. See Antony Anghie 'The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case' (1993) 34 *Harvard Journal of International Law* 445; Weeramantry, above n 195; Storr, above n 59. For South West Africa, the ambiguity of the C mandate form enabled the Union of South Africa to attempt annexation of South West Africa via legislative means, including the imposition of apartheid legislation. South Africa's violent repression of the independence struggle led by the South West African People's Organisation or SWAPO continued until 1990, when the independence of the Republic of Namibia was recognised. See Umzurike Oji Umzurike, *Self-Determination in International Law* (Archon Books, 1972) 112–37; Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (University of Minnesota Press, 1996) 135–42, 158–68. Thanks to Christopher Gevers for these latter references.

<sup>208</sup> Australian Government, '2017 Foreign Policy White Paper' (White Paper, 23 November 2017) <<https://www.fpwhitepaper.gov.au/>> archived at <<https://perma.cc/6ERA-RGFG>> ('2017 White Paper').

scope of this discussion, warrant identification. First, the lens of sub-imperialism offers a means of situating Australia, and indeed the other British self-governing Dominions, within historical accounts of the broader transition from the high imperialism of the late 19<sup>th</sup> century to the international law of the 20<sup>th</sup> century, a theme that has developed into a cross-disciplinary field of inquiry over the last two decades.<sup>209</sup>

Secondly, retracing the historical relationship between sub-imperialism and Australian sovereignty offers a useful framework for assessing contemporary Australian self-positioning in the Pacific region. In November 2017, the Commonwealth government released the first foreign policy White Paper in 14 years.<sup>210</sup> The White Paper identifies shifts in the ‘balance of power’<sup>211</sup> in the Pacific as requiring a renewed Australian commitment to the ‘burden of leadership’ in the region, asserting that

more ambitious engagement by Australia, including helping to integrate Pacific countries into the Australian and New Zealand economies and our security institutions, is essential to the long-term stability and economic prospects of the Pacific.<sup>212</sup>

The identity of the ‘imperial’ power under which Australia orients its regional foreign policy has shifted over the course of the 20<sup>th</sup> century from Great Britain to the US, and the region in which Australia is positioning itself has shifted from ‘the Pacific’ — itself a historically specific geopolitical construction — to the ‘Indo-Pacific’<sup>213</sup> as a means of countering China’s challenge to US’ dominance in the region. Yet the echoes of Australian sub-imperialism in contemporary legal and diplomatic discourse are significant enough to warrant careful attention.

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<sup>209</sup> See, eg, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011); Matthew Craven, ‘Theorising the Turn to History in International Law’ in Anne Orford and Florian Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016); Martti Koskenniemi, Walter Rech, and Manuel Jiménez Fonseca (eds), *International Law and Empire: Historical Explorations* (Oxford University Press, 2017).

<sup>210</sup> *2017 White Paper*, above n 208, vi.

<sup>211</sup> *Ibid* 25.

<sup>212</sup> *Ibid* 8. See also Department of Foreign Affairs and Trade, ‘Stepping Up Australia’s Pacific Engagement’ (Report, April 2018) <<http://dfat.gov.au/geo/pacific/engagement/Pages/stepping-up-australias-pacific-engagement.aspx>> archived at <<https://perma.cc/98U7-W58V>>.

<sup>213</sup> *2017 White Paper*, above n 208, 1, 4.