

RACE, SELF-DETERMINATION AND AUSTRALIAN EMPIRE

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This article focuses on Australia's complex relationship with colonialism and empire. This relationship is most often examined through the related frameworks of settler colonialism and Australia's place within the British Empire. This article sketches and explores a third framework based on what might be termed 'Australia's Empire': Australia's administration of Nauru and Papua New Guinea pursuant to a mandate of the League of Nations and subsequently, as trusteeship territories under the League of Nations. It seeks in this way to make an argument that these different forms and operations of colonialism must be studied simultaneously as they all influenced each other. Concepts of race and self-determination provide a means of linking together these different imperial experiences.

CONTENTS

I	Introduction.....	1
II	The Nauru Mandate and the Beginnings of Australian Empire.....	3
III	Nauru: Self-Determination and Its Aftermath	6
IV	Papua New Guinea and Beyond: Mining and the Post-Colonial State	14
V	Australia and Empire	20
VI	Overlapping Imperial Histories.....	23
VII	Australia and Sub-Imperialism	29
VIII	Towards the Present.....	32
IX	Towards a Conclusion: 'The Old Dead Tree or the Young Tree Green'	37

I INTRODUCTION

The relationship between colonialism and Australian history is most often and widely discussed through the framework of settler colonialism. The argument that Australia possessed something akin to an empire is less frequently considered and explored.¹ This article, then, attempts to sketch the characteristics of 'Australian Empire'. It commences by outlining how Australia was appointed as a Mandatory of the League of Nations ('the League') with responsibilities to administer New Guinea and Nauru, the event which established, in effect, Australian rule over those territories — Australia's 'Empire'. I focus in particular

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¹ It is telling for instance, that a volume entitled *Australia's Empire* contains no chapter devoted to this topic. See Deryck Schreuder and Stuart Ward (eds), *Australia's Empire* (Oxford University Press, 2010).

on Australia's administration of the island of Nauru as a means of providing some sense of how and why Australia assumed an imperial role, the international legal developments and doctrines that supported it and how this imperial history has been largely overlooked in understanding and interpreting the ongoing relations between Australia and Nauru. I then deal briefly with the Australian administration of Papua New Guinea in order to compare and contrast the Nauru experience and to also elaborate, in the context of the larger territory of Papua New Guinea, some of the evolving characteristics of Australian Empire and the people and offices that administered it. Unlike the few existing histories of Australian Empire, I attempt to suggest connections between that Empire and settler colonialism. Further, I place these histories within the framework of yet another history of imperialism which is a continuing theme — that is, Australia's place within the British Empire and the aftermath of that experience. In attempting to consider these different histories of imperialism simultaneously, I also seek to point to a difficult methodological problem. Each of these forms of imperialism or colonialism has a distinctive character; and yet, surely, each affects the other. How then is that broader history to be written, especially when the task of telling those histories from the perspective of the colonised is still largely incomplete? What concepts and lenses will be adequate for this purpose? Here, I use the theme of self-determination, with all its complex connections with race and economics, as one way of linking these histories within a larger framework. The Aboriginal and Torres Strait Islander peoples have been waging a battle for human rights and self-determination now for many decades,² and their claims to recognition and self-determination surely represent one of the most urgent issues confronting the Australian polity.

As the above outline would suggest, this article touches on many topics and themes which each deserve detailed and in-depth inquiry. New and illuminating developments have taken place in the writing of Pacific and global histories and the history of international law,³ and these may be used to explore topics which have in any event remained neglected — for instance, the history of Australian mining companies in New Guinea. This article, however, does not attempt to write those histories, but to suggest a way of thinking about empire and Australian history, one largely framed by international legal doctrines. The purpose of this article is not so much to develop a particular argument, but to point to the hitherto neglected phenomenon of Australian Empire, to sketch some of its characteristics and operations at different periods and to suggest some of the issues and lines of inquiry that might be pursued in exploring the multifarious, varied and complex manifestation of Australian Empire and its aftermath. For instance, recent important work has been done on the origins of Australian international law — the story told in James Crawford's illuminating article by drawing upon the biographies of the early architects of that project,

² There is a large body of literature on this topic. See generally Dylan Lino, 'Towards Indigenous–Settler Federalism' (2017) 28 *Public Law Review* 118. For an invaluable and detailed exploration of the Aboriginal and Torres Strait Islander campaign for rights and self-determination, see Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003).

³ In relation to the Pacific, see, eg, Donald Denoon et al (eds), *The Cambridge History of the Pacific Islanders* (Cambridge University Press, 1997); David Armitage and Alison Bashford (eds), *Pacific Histories: Ocean, Land, People* (Palgrave Macmillan, 2014).

lawyers and diplomats, such as Dr H V Evatt and Sir Percy Spender.⁴ My suggestion here is that it is Australia's emergence as a colonial power that powerfully influenced the origins of Australian international law, and that this is evidenced by the roles played by those major actors who, in many instances, had to deal directly with issues of colonial governance, race and self-determination. In addition, the legal debates regarding Australian sovereignty in the international and domestic realms were shaped by its new status as a colonial power. A study of Australian empire, however, is not confined to understanding the past better. Rather, it might illuminate the unresolved and difficult question of Australian identity, its own ongoing process of self-determination. Further, the aftermath of Australian Empire is still being experienced by communities in Nauru and Papua New Guinea; aspects of Australian foreign policy, particularly the drive for resources in the Asia-Pacific region, have continued to generate international disputes that resulted in Australia appearing before various international tribunals. The past continues to haunt the present. This article might be best approached then, not as a sustained argument, but as a series of loosely connected reflections and observations on Australian Empire, its character and afterlife.

It is also, then, a rough attempt to understand this complex topic and its implications for contemporary Australian politics, both in the broader international arena and in the ongoing Aboriginal and Torres Strait Islander struggle for self-determination.

II THE NAURU MANDATE AND THE BEGINNINGS OF AUSTRALIAN EMPIRE

After the conclusion of the World War One, the victors gathered together at Versailles in 1919 and debated the fate of the territories of the defeated powers, Germany and the Ottoman Empire. In earlier times, these territories would have been divided among the victorious powers. President Woodrow Wilson of the United States, however, insisted that the war had been fought as a matter of principle and that a new system of international order and governance had to be established, one that did not reproduce a system of colonial exploitation.⁵ As a consequence, after much heated debate, it was decided that the territories in question would be placed under the Mandate System that was to be administered through the League. In essence, the system was intended to ensure that while the peoples of these territories were to be governed by foreign powers, those Mandate Powers would exercise their authority as trustees for the 'well-being and development' of their mandate populations.⁶ The idea was to create a regime that would protect and advance 'backward peoples', instead of exploiting them in the manner typical of 19th century empires.⁷ In so acting, the Mandate Powers

⁴ James Crawford, "Dreamers of the Day": Australia and the International Court of Justice' (2013) 14 *Melbourne Journal of International Law* 520.

⁵ Quincy Wright, *Mandates under the League of Nations* (University of Chicago Press, 1930); Christopher Weeramantry, *Nauru: Environmental Damage under International Trusteeship* (Oxford University Press, 1994) 1, 45–6.

⁶ *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, art 22 ('Covenant of the League of Nations').

⁷ *Ibid.*

were discharging the ‘sacred trust of civilization’.⁸ The Mandate Powers were required to report on their administration of the Mandate Territories to the League, which thus exercised a supervisory function to ensure that the mandate peoples were indeed being properly governed and ‘making progress’.⁹

The Mandate System divided the territories into three categories. The Middle Eastern territories of Iraq, Lebanon, Palestine and Syria were designated ‘A’ Class Mandates which were deemed to have ‘reached a stage of development where their existence as independent nations can be provisionally recognized’.¹⁰ African territories were placed under the ‘B’ Class Mandates as they were viewed as less advanced according to the European standards of the time.¹¹ The German territories of the Pacific and South West Africa were characterised as the most remote ‘from the centres of civilisation’, and, for this and other listed reasons, were ‘best administered under the laws of the Mandatory as integral portions of its territory’.¹² Nauru was classified as a ‘C’ Class Mandate, and Australia, New Zealand and the United Kingdom were appointed joint Mandatories, although, as a result of an agreement amongst those countries, Australia effectively governed Nauru until its independence in 1968.¹³

The island of Nauru is barely eight square miles in area. Located in a remote part of the Pacific, Nauru had been visited by European traders since the 17th century. The people of Nauru are believed to be of mixed Micronesian, Melanesian and Polynesian stock. The beauty of the island was such that its early name was ‘Pleasant Island’.¹⁴ Caught up in the intensifying rivalries between European traders, Nauru was nominally brought into the European realm of international law by being officially annexed by Germany, in 1888, after an agreement between the German and British Empires divided that part of the Pacific into German and British spheres of influence in 1886.¹⁵ Phosphate was discovered on the island by accident by the Pacific Phosphate Company, which realised that much of the island was made up of this valuable mineral — a fact that they wanted to conceal from German authorities even as they successfully negotiated to acquire a concession to mine the phosphates.¹⁶ Australia, eager to expand its own influence in the Pacific, quickly took over both Nauru and German New Guinea after war broke out in Europe in 1914. Australia’s Minister for Defence, Sir George Pearce, wrote to his Prime Minister, Billy Hughes, in 1916 that Nauru ‘contains immense deposits of Phosphates which are of great value to our wheat producing interests’ and that Germany controlled that part of

⁸ Aaron M Margalith, *The International Mandates* (Johns Hopkins Press, 1930) 27–8, 31.

⁹ *Covenant of the League of Nations* art 22.

¹⁰ Margalith, above n 8, 31.

¹¹ *Covenant of the League of Nations*, art 22 [6].

¹² *Ibid.*

¹³ Margalith, above n 8, 31.

¹⁴ ‘Nauru: Paradise Well and Truly Lost’, *The Economist* (online), 20 December 2001 <<http://www.economist.com/node/884045>> archived at <<https://perma.cc/Z4LL-MMSN>>.

¹⁵ *Declaration between the Governments of Great Britain and the German Empire Relating to the Demarcation of the British and German Spheres of Influence in the Western Pacific*, signed 10 April 1886, LXXIII Sessional Papers C 4656, art 2 (‘Anglo–German Treaty of 1886’).

¹⁶ Weeramantry, above n 5, 21. For a valuable and detailed account of Nauru, see Nancy Viviani, *Nauru: Phosphate and Political Progress* (Australian National University Press, 1971).

New Guinea which was ‘the richest portion and capable of great development’.¹⁷ By the time of the Paris Peace Conference, not only Australia, but New Zealand and the United Kingdom, realised that Nauru possessed vast phosphate deposits, and they competed with each other for control. Finally, an agreement was reached amongst the three governments, embodied in the *Nauru Island Agreement*, which established an entity, the British Phosphate Commissioners (‘BPC’), entrusted with the task of mining the phosphates.¹⁸ The BPC took over the phosphate concession from the Pacific Phosphate Company. The *Nauru Island Agreement* essentially protected the mining operation from any interference by the administrators of Nauru. Article 13 of the *Nauru Island Agreement* read:

There shall be no interference by any of the three Governments with the direction, management, or control of the business of working, shipping, or selling the phosphates, and each of the three Governments binds itself not to do or to permit any act or thing contrary to or inconsistent with the terms and purposes of this Agreement.¹⁹

As one of the BPC stated in 1933, ‘[t]he Commissioners unanimous are a sovereign independent state and can do what they like’.²⁰ In effect, the mining operation and its dictates were sovereign over the people of Nauru and the exploitation of the phosphates was given precedence over the wellbeing of the people. Although many questions were raised, for instance in the British Parliament in a debate about the then Bill, as to how such an arrangement was compatible with the Mandate System and its lofty goals, the *Nauru Island Agreement* continued in effect until the time of Nauruan independence in 1968.²¹ It served as the legal basis for the mining operations conducted by Australia that devastated the island and threatened the survival of the Nauruans as an independent people. The Nauruans were precluded from any effective form of political participation in the affairs of the island until the 1960s, on the verge of independence.²² The mining operations remained immune from interference until independence, when, as part of the settlement, Nauru paid \$21 million for the assets of the British Phosphate Commissioners — a huge sum of money for a very small nation, as it was beginning its life as an independent state, for assets that were arguably in any event the assets of the people of Nauru.²³ The leaders

¹⁷ *New Guinea Empire: Australia’s Colonial Experience* is an invaluable book as it consists of extracts from significant documents relating to Australia’s imperial history. See Letter from George Pearce to W M Hughes, 14 January 1916, cited in W J Hudson (ed), *New Guinea Empire: Australia’s Colonial Experience* (Cassell, 1974) 1–2.

¹⁸ *Nauru Island Agreement Act (No 8) 1919* (Cth) art 6 (‘*Nauru Island Agreement Act*’).

¹⁹ *Ibid* art 13.

²⁰ Thomas Lodge (Commissioner for the United Kingdom) to A Harold Gaze, 23 September 1933, cited in Maslyn Williams and Barrie Macdonald, *The Phosphateers* (Melbourne University Press, 1985) 133.

²¹ Weeramantry, above n 5, 56–7.

²² Antony Anghie, ‘“The Heart of My Home”: Colonialism, Environmental Damage, and the Nauru Case’ (1999) 40 *Harvard International Law Journal* 445, 452–3; ‘Memorial of the Republic of Nauru’, *Certain Phosphate Lands in Nauru (Nauru v Australia)* [1990] International Court of Justice, 58 [149]–[152] (‘*Nauru Case (Memorial)*’). See also Deborah Z Cass, ‘Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories’ (1992) 18 *Syracuse Journal of International Law and Commerce* 21, 23–4.

²³ Weeramantry, above n 5, 282–3.

of Nauru, withstanding immense pressure in the negotiations leading up to independence, insisted on maintaining that they regarded Australia as responsible for rehabilitating the phosphate lands mined out prior to independence. Despite many diplomatic efforts made by independent Nauru in pursuing this issue, Australia refused to acknowledge any liability for the damage caused to the territory of Nauru. Nauru then established a Commission of Inquiry into the Rehabilitation of the Worked-Out Phosphate Lands of Nauru ('the Commission of Inquiry'), headed by the late Professor Christopher Weeramantry, which was given the task of exploring the cost and feasibility of rehabilitation and the legal issues surrounding the question of liability. Australia did not attend the Commission of Inquiry, which handed down its findings in a lengthy, ten-volume report in 1988 that concluded, inter alia, that Australia was responsible under international law for the rehabilitation of the mined out phosphate lands.²⁴ Australia did not respond to the findings of the Commission of Inquiry, and Nauru instituted proceedings in the International Court of Justice ('ICJ'). Australia objected to the Court's jurisdiction.²⁵ The first phase of the *Certain Phosphate Lands in Nauru (Nauru v Australia)* case ('the *Nauru Case*') was decided in favour of Nauru by the Court.²⁶ The dispute was then settled prior to the hearing of the merits of the case. The *Nauru Case* was settled in 1993 by Australia's payment (the other partner governments, New Zealand and the United Kingdom, later contributed) of something like AUD107 million and an annual stipend of the equivalent of AUD2.5 million for the rehabilitation of the phosphate lands damaged by the mining.²⁷ Lacking any other resources, Nauru was compelled to continue phosphate mining. No rehabilitation of the damaged lands has commenced as yet.

III NAURU: SELF-DETERMINATION AND ITS AFTERMATH

Nauru is now, as a result of the bipartisan policy of Liberal and Labor governments, a detention facility for people seeking asylum in Australia. The violence and cruelty experienced by the detainees on Nauru is now infamous. *The Guardian* reported on leaked documents which revealed the disturbing violence taking place in Nauru.²⁸ Detainees were allegedly being sexually and physically abused by guards. Many had attempted suicide.²⁹ The then Australian

²⁴ 'Report of the Nauru Commission of Inquiry into the Rehabilitation of the Worked-out Phosphate Lands of Nauru' (Report, 1988) ('*Report of the Nauru Commission of Inquiry*').

²⁵ *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240, 242–5 ('*Nauru Case (Preliminary Objections)*').

²⁶ Ibid 261–2.

²⁷ 'Australia settled the case out of court in 1993, agreeing to pay a lump sum settlement of A\$107 million (US\$85.6 million) and an annual stipend of the equivalent of A\$2.5 million in 1993 dollars toward environmental rehabilitation'. See: US Department of State, 'Nauru (09/06)', *Nauru Background Note* (6 September 2017) <<https://2009-2017.state.gov/outofdate/bgn/nauru/74212.htm>> archived at <<https://perma.cc/948T-TEBZ>>.

²⁸ Paul Farrell et al, 'The Nauru Files: Cache of 2,000 Leaked Reports Reveal Scale of Abuse of Children in Australia Offshore Detention', *The Guardian* (online), 10 August 2016 <<https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention>> archived at <<https://perma.cc/29N2-4W59>>.

²⁹ Ibid.

Minister for Immigration and Border Protection, Peter Dutton, accused those detainees who had sewn up their own lips and set themselves on fire as engaged in a manipulative attempt to enter Australia.³⁰ Thousands of Australians protested against their government's policies and called for the closing of the detention camps and the transfer of all detainees to Australia.³¹

Whereas previously Nauru had supplied Australia with the phosphate it had so strenuously sought for its agricultural needs, it now served a different function within the scheme of Australian foreign relations. In his book, based on the Commission of Inquiry into the Rehabilitation of the Worked-Out Phosphate Lands of Nauru Report, Christopher Weeramantry wrote that 'Nauru presents in microcosm an unusual variety of the great historical currents that have shaped the course of human affairs'.³² He refers to the settlement of the Pacific, the emergence of a distinctive culture and way of life on Nauru, and then, the gradual expansion of the European presence in the remotest parts of the Pacific in search of land and minerals.³³ The history of the European Empire in the Pacific could be told through the story of Nauru. It is, as these histories tend to be, marked by a strange dissonance; decisions made in Berlin and in Versailles had profound consequences for people living thousands of miles away who had very little idea of the great debates and statesmen and factors deciding their fate. For instance, Nauru was placed in the German sphere of influence,³⁴ whereas the neighbouring island of Banaba (part of the Gilbert and Ellis chain of islands) was placed in the British sphere of influence thanks to the *Anglo-German Treaty of 1886*,³⁵ an agreement reached in the aftermath of the Berlin Conference on West Africa of 1885 that focused on European empires in Africa and that led to the *General Act of the Berlin Conference on West Africa 1885* regulating commerce in the Congo.³⁶ The *Nauru Case* dealt with international legal doctrines relating to the exploitation of resources and the content of self-determination, and it also offered in its own way a graphic illustration of how entrenched systems of political economy are fundamentally inimical to environmental well-being and how environmental devastation could result in the destruction of sovereignty itself. Now of course, Nauru and the events occurring there are enmeshed in yet another set of international legal controversies and doctrines — relating not only

³⁰ Ibid; Ben Doherty and Paul Farrell, "People Have Self-Immolated to Get to Australia" — Immigration Minister's Response to Nauru Files', *The Guardian* (online), 10 August 2016 <<https://www.theguardian.com/news/2016/aug/11/labor-will-reintroduce-bill-to-force-mandatory-reporting-of-child-abuse-after-nauru-files>> archived at <<https://perma.cc/DMU7-X53G>>.

³¹ Helen Davidson, 'Thousands Call for Nauru and Manus Camps to Close in Rallies across Australia', *The Guardian* (online), 27 August 2016 <<https://www.theguardian.com/australia-news/2016/aug/27/nauru-files-manus-island-close-the-camps-rallies-asylum-seeker>> archived at <<https://perma.cc/ER76-283Z>>.

³² Weeramantry, above n 5, 1; *Report of the Nauru Commission of Inquiry*, above n 24.

³³ Ibid.

³⁴ The Commonwealth, *Nauru: History* (30 September 2018) <<http://thecommonwealth.org/our-member-countries/nauru/history>> archived at <<https://perma.cc/9GF9-HLBH>>.

³⁵ *Anglo-German Treaty of 1886* art 2.

³⁶ *General Act of the Berlin Conference on West Africa*, signed 26 February 1885, ch 1. Regarding phosphate mining in Banaba, see especially Katerina Martina Teaiwa, *Consuming Ocean Island: Stories of People and Phosphate from Banaba* (Indiana University Press, 2014).

to environmental damage, but also to refugee and asylum law and human rights. It is taken as exemplary of how environmental devastation may endanger the existence of states and create ‘environmental refugees’, as they could be termed.³⁷ The plight of Nauru also parallels in some ways the fate of the Chagos Islanders who were displaced from their land, and whose failed struggles for self-determination also raised complex issues about the legacies of colonialism.³⁸ Further, the *Nauru Case* is rich for reconsideration in the context of new developments in the history and theory of international law which scrutinise the relationship, for instance, between colonialism, political economy and the environment.³⁹

The *Nauru Case* raises enduring questions about the meaning and content of self-determination. At the time art 22 of the *Covenant of the League of Nations* (‘the Covenant’) was drafted, self-determination was still a vague principle: its legal status was uncertain and its political ramifications worrying and unclear.⁴⁰ The former Ottoman territories in the Middle East such as Mesopotamia and Syria were designated as Mandate Territories, which were classified as ‘A’ Class Mandates. According to the language of art 22, such territories ‘have reached a stage of development where their existence as independent nations can be provisionally recognised’.⁴¹ Nauru, however, was characterised as a ‘C’ Class Mandate that was to be administered ‘under the laws of the Mandatory as integral portions of its territory’.⁴² Crucially however, such administration was to be ‘subject to the safeguards above mentioned in the interests of the indigenous

³⁷ Carl N McDaniel and John M Gowdy, *Paradise for Sale: A Parable of Nature* (University of California Press, 2000).

³⁸ See, eg, Stephen Allen, *The Chagos Islanders and International Law* (Hart, 2014); David Vine, *Island of Shame: The Secret History of the US Military Base on Diego Garcia* (Princeton University Press, 2009).

³⁹ As Stephen Humphreys and Yoriko Otomo point out, ‘European colonialism was premised on the exploitation of natural resources and on the maintenance of conditions of global trade in raw materials’. See Stephen Humphrey and Yoriko Otomo, ‘Theorizing International Environmental Law’ in Anne Orford, Florian Hoffmann and Martin Clark (eds), *Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 797, 811. For recent scholarship on the issues that arise, see generally Ileana Porras, ‘Binge Development in the Age of Fear: Scarcity, Consumption, Inequality, and the Environmental Crisis’ in Barbara Stark (ed), *International Law and Its Discontents: Confronting Crises* (Cambridge University Press, 2015) 25; Karin Mickelson, ‘International Law as a War Against Nature? Reflections on the Ambivalence of International Environmental Law’ in Barbara Stark (ed), *International Law and Its Discontents: Confronting Crises* (Cambridge University Press, 2015) 84; Usha Natarajan and Kishan Khoday ‘Locating Nature: Making and Unmaking International Law’ (2014) 27 *Leiden Journal of International Law* 573; Usha Natarajan and Kishan Khoday, ‘Fairness and International Environmental Law from Below: Social Movements and Legal Transformation in India’ (2012) 25 *Leiden Journal of International Law* 415. For particular studies of Nauru and the legacies of the phosphate mining, see Katerina Teaiwa, ‘Ruining Pacific Islands: Australia’s Phosphate Imperialism’ (2015) 46 *Australian Historical Studies* 374; Cait Storr, ‘Islands and the South: Framing the Relationship between International Law and Environmental Crisis’ (2016) 27 *European Journal of International Law* 519.

⁴⁰ *Covenant of the League of Nations* art 22; Cass, above n 22, 23–4.

⁴¹ *Covenant of the League of Nations* art 22 [4]; *The Treaty of Peace Between the British Empire and Allied Powers (France, Italy, Japan, Armenia, Belgium, Czecho-Slovakia, Greece, the Hedjaz, Poland, Portugal, Roumania and the Serb–Croat–Slovene State) and Turkey*, signed 10 August 1920, 113 BFSP 652, art 94.

⁴² *Covenant of the League of Nations* art 22 [6].

population'.⁴³ Clearly, then, Nauru was to be administered in accordance with basic principles of trusteeship which ensured that all the resources of the island were utilised or preserved for the benefit of its people. At the very least, the obligations of art 22 of the *Covenant* prohibited the destruction of the physical territory of Nauru.⁴⁴ By the time the Mandate System was replaced by the Trusteeship System of the United Nations, however, it was made explicit in the applicable treaties the inhabitants of Trusteeship territories such as Nauru had the right to become independent sovereign states.⁴⁵ The obligations undertaken by Australia and the partner governments under the Trusteeship System were far more specific and detailed than those included in art 22 of the *Covenant of the League of Nations*. Article 76(b) of the *Charter of the United Nations* ('UN Charter'), in particular, stipulated the purpose of the Trusteeship System was to

promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement ...⁴⁶

The people of Nauru were desperate to continue their existence as an independent people, and art 76(b) in effect protected their right to self-determination to emerge as a sovereign nation state.⁴⁷ It was clear, however, virtually from the beginning of the Australian administration in 1919, that to Australia, the welfare of the Nauruans was of secondary importance; what mattered was the exploitation of the phosphates. The management of the island was effectively left in the hands of the British Phosphate Commissioners, the body which was established to conduct the mining operations. The *Nauru Island Agreement* between the partner governments, which created this entity, included the startling provision that prevented the administrator of the island from interfering with the operations of the mining operation.⁴⁸ The BPC, and the mining operation they were charged with managing, governed the island, as many outsiders observed.⁴⁹ The Australian officials who were concerned about the impact of phosphate mining on Nauru and its people were thus legally disabled from controlling a system of governance essentially based on the exploitation of the phosphates.

Australia's failure to ensure the meaningful self-determination of the people of Nauru was driven not only by its intention to exploit all the phosphates on the island, but also by a racism that profoundly shaped Australian attitudes towards

⁴³ Ibid.

⁴⁴ Ibid art 22.

⁴⁵ Ibid art 76(b).

⁴⁶ *Charter of the United Nations* art 76(b).

⁴⁷ Ibid.

⁴⁸ 'There shall be no interference by any of the three Governments with the direction, management, or control of the business of working, shipping or selling the phosphates...': *Nauru Island Agreement Act* art 13.

⁴⁹ See comments of representatives of the Trusteeship Council, for example, Mr Rolz Bennett of Guatemala stated that 'every aspect of life on Nauru depended on a single activity, the exploitation of the phosphate deposits': United Nations Trusteeship Council, T/SR.738, 18th sess, 738th mtg, (6 August 1956) 153, quoted in Weeramantry, above n 5, 128.

Nauru. At least amongst Western states and settlor colonies at the time, indigenous and non-white peoples were regarded as inferior, as backward and uncultured, savage and dangerous.⁵⁰ Racism also generated paternalistic attitudes which held, among other things, that the backward, lesser peoples were incapable of self-government and needed to be civilised. This form of thinking was pervasive within international institutions themselves — the Mandate System after all was based on the premise that different societies could be scientifically categorised according to their level of progress or advancement. 19th century international law was based on the premise that ‘uncivilised’ peoples, essentially those who were not of European origin, were not properly sovereign and hence excluded from the family of nations that made international law. Racial thinking was central to the formation of modern Australia; the White Australia policy was one of the crucial issues addressed at the time of Federation itself, in 1901.⁵¹ Indeed, the British policy of granting all citizens of the Commonwealth, including its Asian members, equal rights, had been a source of tension between Australia and the British Empire, as Australia did not want to extend such rights to Indians, Chinese and ‘other coloured peoples’ who were technically British subjects.⁵²

In the context of Nauru, many Australian officials and administrators regarded the Nauruans as inherently incapable and inadequate. Australians and New Zealanders who knew the Nauruans often treated them with deep-seated and

⁵⁰ Race and racial superiority were a major preoccupation of writers on international affairs of the time. The global ‘triumph’ of the white races was extolled and celebrated, and threats to such dominance — by an emerging Asia for instance — were viewed with fear and alarm that often called for the even more emphatic assertion of power by the white races. For a detailed examination of this enduring topic, see John H Hobson, ‘Racist and Eurocentric Imperialism: Racist-Realism, Racist-Liberalism, and “Progressive” Eurocentric Liberalism/Fabianism 1919–1945’ in John H Hobson, *The Eurocentric Conception of World Politics* (Cambridge University Press, 2012) 150. For a superb work that also covers racial attitudes in Australia at the turn of the century, see: Marilyn Lake and Henry Reynolds, *Drawing the Global Colour Line: White Men’s Countries and the International Challenge of Racial Equality* (Cambridge University Press, 2008). Given the determining significance of race in conceptualising all the major issues of global community and governance, it is hardly surprising, then, that W E du Bois famously declared that ‘the problem of the Twentieth Century is the problem of the color-line’: W E Burghardt Du Bois, *The Souls of Black Folk* (Blue Heron, 1953) vii. For a recent insightful work on the relationship between race and imperialism, see Robert Knox, ‘Valuing race? Stretched Marxism and the Logic of Imperialism’ (2016) 4 *London Review of International Law* 81.

⁵¹ The first Parliament of the Commonwealth of Australia legislated to expel Pacific Islanders from north Queensland through the *Immigration Restriction Act (No 17) 1901* (Cth), while the *Pacific Island Labourers Act 1901* (Cth) was also passed to prevent non-whites from settling in Australia. See Marilyn Lake and Henry Reynolds, ‘White Australia Points the Way’ in Marilyn Lake and Henry Reynolds, *Drawing the Global Colour Line: White Men’s Countries and the International Challenge of Racial Equality* (Cambridge University Press, 2008) 137. Many of the politicians involved in the debate were influenced by the work of Charles Henry Pearson, who, in his book, *National Life and Character*, warned that ‘the day will come’ when ‘black and yellow races’ would form their own governments and be invited to international conferences, thus diminishing the power of the white man: Charles Henry Pearson, *National Life and Character: A Forecast* (Macmillan and Co, 1893) 84–5. As Gary Foley argues, ‘[t]he purpose of federation was to exclude all non-white peoples from this country, and to establish the land of Australia as an isolated outpost of white supremacy’: Gary Foley, ‘Black Power, Land Rights and Academic History’ 20 *Griffith Law Review* 608, 609.

⁵² The settlor colonies, Australia, South Africa and Canada, formed a common front in relation to this issue, see: Lake and Reynolds, *Drawing the Global Colour Line*, above n 51, 164–9.

paternalistic benevolence while firmly believing ‘that their Pacific friends were congenitally feckless and could never be changed for the better by education, much less by a sudden excess of prosperity’.⁵³ The persistence of these attitudes had very serious consequences for the people of Nauru, because, despite the best efforts of individual officials who attempted to discharge Australia’s international obligations, the attitude that prevailed during Australia’s administration of the island was that the Nauruans had no capacity for education and self-government. International lawyers themselves, unsurprisingly, reproduced and indeed relied on this racialised thinking. Writing in the *British Year book of International Law*, Professor Archibald Charteris, a founding member of the Australia–New Zealand Society of International Law, asserted about the adequacy of the royalties paid to the Nauruans from their own resources: ‘the remuneration is small, perhaps, in the eyes of a civilised man in view of the immense value of the product in the Commonwealth, but it is not small to a child of nature who lives on cocoa-nuts and fish and sunshine’.⁵⁴

The passage is telling, first, because it acknowledges the great value of the phosphates to Australia and makes explicit the reality that the Nauruans never received the value of their resources, and secondly, because we see here, in the specific and unique context of Nauru, another instance in which racialised thinking becomes the foundation of legal reasoning and conclusion. It mirrors, in this way, the broader jurisprudence of 19th century international law, which operated on the basis that ‘uncivilised’ people were not sovereign. Here, the resources of people could be simply appropriated because they were ‘uncivilised’.

For those who are somewhat familiar with the history of Nauru, it was apparent from the outset that even the success of the Nauruan campaign for compensation was a decidedly ambivalent victory. Nauru itself should not be exonerated of the consequences of the many bad decisions it made following independence. But given the history of the relationship between Australia and Nauru, it was obvious that the odds were very much against the people of the tiny island. Indeed, it was astonishing that Nauru was able to achieve independence at all, given the implacable Australian policies towards Nauru and the unrelenting determination of Australia to exploit a completely unequal relationship. It is telling, for instance, that the BPC — in essence the partner governments — initially prevented the Nauruans access to expert advice when it came to the extraordinarily complex and crucial negotiations regarding the phosphate industry prior to independence.⁵⁵ Australia, on the other hand, was able to draw on the brilliance of eminent lawyers.⁵⁶ It was only due to the

⁵³ Williams and Macdonald, above n 20, 282. For a detailed study, see Stewart Firth, ‘Colonial Administration and the Invention of the Native’ in Dennon et al, above n 3, 253, 254–88. Firth provides here an insightful account of the construction in the colonial imagination of the ‘Native Mother’: at 280–7.

⁵⁴ A H Charteris, ‘The Mandate over Nauru Island’ in Cecil Hurst, A Pearce Higgins and E A Whittuck (eds), *British Year Book of International Law* (Henry Frowde and Hodder & Stoughton, 1923–24) 137, 151.

⁵⁵ Speaking to the inequality of the Australia–Nauru relationship, especially in relation to phosphate, see generally Teaiwa, above n 39, 376–80. In relation to the denial of independent advice, see *Nauru Case (Memorial)* 49 [129]; Weeramantry, above n 5, 132.

⁵⁶ See *Nauru Case (Memorial)* 49 [129]; UN TCOR, 31st sess, 1236th mtg, Agenda Item 4(c) T/SR.1236 (11 June 1964) 83 [53]–[56], quoted in Weeramantry, above n 5, 132.

courage and determination of the Nauruan leader, the heroic Hammer DeRoburt, and the supervision of the Trusteeship Council which continuously questioned Australia's policies in Nauru, that the island survived.⁵⁷

Self-determination, as granted by Australia, consisted in handing over a devastated landscape to a people that were deliberately neglected and subordinated, whatever the funds they received through the settlement. Mining was the only industry that Australia fostered on the island, and so Nauru was faced with the predicament whereby its only means of economic development was the continuation of the mining that was so damaging to the island. Dedicated Australian officials sought to make good on Australia's obligations under the Mandate System, but these initiatives were ultimately defeated by the imperatives of the mining operation. As far back as 1928, the first Australian administrator of Nauru, Thomas Griffiths, had planned to educate Nauruans to manage their own affairs and had instituted a training program for Nauruans in Geelong, Victoria.⁵⁸ As a result, a group of concerned citizens from Geelong became involved in the development of the island, and arranged for Nauruans to be trained in Geelong in various trades. The program was a great success, and both the organisers and sympathetic Australian administrators believed that the 'Geelong Boys', as they came to be known, could gradually assume responsibility for many aspects of the administration of the island.⁵⁹ This did not occur. Trained Nauruans were a threat to the continuing operation of the phosphate industry and the Geelong program was condemned for producing 'malcontents'.⁶⁰

Over time, the Australians who took an interest in the welfare of the Nauruans and became familiar with their affairs were greatly disturbed by Australian policies in Nauru. They formed an organisation based in Geelong, the Pacific Island Natives Welfare Association ('PINWA'), which took up the Nauruan cause, for by the 1940s, it was obvious that the continuation of phosphate mining would seriously damage the island. Several members of PINWA were very well acquainted with the plight of the Nauruans as they had worked on Nauru and had also supported the 'Geelong Boys'.⁶¹ PINWA, after much effort, met with the Minister of External Territories to express their concerns, but were disappointed in the government's response.⁶² Many years later, Harold Hurst, a member of PINWA who had also earlier been involved in the Geelong training program, set out what he saw as the desperate plight of the Nauruans in an article titled 'Australia Seeks to Destroy Nauruans as a People'.⁶³ Much earlier, William Groves, who had served as a Director of Education in Nauru, noted the failure of Australia to promote education for self-governance, pleading that the Nauruans should not become 'what I fear our Australian aborigines have become, a

⁵⁷ Weeramantry, above n 5, 123–51, 392–9. See generally, Encyclopedia Britannica, *Hammer DeRoburt* (11 July 2018) <<https://www.britannica.com/biography/Hammer-DeRoburt>> archived at <<https://perma.cc/3QLG-QNF2>>.

⁵⁸ Weeramantry, above n 5, 112.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* 112–13.

⁶¹ *Ibid.* app III, 384–90.

⁶² *Ibid.* app III, 389.

⁶³ *Ibid.* app III, 390.

despised and dying race'.⁶⁴ The Trusteeship Council, too, continuously questioned Australia and its failure to promote self-government.⁶⁵ Australia had responded that no Nauruans were capable of assuming real responsibilities.⁶⁶ Having deprived the Nauruans of a proper education system, the Australian government then proclaimed them to be incapable of assuming any administrative responsibilities. It seemed that Australia was intent on keeping Nauruans in a permanently subordinate position. It was not until 1965, three years before independence, that Nauruans were given limited legislative powers, and even then, they never exercised any sort of powers with respect to the phosphate mining, despite their protests. It is uncertain how meaningful self-determination could have followed, or how Nauru could have sustained itself politically and economically, given this history. Article 76(b) of the *UN Charter* outlines self-determination as ensuring, not simply political independence, but the promotion of the economic, social and cultural advancement of the peoples under trusteeship.⁶⁷ Australia, in its efforts to protect its interests in the mining of phosphates, failed in all these areas.

The people of Nauru, almost from the beginning of their relationship with Australia, have been treated with condescension that was entirely demeaning and ignorant, even if supposedly benevolent. In the course of the pre-independence talks, the Nauruan representatives made this point:

We feel the Australian people have an image of Nauruans which is quite wrong ... Australians seem to have a picture of an absurdly small people who want too much from Australia, who want complete sovereign independence, and who are not as grateful as they should be for what Australia is generously offering them.⁶⁸

In recent decades, Nauru has lurched from crisis to crisis as it struggles to survive; it suffers major financial problems and most of its major assets have been sold; it has practiced all the manoeuvres available to 'bare sovereignty' — for Nauru's resources do not seem to amount to very much more than its legal status as a sovereign state.⁶⁹ It extended recognition to entities seeking statehood and was compensated for doing so; it has been a tax haven; and later, it was Nauru that defended Australia's problematic 'Pacific Solution' which provided it with the millions of dollars it desperately needs from the Australian government.⁷⁰ A new and compelling form of dependency whereby Nauru's putative sovereignty is exercised to further Australia's detainee practices has replaced the earlier relationship of subordination, making Nauru at the very least complicit in such practices and the human rights violations they entail. Previously Australia's policies were seriously comprising the nascent

⁶⁴ Ibid 113.

⁶⁵ United Nations Trusteeship Council, T/SR.738, 18th sess, 738th mtg, (6 August 1956), 153, quoted in Weeramantry, above n 5, 141–42.

⁶⁶ Ibid 141.

⁶⁷ *Charter of the United Nations* art 76(b).

⁶⁸ Weeramantry, above n 5, 296.

⁶⁹ 'Nauru: Paradise Well and Truly Lost', *The Economist* (online), 20 December 2001 <<http://www.economist.com/node/884045>> archived at <<https://perma.cc/Z5AU-TJT7>>.

⁷⁰ Ibid; Ariane Rummery, 'Australia's "Pacific Solution" Draws to a Close', *United Nations High Commissioner for Refugees* (online), 11 February 2008 <<http://www.unhcr.org/en-us/news/latest/2008/2/47b04d074/australias-pacific-solution-draws-close.html>> archived at <<https://perma.cc/K794-FET2>>.

sovereignty of Nauru — not out of any particular malice towards those people — who were viewed generally with affectionate and damaging condescension, but because it was intent on exploiting the island's phosphates. Now, however, Australia would prefer to insist on Nauru's sovereignty: it is Nauru that must protect the human rights of the many unfortunate people housed on the island. Nauru represents a complex and anomalous sort of sovereignty. Nauru, like Guantanamo — another product of a colonial relationship — has been termed a 'legal black hole'.⁷¹ This arrangement may be seen as a very particular form of neo-colonialism.

Nauru continues to be the subject of Australian disparagement and derision. Most notably Alexander Downer, a former Australian politician and diplomat, described Nauru as being the 'worst place he had ever visited' whilst he was the Minister for Foreign Affairs.⁷² Given Australia's relationship with Nauru, the denunciation is ironic and tragic, reflecting an unfortunate insensitivity of Australia's role in creating the dereliction that the Minister later condemned. Phosphate was crucial for Australian agriculture, and Nauru had supplied thousands of tons of the fertiliser to Australian farmers at cost price.⁷³ Apart from the environmental damage it caused, Australia had benefitted enormously from the whole relationship. The Commission of Inquiry provided some plausible figures suggesting the extent of the massive sums involved and figures were also indicated in Nauru's memorial in the ICJ proceedings.⁷⁴ What is also perhaps most telling is that the people who presciently saw, warned against, and protested the destruction of the island of Nauru and its effects on its people were conscientious Australian administrators and citizens — people such as Thomas Griffiths and H E Hurst, who had a deep knowledge of the situation in Nauru and who sincerely attempted to ensure that Australia fulfilled its obligations under the Mandate and Trusteeship arrangements.⁷⁵

IV PAPUA NEW GUINEA AND BEYOND: MINING AND THE POST-COLONIAL STATE

We might consider the *Nauru Case*, not only in terms of its legacy for the people of Nauru, but as exemplifying a set of practices and policies that Australia adopted more widely in the Pacific.

In her important article, Associate Professor Katerina Teaiwa analyses Nauru in the context of what she terms 'Phosphate Imperialism' — an imperialism

⁷¹ George Williams, 'Asylum Seekers on Nauru are in a Legal Black Hole', *Sydney Morning Herald* (online), 3 February 2016 <<http://www.smh.com.au/comment/nauru-a-legal-black-hole-for-asylum-seekers-20160203-gmklf8.html>> archived at <<https://perma.cc/6CJN-Q4SW>>.

⁷² Tony Wheeler, 'Letter from ... Nauru — The Worst Place in the World?', *Crikey* (online), 5 April 2011 <<https://www.crikey.com.au/2011/04/05/letter-from-nauru-the-worst-place-in-the-world/>> archived at <<https://perma.cc/FMU4-4566>>.

⁷³ 'Phosphate has been exported mainly to Australia and New Zealand, where it improved the poor soils in those countries'. See Encyclopedia of Nations, *Nauru — Overview of Economy* <<http://www.nationsencyclopedia.com/economies/Asia-and-the-Pacific/Nauru-OVERVIEW-OF-ECONOMY.html#ixzz4N7Wqx948>> archived at <<https://perma.cc/8FG8-QL4Q>>; Weeramantry, above n 5, 263–4.

⁷⁴ *Nauru Case (Preliminary Objections)* [1992] ICJ Rep 240, [233].

⁷⁵ Seeing the dangers, Griffiths unsuccessfully attempted to limit the depth of mining to 20 feet: Weeramantry, above n 5, 102, 112, 172.

which extended to other Pacific islands, such as Banaba, which were equally devastated.⁷⁶ Here I focus on another territory that was under the Australian Mandate and later Trusteeship administration, Papua New Guinea. Whereas Australia's interest in Nauru was commercial, its interest in Papua and New Guinea was very much strategic: Australia could not afford potential enemies to control a territory so close to its own and the prospect of an expanding and newly powerful Asia was a source of ongoing alarm.⁷⁷ Intensive phosphate mining began in Nauru in the 1920s. By contrast, mining commenced in earnest in Papua New Guinea during the 1960s — in the context of a very different legal, political and economic environment which, when viewed from a broader perspective, reflected a transformation and reconfiguration of ideas relating to sovereignty, resources, governance and self-determination. In the case of Nauru, the phosphates were mined by the British Phosphate Commissioners as explicit representatives of the partner governments; by contrast, private corporations exploited the resources of Papua New Guinea that were discovered in the 1960s. In the case of the massive Bougainville mine, these included the Australian mining company, Rio Tinto.⁷⁸ In the 1960s, it was hardly acceptable, under trusteeship, for the partner governments discharging that trusteeship to follow the procedures that were redolent of the 19th century by establishing a monopoly over the phosphates, even if indirectly, to a body which it effectively controlled. Private rights, however, were better protected from any sort of governmental or international interference.⁷⁹ It is through a rough comparison of Nauru and Papua New Guinea that we might acquire a sense of change and continuity in Australian policy towards resources, self-determination and political economy, all of which were inevitably affected by developments within the UN and elsewhere about colonialism and self-determination.

A cursory glance at some of the Trusteeship Council proceedings regarding the mining concessions in Papua New Guinea raise various questions. The 'development discourse' that had begun at the time of the League itself had reached a further stage,⁸⁰ and the Special Representative for Australia noted that 'like all developing countries, the Territory needed an established policy on

⁷⁶ See Teaiwa, above n 39, 375, 381–91.

⁷⁷ See Hudson, above n 17, viii, 2–5.

⁷⁸ For details about the interactions of Rio Tinto in Papua New Guinea during the 1960s, see eg, Stuart Doran (ed), *Documents on Australian Foreign Policy: Australia and Papua New Guinea 1966–1969* (Australian Department of Foreign Affairs and Trade, 2006) vol 1, 36, 240–5. For a history of the Panguna Mine in Bougainville, see Donald Denoon, *Getting under the Skin: The Bougainville Copper Agreement and the Creation of the Panguna Mine* (Melbourne University Press, 2000). This is a detailed account of the background to the creation of the mine, its operations and the conflict surrounding it. Denoon makes the important point that the land rights of the people of Papua New Guinea were recognised, whereas 'Aboriginal Australians were not deemed to own land': at 49. Denoon also includes a fascinating report by the noted anthropologist, Douglas Oliver, commissioned by Rio Tinto, on managing relations between the indigenous peoples and the mining operation. See Douglas Oliver, 'Some Social-Relational Aspects of CRA Copper Mining on Bougainville: A Confidential Report to Management' (Report, Conzinc Rio Tinto Australia, 1968) 204–31.

⁷⁹ See generally James Gathii, *War, Commerce and International Law* (Oxford University Press, 2010).

⁸⁰ See generally Antony Anghie, 'Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations' (2002) 34 *New York University Journal of International Law and Politics* 513, 583, 586–9, 592.

outside investment to ensure that the interests of the people were safeguarded'.⁸¹ The World Bank had visited Papua New Guinea and written an influential report on how development was to be achieved, and mining became crucial for this project.⁸² We see in the mandate system the ways in which the concept of 'development' was being colonised even before it was elaborated on by the World Bank and eventually embraced by post-colonial states themselves. The Australian government believed that the exploitation of the mine was central to the development of Papua New Guinea. It would double the Territory's export income:

The Administration believes that the Bougainville Copper project offers a most important opportunity for the Territory to take a significant step forward toward economic self-reliance. Because of this the project is seen as of national rather than local importance, and it is seen as a unit in the mining industry rather than a single mine.⁸³

Various local bodies had been consulted about the need for such investment, and the Papuan House of Assembly had 'adopted a formal declaration on development capital, providing for various guarantees for investors: that declaration had been reaffirmed on 3 September 1968'.⁸⁴ Information was given about the benefits that would accrue to the local population, and how the processing of raw materials within the territory could add value. Plans were made, further, to provide the local populations with equity in the mining operations. The Trusteeship Council monitored these arrangements, which were lauded by the representatives of the United Kingdom and France.⁸⁵ The Soviet representative, however, demurred and stated:

the Bougainville Copper Company would be set up in such a way that two thirds of the shares would belong to Riotinto Zinc, a company known for its activities in the southern part of Africa, which was an international monopoly. One third of

⁸¹ *Report of the Trusteeship Council*, UN TCOR, 24th sess, Supp No 4, UN Doc A/7604 (19 June 1969), 21 [170].

⁸² I have argued that the World Bank continued in many respects the project of 'development' commenced in the League of Nations, and, elaborated by the Permanent Mandates Commission of the League; and the involvement by the World Bank in Papua New Guinea and its role in articulating the relationship between 'development' and 'sovereignty' (in the mode of 'nation-building') tends to confirm this view: Antony Anghie, 'Colonialism and the Birth of International Institutions', above n 80, 624–8; Antony Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions and the Third World' (2000) 32 *New York University Journal of International Law and Politics* 243; Mission Organized by the International Bank for Reconstruction and Development, 'The Economic Development of the Territory of Papua and New Guinea' (Report No 11153, The International Bank for Reconstruction and Development, 1965).

⁸³ There was an attempt to persuade the Papuan House of Assembly of the benefits of the mining. But it seemed that the Administration was prepared to do whatever was necessary in Bougainville, including use force 'subject to humanity and standing field orders', if the Administration's explanations were rejected. There had been fierce local opposition to Conzinc Riotinto Australia's activities by the locals in Bougainville, and as early as 1969 there were dangers of Bougainville seceding. See A P J Newman, (Statement delivered at the House of Assembly, Port Moresby, 16 June 1969), cited in Doran, *Documents on Australian Foreign Policy*, above n 78, 811; Stuart Doran, 'Introduction' in Doran, *Documents on Australian Foreign Policy*, above n 78, xv.

⁸⁴ *Report of the Trusteeship Council 20 June 1968 – 19 June 1969*, UN TCOR, 24th sess, Supp No 4, UN Doc A/7604 (1969) 21 [171].

⁸⁵ Doran, Introduction, above n 83, xv, xxix–xxx.

the shares would belong to the New Broken Hill Company, which had its headquarters in London. They would exploit the extremely rich deposits of copper of Bougainville Island. He said that from the statement of the Special Representative it was quite obvious that the lion's share of this project would go to Bougainville Copper and not to the indigenous population. And there was no reason to doubt that if the project went forward Bougainville island would really become the patrimony of the company.⁸⁶

The Soviet response might be interpreted as a predictable and ideologically motivated criticism in the context of the ongoing Cold War. Notably, for instance, a detailed study of the conflict in Bougainville states that '[b]y the standards of the time, Bougainville Copper Limited, whose principal investor was Conzinc Riotinto Australia, had a comparatively advanced sense of corporate social responsibility'.⁸⁷ This policy was based on enlightened self-interest; Bougainville Copper Limited provided scholarships to indigenous students, funded agricultural extensions and paid for all the infrastructure needed to operate the mine — the roads, electricity, water, telecommunications, ports, airstrips and housing.⁸⁸ Further, the Australian Administration of Papua New Guinea exercised its right to acquire 20 per cent of the equity of the mine, and many shares were reserved for purchase by indigenous individuals.⁸⁹ The mining companies paid very high taxes on their profits, and these increased even further after independence when the new government of Papua New Guinea entered into negotiations.⁹⁰

However generous the mining companies were according to the standards of the time, the Soviet warning became a reality in certain ways. The mine was central to achieving not merely political sovereignty but 'economic self-reliance', the development so crucial for the success of the new state, and thus the mine became one of the central institutions of the political life of Papua New Guinea.⁹¹

The conflict in Bougainville has been the subject of study for many institutions,⁹² and considerable effort and resources have been devoted to peace building and conflict resolution on the island.⁹³ It is unclear as to how the history

⁸⁶ *Report of the Trusteeship Council 20 June 1968 – 19 June 1969*, UN TCOR, 24th sess, Supp No 4, UN Doc A/7604 (1969) 30 [246].

⁸⁷ See John Braithwaite et al, *Reconciliation and Architectures of Commitment: Sequencing Peace in Bougainville* (Australian National University Press, 2010) 12; Doran, *Documents on Australian Foreign Policy*, above n 78, xxix.

⁸⁸ Braithwaite et al, above n 87, 12.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ Bougainville was central to Papua New Guinea's development programme, and hence its future: the negotiation of the Bougainville programme 'came to parallel the development program in order of magnitude and importance'. The Minister, Barnes, stated the agreement 'would be a milestone in the Territory's economic development': Doran, *Documents on Australian Foreign Policy*, above n 78, xxix, 811.

⁹² See generally Anthony J Regan, 'Current Developments in the Pacific: Causes and Course of the Bougainville Conflict' (1998) 33 *The Journal of Pacific History* 269; Volker Boege, 'Bougainville and the Discovery of Slowness: An Unhurried Approach to State-Building in the Pacific' (Occasional Papers No 3, Australian Centre for Peace and Conflict Studies, August 2006); Benjamin Reilly, 'State Functioning and State Failure in the South Pacific' (2004) 58 *Australian Journal of International Affairs* 479, 488.

⁹³ For a penetrating and valuable study of law in post-colonial Papua New Guinea, see Peter Fitzpatrick, *Law and State in Papua New Guinea* (Academic, 1980).

and origins of the conflict should be understood, or even whether these things matter. Perhaps the most important issue is to address the immediate demands of the parties involved, simply, to stop the violence. Nevertheless, it may be illuminating to examine the Bougainville mining operation in terms of Australia's administration of the territory and the relevant deliberations in the Trusteeship Council. Such an examination could offer insights into contemporaneous debates and discussions and the thinking of Australian and UN officials, Papua New Guineans, indigenous peoples, the people of Bougainville and others concerned about and involved in the granting of the concession and the legal and political issues that might have arisen.

What is absolutely clear, however, is that Australian officials would have been aware that mining could cause grave environmental damage which would have catastrophic consequences for the welfare of the indigenous population — the inhabitants whose interests were to be protected by the Trusteeship arrangement. It was in the early 1960s, precisely, that the desperate Nauruans were making this very point as they demanded the rehabilitation of their mined out lands,⁹⁴ and the scarred landscape of the island offered its own eloquent story. The Australian Department of Territories — under the Ministership of Sir Paul Hasluck at the time — was busy battling the Nauru protests and claims arising from mining at the same time as it was formalising the Bougainville concession agreements to two major Australian mining companies.⁹⁵ There was, however, at least one significant difference between the two situations. In the case of Papua New Guinea, the community that would have suffered most as a result of the mining was not the community that the Australian administration most directly and decisively engaged with, even if the local communities were paid royalties. The government of Papua New Guinea and its antecedent had no particular concern for the well-being of the people of Bougainville — who, it seems, had always seen themselves and been viewed as a different community, as part of the Solomon Archipelago rather than Papua New Guinea. Bougainville was placed in the German sphere of influence, however, and thence treated as a part of Papua New Guinea.⁹⁶ As one writer from Bougainville bitterly stated, '[f]or too long has our existence been controlled by people with an alien attitude to life, and peoples with different customs and beliefs, and with different sets of values'.⁹⁷ Tired of being treated like 'commodities or chattels' as they were governed by Germany in the 19th century, then Australia and finally Papua New Guinea, the people of Bougainville claimed their own right to self-determination under the *UN Charter*,⁹⁸ as a means of remedying the 'arbitrary and inconsiderate bungling of foreign powers, who swapped us around like pawns, with little consideration of our rights and interests'.⁹⁹ More particularly and understandably, the people of Bougainville objected to the royalties from the

⁹⁴ Weeramantry, above n 5, 256.

⁹⁵ Doran provides an overview of the dates of the negotiations in 1966–67, exactly the same time as the negotiations between the Nauruans and Australia regarding the phosphates and independence. See Doran, *Documents on Australian Foreign Policy*, above n 78, xxix–xxx.

⁹⁶ Braithwaite et al, above n 87, 12.

⁹⁷ Leo Hannett, 'Bougainville Independence' [1969] (March–April) *New Guinea* 10, 10–13, cited in Hudson, above n 17, 131.

⁹⁸ *Ibid.*

⁹⁹ *Ibid* 130–1.

copper mining being used by the Administration to finance the development of Papua New Guinea as a whole. This policy was against native custom, ‘which [said] that whatever is on the land or under the land belongs to the landowner’.¹⁰⁰ Further, the people of Bougainville felt that on this, as on a previous occasion, they had been cheated. Reference is made to a forestry project recommended by the World Bank:

‘We were ignorant of the real value of our forestry resources and there was no one on the spot to advise us. The only persons who advised us were the Administration officials who spared not efforts to get us into a unilateral [by which seems to be meant, one-sided and unequal] contract’.¹⁰¹

This situation is a familiar one in post-colonial states. For instance, the Nigerian government was indifferent to the well-being of the Ogoni people whose lands were destroyed by the oil drilling that benefitted the Nigerian state and the interests that dominated it, a different ethnic group.¹⁰² Secessionist wars were fuelled by the volatile combination of ethnic differences and compounded by uneven economic development. In another variation on this theme, European powers have attempted to foster secession in countries in the hope of getting or retaining access to mineral rich areas — thus Belgium encouraged the secession of Katanga from the Republic of Congo–Léopoldville in order to protect the interests of its mining companies.¹⁰³ Many mining companies, such as Rio Tinto, had interests in several different colonial territories and their strategies for advancing and protecting those interests were international in character.¹⁰⁴ A global history could be written then, of the relations between colonial governments and the private mining companies with which they were intimately connected — it is telling, after all, that Broken Hill Proprietary Company (now known as BHP), also involved in mining in Papua New Guinea, was famously known as ‘the Big Australian’.¹⁰⁵ Furthermore, the manner in which governments attempted to protect their multinational companies against the threat of self-determination is a complex and compelling theme.

¹⁰⁰ Daniel Tsibim, ‘The Bougainville Affair’ [1966–67] (December–January) *New Guinea* 34, 34–6 in Hudson, above n 17, 131.

¹⁰¹ *Ibid* 132.

¹⁰² For further information on the Ogoni people in Nigeria, see generally Steven Cayford, ‘The Ogoni Uprising: Oil, Human Rights, and a Democratic Alternative in Nigeria’ (1996) 43(2) *Africa Today* 183.

¹⁰³ Association for Diplomatic Studies and Training, ‘Congo in Crisis: The Rise and Fall of Katangan Secession’ (September 2015) <<http://adst.org/2015/09/congo-in-crisis-the-rise-and-fall-of-katangan-secession/>> archived at <<https://perma.cc/J8RM-FS2B>>.

¹⁰⁴ See the history of Rio Tinto which operated in other colonial territories such as Rhodesia. Similarly, the Royal Dutch Petroleum Company, a component of what was to later be Royal Dutch Shell, began as a resource company in Dutch Indonesia. The return of these companies to developing countries has generated a number of cases in which corporations have been accused of human rights violations. For Rio Tinto’s activities in Rhodesia for instance, see, eg, Charles E Harvey, *The Rio Tinto Company: An Economic History of a Leading International Mining Concern 1873–1954* (Alison Hodge, 1981) 244–5.

¹⁰⁵ Even the Sydney Morning Herald occasionally still refers to BHP as the ‘Big Australian’: Colin Kruger, ‘BHP Reject South32 Beats the “Big Australian” on Share Price and CEO Pay’, *The Sydney Morning Herald* (online), 11 September 2016 <<http://www.smh.com.au/business/cbd/bhp-reject-south32-beats-the-big-australian-on-share-price-and-ceo-pay-20160908-grc0gz.html>> archived at <<https://perma.cc/W6GH-73G4>>.

The independence of Papua New Guinea would not necessarily have helped local communities. Here, ironically and tragically, the post-colonial state of independent Papua New Guinea continued in certain respects to reproduce the role of the colonial state because it was somewhat indifferent to the needs of the local communities and because it needed the expertise and capital offered by the mining companies. As far as these local communities were concerned, the post-colonial state, invariably obsessed by the imperatives of ‘development’, was no better — and perhaps even worse — than the colonial state. It is important to note that right from the outset, local communities in Bougainville protested against the mining.¹⁰⁶ Scholars of nationalism have elaborated on this crucial problem confronting multiethnic states where one ethnic group takes control over the formidable apparatus of the state.¹⁰⁷ It is surely a tragedy that the mining operation envisaged to be the foundation of the independent nation state of Papua New Guinea has instead become one of the gravest threats to its wellbeing and, indeed, existence.

Extensive litigation has followed over the years. Residents of Bougainville unsuccessfully sued Rio Tinto in the US under the *Alien’s Action for Tort Claims Act*, alleging it had committed crimes against humanity, war crimes and racial discrimination.¹⁰⁸

V AUSTRALIA AND EMPIRE

The Australian administration of Nauru and Papua New Guinea might be seen within the broader trajectory of the theme of Australia and Empire. The story of Australia and Empire is generally told in two modes: first, it is the story of British Empire and Australia’s place within this larger scheme of policies;¹⁰⁹ secondly, and following from this, it is the story of settler colonialism, of the brutalities inflicted on the Aboriginal people, of conquest and dispossession. It is also the story of how a penal colony is gradually transformed and develops its own sense of identity and nationhood which then must formulate a relationship with the Empire of which it is a part.¹¹⁰ The European settlement of Australia was driven by the various imperatives of British Empire: the need to establish a penal colony, and then, to settle lands. It is rarer, however, to consider Australia

¹⁰⁶ Hugh Laracy, “‘*Imperium in Imperio*’?: The Catholic Church in Bougainville’ in Anthony J Regan and Helga M Griffin (eds), *Bougainville Before the Conflict* (Pandanus Books, 2005) 131–2. See also Denoon, *Getting under the Skin*, above n 78, 213–14, 224–5.

¹⁰⁷ Clifford Geertz, ‘After the Revolution: The Fate of Nationalism in the New States’ in Clifford Geertz, *The Interpretation of Cultures* (Basic Books, 1973).

¹⁰⁸ The *Sarei v Rio Tinto* decision followed the US Supreme Court decision in *Kiobel v Royal Dutch Petroleum Co* which decisively limited the application of the *Alien’s Action for Tort* in the United States: *Sarei v Rio Tinto* 671 F 3d 736 (9th Cir, 2011); *Kiobel v Royal Dutch Petroleum* 133 S Ct 1659 (2013); *Alien’s Action for Tort*, 28 USCA 1350 (1948). See also, Jonathan Stempel, ‘Rio Tinto Wins End to Human Rights Abuse Lawsuit in US’, *Reuters* (online), 29 June 2013 <<http://www.reuters.com/article/riotinto-abuse-lawsuit-idUSL2N0F41AD20130628>> archived at <<https://perma.cc/KVY9-HMVH>>.

¹⁰⁹ Deryck M Schreuder, ‘Empire: Australia and “Greater Britain”, 1788–1901’ in Alison Bashford and Stuart Macintyre (eds), *The Cambridge History of Australia: Indigenous and Colonial Australia* (Cambridge University Press, 2013) vol 1, 511, 511–34.

¹¹⁰ Schreuder describes what he has termed ‘colonial nationalism’: *ibid* 530–1.

itself as an Empire.¹¹¹ Australian settlers themselves, however, soon developed classic imperial instincts — and these were driven by characteristic factors — the desire for more land, the need for labour and concerns about security. As Professor Marilyn Lake observes, ‘as Anglo-Saxons, Australians and New Zealanders claimed ... the right to rule over others who were deemed not to enjoy this capacity, most notably the natives of Australia and the Pacific Islands’.¹¹²

Australian parties in New South Wales called for British intervention in New Zealand in the 1820s. Fiji had been an early target of Australian colonial ambitions; in 1859 ‘the New South Wales Legislative Assembly resolved that the island group should become a British possession’.¹¹³ In 1869, *The Age* in Melbourne posed the question to its readership, wealthy because of the gold rush and intent on commercial expansion, ‘since England can rule India, why should not Victoria make the experiment of trying to rule Fiji?’.¹¹⁴ The major Australian company, the Colonial Sugar Refining Company, had invested two million pounds in Fiji by 1900 and had transported thousands of Indians there for labour.¹¹⁵ Although termed ‘sub-imperialism’ on account of Britain’s dominant position in this arrangement, some Australian states had an autonomous drive for Australian expansion that far exceeded anything that Britain was prepared to engage in. This was particularly the case with Queensland’s campaign to annex New Guinea — viewed as ‘terra nullius’. Queensland raised its flag in Port Moresby in 1883. imperial rivalries had extended to the Pacific by the end of the 19th century, and the Australian states were concerned about German and French initiatives in the area. British support then was crucial for the defence of Australia, and the states believed they had to contribute to imperial war efforts to maintain their relationship. The New South Wales government offered troops for Herbert Kitchener’s campaign in the Sudan.¹¹⁶ Many years later, Australia responded enthusiastically to Kitchener’s call to arms at the outbreak of World War One.¹¹⁷ Importantly, the common resolve of the different Australian states to participate in imperial campaigns contributed to the sense of Australian nationhood itself.¹¹⁸ A complex dynamic emerges, one in which Australia became affiliated to the British Empire for reasons of culture, self-interest and

¹¹¹ See, eg, Marilyn Lake, ‘Colonial Australia and the Asia-Pacific Region’ in Alison Bashford and Stuart Macintyre (eds), *The Cambridge History of Australia: Indigenous and Colonial Australia* (Cambridge University Press, 2013) vol 1, 535, 535–40. This theme when taken up usually focuses precisely on the Mandate Territories, see, eg, Hudson, above n 17. For a recent incisive analysis of Australian sub-imperialism, see Cait Storr, “‘Imperium in Imperio’: Sub-Imperialism and the Formation of Australia as a Subject of International Law’ (2018) 19 *Melbourne Journal of International Law* 335.

¹¹² Lake, *Colonial Australia and the Asia-Pacific Region*, above n 111, 550.

¹¹³ Tom O’Lincoln, *Robbers and Spoilers: Australia and Britain in the 19th Century Pacific* (6 November 2016) Social Alternative <<http://sa.org.au/interventions/empire.htm>> archived at <<https://perma.cc/Z9A7-BE5Q>>.

¹¹⁴ *Ibid.*

¹¹⁵ O’Lincoln, above n 113.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.* Herbert Kitchener personally signed the death warrants of Australian troops court martialled for the killing of a pastor during the Boer War, the incident that became the subject of the film, *Breaker Morant: Breaker Morant* (Directed by Bruce Beresford, South Australian Film Corporation, 1980) (*Breaker Morant*).

¹¹⁸ O’Lincoln, above n 113.

defence, even as it gradually developed its own identity and foreign policy.¹¹⁹ The ‘Little Digger’, Billy Hughes, fought ferociously at Versailles for the annexation of New Guinea and Nauru. Indeed, he was the principal and most vociferous opponent of President Wilson’s scheme for the Mandate System.¹²⁰ Australia, like Japan at Versailles, was intent on asserting itself in the international arena.¹²¹ For Hughes, security concerns — the threat of a rising Japan — and reparations for all the losses suffered during the war, both economically and in terms of the thousands of Australian lives lost, drove his dogged campaign. As late as the 1960s, Sir Paul Hasluck, the Australian Minister for External Territories, was drawing up a plan for the creation of an Australian Empire in Melanesia which could be a prelude to eventual self-government for the territories involved.¹²² This was in many ways a response to the threat of Indonesia’s claims to West Papua.¹²³ The proposal was rejected by the Menzies government. The Australian Empire displayed, then, several of the basic elements of imperialism: the drive for security, natural resources and land and the exploitation of labour, all this combined with quasi benevolence towards the natives that was such an essential feature of the civilising mission. As for the native peoples subject to this rule, Lake states that ‘[t]heir worlds were disrupted, communities torn apart, resources exploited, populations depleted and lives destroyed by disease, dislocation and despair’.¹²⁴

It is in this context of a complex sort of Australian Empire, one that contained within itself different versions and positions in the operations of imperialism that we might place the history of Nauru. What Nauru and Papua New Guinea might offer, then, is a way of understanding the actual operation of the Australian Empire in some detail — the attitudes that informed such an Empire; the government policies and bureaucratic norms that were formulated and implemented; the manner in which it dealt with issues of self-determination and international scrutiny; its conception of native communities and their relationships; and the connection between ‘development’ and nation-building in the latter stages of the enterprise — to suggest only some themes. Equally importantly, we see all this in the context of a complex set of legal structures and manoeuvres created by the Australian government to justify its policies — policies that were scrutinised and criticised by the various bodies established to

¹¹⁹ See generally Roger C Thompson, *Australian Imperialism in the Pacific: The Expansionist Era 1820–1920* (Melbourne University Press, 1980), 226–7, 229.

¹²⁰ See Weeramantry, above n 5, 43–6; Peter Spertalis, *The Diplomatic Battles of Billy Hughes* (Hale & Iremonger, 1983), chs 5–6. The emergence of Australia onto the international arena, which occurred in Versailles, is a rich topic which could benefit from fresh studies in the light of the new histories of that period, see Margaret MacMillan, *Paris 1919: Six Months that Changed the World* (Random House Trade, 2003). For Hughes’s own dramatic and rather self-promoting account of his battle with Wilson, see Billy Hughes, *Policies and Potentates* (Angus and Robertson, 1950).

¹²¹ Kinji Akashi, ‘Chapter 30: Japan–Europe’ in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012), 739.

¹²² Christopher Waters, ‘The Last of Australian Imperial Dreams for the Southwest Pacific: Paul Hasluck, the Department of Territories and a Greater Melanesia in 1960’ (2016) 51 *The Journal of Pacific History* 169, 169–70.

¹²³ *Ibid.*

¹²⁴ Lake, *Colonial Australia and the Asia-Pacific Region*, above n 111, 551.

monitor the Australian administration — the Permanent Mandates Commission of the League of Nations, and then the Trusteeship Council.

VI OVERLAPPING IMPERIAL HISTORIES

Although we might broadly identify different versions of imperialism embodied in Australian history, they are all intimately linked in extremely complex ways — right from the outset, for instance, Australian administrators of Nauru saw similarities between the people of Nauru and the Aboriginal people of Australia. As mentioned above, as early as 1920, Australian officials warned that unless Australia properly discharged its functions, the people of Nauru could suffer the fate of the Aborigines.¹²⁵

There are, then, at least two different versions of Empire to consider in relation to the Nauru and Papua Mandates — their relationship, first, to settler colonialism and its impact on the Aboriginal people of Australia, and, second, their relationship to sub-imperialism. These two versions of Empire were fused administratively in the Australian political system by the creation of the Department of Territories in Australia, which operated between 1951 and 1968 and had jurisdiction over Papua New Guinea and Nauru, both Mandate Territories, as well as the Northern Territory of Australia.¹²⁶ A complex complementarity and contrast resulted. The fusion was also evident in the careers, policies and temperaments of the major personnel involved.

Sir Paul Hasluck was the Minister for Territories from 1951–63 and Minister for External Affairs from 1964–69. He was later appointed Governor-General, and Australian history may have been different if he had extended his term instead of being succeeded by Sir John Kerr. One of the major figures in the making of Australia's foreign policy, one of the 'dreamers of the day',¹²⁷ Hasluck was an expert both in what might be termed 'colonial administration' — he wrote a 452 page book on Papua New Guinea, *A Time for Building*:

¹²⁵ Weeramantry, above n 5, 113.

¹²⁶ Commonwealth, *Commonwealth of Australia Gazette: Administrative Arrangements*, No 46, 2 July 1951, 1653, 1663.

¹²⁷ Crawford, above n 4.

Australian Administration in Papua New Guinea — and Aboriginal policy.¹²⁸ He wrote several books on Aboriginal affairs, as well as on foreign affairs.¹²⁹ In addition, he was an eminent war historian. The predecessor to the Department of Territories was the Department of External Territories, which functioned from 1941–51 in its first incarnation. Its duties focused on the administration of Nauru, New Guinea, Norfolk Island and Papua. Sir Percy Spender, another prominent ‘dreamer of the day’, served as Minister for External Affairs from 1949–51.¹³⁰ Many of the giants of Australian international law were involved in the highest levels of Australian government. It is notable and hardly surprising then, that many of them (such as Hasluck) were directly involved in managing colonial issues. This experience was to have enduring effects on the careers of those involved. Spender, together with J R Jayewardene of Sri Lanka, was one of the principal architects of the Colombo Plan that resulted in the education of many talented Asians in Australia.¹³¹ But there are other ramifications that followed Nauru’s battle for independence, and these emerged in a very different forum. Spender was also Minister for External Territories in 1951. He knew of the operations of the BPC on Nauru. By the 1960s, as Nauru became more assertive in claiming compensation for the mining damage from Australia, Australian international law scholars had already pointed out that an independent Nauru would have a powerful case against Australia under the Mandate and

¹²⁸ Hasluck was lauded by Michael Somare, as the first Prime Minister of Papua New Guinea, for his unequivocal promotion of self-government in that territory. For the praise and a review, see L V Kepert, ‘Pukka Sahibs of Moresby’, *The Sun-Herald* (Sydney) 18 July 1976, 86. His son, Nicholas Hasluck, a distinguished writer and lawyer, is the author of *The Bellarmine Jug*, a compelling international law moral thriller, that is a predecessor to Dan Brown and takes place as decolonisation in Asia is unfolding and is set in an international law institute in Holland, ‘The Grotius Institute’ which is attended by students from all over the world who hope to pass the notoriously demanding exams: it is not difficult to see many resemblances to the Hague Academy. The reputation of Grotius is threatened by a secret document outlining the involvement of his son in the terrible events following the wreck of the *Batavia*, the pride of the Dutch East Indies Company at the time, off the coast of Western Australia, in 1629. The Director of the Institute, desperate to protect both the Institute and Grotius, confronts the novel’s protagonist and warns that the destruction of the Institute would be ensured by ‘suggesting that Grotius has been the cause of ruin, that his thoughts have found expression in atrocities’. It is also a striking novel for representing the origins of European explorations of Australia in developments in the East Indies. See Nicholas Hasluck, *The Bellarmine Jar* (Penguin Australia, 1984) 126. The Australian encounter with Papua New Guinea has produced at least one brilliant novel, Randolph Stow’s neglected masterpiece: Randolph Stow, *Visitants* (Secker & Warburg, 1979). Interestingly, another of Stow’s superb novels, *To the Islands*, deals with relations with Aborigines. Stow was an anthropologist as well as a writer and here too we might see an exploration of white Australian identity in relation to different colonised subjects: Randolph Stow, *To the Islands* (University of Queensland Press, 2002)

¹²⁹ The sweep of Sir Paul’s career and his expertise on ‘native issues’ makes him perhaps comparable to Sir F D Lugard, whose work *The Dual Mandate* is a classic on colonial governance: Sir F D Lugard, *The Dual Mandate in British Tropical Africa* (William Blackwood and Sons, 2nd ed, 1923). His biography was written by Margery Perham: Margery Perham, *Lugard: The Years of Adventure 1858–1898* (Collins, 1956); Margery Perham, *Lugard: The Years of Authority 1898–1945* (Collins, 1960); see also, Mary Bull, ‘Writing the Biography of Lord Lugard’ (1991) 19 *The Journal of Imperial and Commonwealth History* 117, 117–36.

¹³⁰ For an account of Spender’s contribution to Australia’s advancement in international law, see Crawford, above n 4, 529–38.

¹³¹ A C B Symon, ‘The Colombo Plan’ (1952) 39 *Journal of the Royal Central Asian Society* 188.

Trusteeship Agreements.¹³² The responsibility of an Administering Authority under the Mandate System was precisely the issue that Spender was called upon to decide in the famous *South West Africa (Liberia v South Africa)* of 1966.¹³³ Nauru, like South West Africa, was a ‘C’ Class Mandate.¹³⁴ It is hard to know what motivated Spender to take extraordinary steps to ensure that Sir Muhammed Zafrullah Khan, who was known to be unsympathetic to South Africa’s position in that case did not participate in the final decision.¹³⁵ As a consequence, the Court split 7–7, but it was decided by virtue of the casting vote of Spender, who served as the Court’s President, that the case brought by Ethiopia and Liberia on behalf of the people of South West Africa against South Africa was inadmissible.¹³⁶ The decision was extremely controversial because the Court in its earlier judgment had decided that Liberia and Ethiopia had established jurisdiction, and the second case was supposed to deal with the merits.¹³⁷ As a result of the decision, the Court was condemned by developing countries which had always harboured the fear that it was biased in favour of Imperial powers; and Sir Kenneth Bailey, who was arguably the most able Australian international lawyer of his time, lost all chances of being appointed to the Court. Australia’s absence on the Court continued until 2014, when James Crawford was elected to the Court. This, then, is another way in which this complex history of overlapping imperialisms may be told — following Martti Koskenniemi’s pioneering study through the biographies of the major jurists and statesmen involved, the European lawyers of the 19th century that created the Institut de Droit International,¹³⁸ and (in Crawford’s case) the Australian lawyers who formulated its engagement with the ICJ.¹³⁹

Hasluck had an enormous influence on the formation of Australian colonial policy, although it must be noted that he claimed that Australia never was a colonial power. Writing of Papua New Guinea, Hasluck claimed:

The Territory is no more remote from the national capital and the heart of Australian population than the outlying States of the Commonwealth. Hence, the

¹³² Weeramantry, above n 5, 265.

¹³³ See *South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)* [1966] ICJ Rep 6 (‘*South West Africa Cases*’).

¹³⁴ Margalith, above n 8, 31.

¹³⁵ See Victor Kattan, ‘Decolonizing the International Court of Justice: The Experience of Judge Sir Muhammad Zafrulla Khan in the *South West Africa Cases*’ (2015) *Asian Journal of International Law* 310, 333, 340, 346, 348.

¹³⁶ *South West Africa Cases* [1966] ICJ Rep 6, 51 [100].

¹³⁷ *Ibid* 8–9.

¹³⁸ Chapter 2 is particularly useful in Martti Koskenniemi’s work. See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1879–1960* (Cambridge University Press, 2002) 98–178.

¹³⁹ The biographical method is mentioned explicitly by Crawford: ‘Australia’s relationship with the Court has been built on the personal interactions of a series of remarkable individuals: H V Evatt, Paul Hasluck, Percy Spender and Kenneth Bailey’: Crawford, above n 4, 549. The theme of imperialism is not explicitly dealt with in Crawford’s article, although the *South West Africa Cases* and *Nauru Case* are discussed in some detail. However, the very title of the article — ‘Dreamers of the Day’ — invokes an imperial context, as this phrase is taken from T E Lawrence’s *Seven Pillars of Wisdom*: T E Lawrence, *Seven Pillars of Wisdom* (Wordsworth, 1997) 7, quoted in Crawford, above n 4, 520.

administration of the Territory can be seen in the clearest and most direct sense an Australian administration, as distinct from a colonial government.¹⁴⁰

Hasluck worked tirelessly to promote what he saw as self-government for Papua New Guinea. Unlike in Nauru, education was given priority and Australian expenditure to promote development in Papua New Guinea was considerable.¹⁴¹ Hasluck proceeded on the confident basis that Australia provided the universal model of the individual, society and commerce: 'The end to which this Government will direct its activities is to establish in these territories a well-grounded, happy and stable condition of living that will conform with the best standards of Australia'.¹⁴² Although biographies have been written about Hasluck,¹⁴³ it is more difficult to find a systematic analysis of his extensive writings on Aboriginal affairs and the administration of Trusteeship Territories — Papua New Guinea and Nauru. There is an argument to be made that he is comparable in various ways with Sir Frederick D Lugard, the doyen of colonial administrators, both in terms of his immense stature — he became the Governor-General of Australia — his far-ranging intellect, as well as his engagement with 'colonial administration', despite his own claims to the contrary. Indeed, Hasluck was familiar with Lugard's work, having studied it as an undergraduate student at the University of Western Australia. He remained unimpressed:

I had been somewhat sceptical about the Lugard gospel of 'indirect rule' as expounded and applied in West Africa. It seemed to me to be a device by which colonial rule could be assisted and perpetuated rather than a path towards the development of indigenous political institutions ... It [indirect rule] was a helpful method by which a tutelary power could run a dependent country but had little value for building the political structure of a nation.¹⁴⁴

This is an astute comment on Lugard, and Hasluck differentiates himself from what he regards as Lugard's colonial approach by instead seeking to promote self-government and political institutions in New Guinea. This view is based on the assumption that policies furthering self-government cannot themselves be in some respects colonial. Hasluck seemed to view Lugard as being overly theoretical in thinking of the larger goals and policies of colonial administration; by contrast, his own approach was practical and much of his writing was concerned with the issue of implementation. The formidable challenge he faced was that of forming a modern nation state out of the many disparate peoples of Papua New Guinea. His approach in Papua New Guinea was to create modern

¹⁴⁰ Paul Hasluck, 'Australia's Task in Papua and New Guinea' (Speech delivered at Seventh Roy Milne Memorial Lecture, Perth, 10 September 1956), reproduced in Australian Institute of International Affairs (ed), *Roy Milne Memorial Lectures: 1st–11th 1950–1960* (Ramsay Ware, 1960) 4, cited in Hudson, above n 17, vii.

¹⁴¹ Hudson, above n 17, x–xi, 56.

¹⁴² Commonwealth, *Parliamentary Debates*, Legislative Assembly, 5 September 1952, 1089–90 (Sir Paul Hasluck, Minister for External Territories), cited in Hudson, above n 17, 53.

¹⁴³ See generally Robert Porter, *Paul Hasluck: A Political Biography* (University of Western Australia Press, 1993); Geoffrey Bolton, *Paul Hasluck: A Life* (UWA Publishing, 2014).

¹⁴⁴ Paul Hasluck, *A Time for Building: Australian Administration in Papua and New Guinea 1951–1963* (Melbourne University Press, 1976) 165.

political institutions.¹⁴⁵ He had little doubt about the goals of policy, whether in regard to Aboriginal Affairs or Papua New Guinea — the transformation of the native into the modern individual, or even, more specifically, the Australian individual, with all the benefits and advantages that would follow. In Hasluck's case, it would seem, a crucial part of this program, as in the case of the Mandate System more generally, was the importance of creating a modern commercial economy that would both support and create that modern individual.¹⁴⁶ It is hardly surprising that Hasluck is viewed as the architect of the long-standing and profoundly important policy of assimilation which drove Aboriginal policy for decades and that was also evident in Papua New Guinea.¹⁴⁷ For Hasluck,

My idealism simply is this: What is true of a white Australian is true of every human being, and it is part of the responsibility that is laid on us in our administration both in New Guinea and of matters affecting the Australian aborigine that not one man, woman or child shall be barred from being the best that person can possibly be.¹⁴⁸

The passage is revealing for placing these three identities, white Australian, Aboriginal and the Papua New Guinean all within the same system in which white Australian identity is posited as the universal, human identity that the others latently possess within them and which the administration of those peoples should be directed towards developing. The problem with this approach is that any assertion of native identity, of difference, could then be seen as an aberration or inadequacy which had to be addressed and reformed. The task of reform would then become endless both in duration and administrative innovation as the natives inevitably resisted these attempts at assimilation and fought to retain their identities. If the granting of independent statehood was posited on the emergence of the 'assimilated native', then the prospects of such independent statehood could recede indefinitely as this dynamic of difference played itself out. Hasluck's idealism should not be overlooked, but contemporaneous critics of Hasluck's policies, such as the anthropologist Murray Groves, pointed out that these policies 'assume the Papuans will wish to acquire

¹⁴⁵ For Hasluck's approach and for criticisms of that approach for being paternalistic by assuming that Australia represented the modern to which all people aspired, see Hudson, above n 17, 58–9. For a crisp assessment of Hasluck's role in the decolonisation of Papua New Guinea, see Donald Denoon, *A Trial Separation* (Australian National University Press, 2012) 24–30.

¹⁴⁶ See Anghie, 'Colonialism and the Birth of International Institutions', above n 80, 587–95.

¹⁴⁷ Sir Paul Hasluck was a strong proponent of assimilation: 'Assimilation means that eventually, as they make progress, all the aboriginal people are to live as we do. The direct and immediate consequence of the acceptance of the policy of assimilation is that endeavours will be made to assist the social progress of aborigines towards European standards and that, when persons of aboriginal origin are able to live their own lives as members of the Australian community, full opportunity shall be given to them to do so': Paul Hasluck, 'From Protection to Welfare' (Speech delivered at the Biennial Conference of the Australian National Council of Women, 14 October 1952), cited in Paul Hasluck, *Native Welfare in Australia: Speeches and Addresses* (Paterson Brokensha, 1953) 35–6.

¹⁴⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 October 1956, 1441–2 (Paul Hasluck), quoted in Hudson, above n 17, 54. Hasluck's complex views on self-determination and self-government evolved over time. In his last address on Papua New Guinea in 1964 he stated '[s]elf-government also means, in my book, government according to a form chosen by the people themselves, introduced at a time which they think appropriate and confided to a government which they themselves have entrusted with office': Hasluck, *A Time for Building*, above n 144, 423.

the manners and customs of their Australian overlords, to the great convenience of the latter'.¹⁴⁹ For Groves, further, the Australian economic policy in Papua New Guinea ensured the domination of Australian business interests, and was based on the view that 'Papuan serve their own best interests by serving Australian plantation and business enterprises'.¹⁵⁰ For the economist Ron Crocombe, further, the economic policies devised to bring about development through attracting foreign investment and enabling the participation of the Papua New Guineans, was problematic. Referring to such participation, Crocombe argued:

'Participation' is the key word in this plan, but when its nature is analysed in terms of the provisions made, it is found to mean participation mainly as labourers [sic] for expatriate industry, participation as savers for expatriate entrepreneurs to invest, participation as peasant producers for expatriate commerce to buy produce from and supply goods to.¹⁵¹

In the case of Papua New Guinea, it would seem that there was nothing malevolent or intentionally exploitative about the policies adopted. However, the assumption that Papua New Guineans could be transformed into Australians and wanted to be transformed into Australians, together with the formulation of economic development policies that might have undermined local interests, was highly problematic.

The situation in Nauru was in many ways much more dire, as the single-minded exploitation of the phosphates threatened the very existence of Nauruans as a people. Further, there were no real plans made for their education and advancement. The struggles of Nauru for self-determination from the 1960s onwards occurred at precisely the time that Aboriginal activists were fighting for land rights.¹⁵² Nauru received independence in 1968; Australian Aborigines and civil rights activists campaigned for the national referendum in 1967 that led to an improvement in their status by removing discriminatory language in the Australian Constitution.¹⁵³ Both the Aborigines and Nauruans feared and resisted the assimilationist policies promoted by the Australian government that were perceived by that government as benevolent and inevitable. At one stage of the

¹⁴⁹ Murray Groves, 'New Guinea: Australia's Colonial Fantasy' (Speech delivered at Chifley Memorial Lecture, Melbourne, 1962), cited in Hudson, above n 17, 58.

¹⁵⁰ Ibid.

¹⁵¹ Ron Crocombe, 'That Five Year Plan' [1968–1969] (December–January) *New Guinea* 57, 57–70, cited in Hudson, above n 17, 115.

¹⁵² Foley places his account of the struggle of Indigenous Australians in a global context, 'a particular moment in the history of the world when many things were changing — the decolonisation of Africa and the Pacific and other colonised nations around the world; the upsurge of activity amongst other Indigenous peoples in other parts of the world, especially the American Indians, and especially the Maori people': Foley, above n 51, 609. The emergence of Aboriginal political consciousness between federation and the Second World War' in Gordon Briscoe alludes, for instance, to the impact of the *Universal Declaration of Human Rights* on changing the dialogue of Aboriginal politics: Gordon Briscoe, 'The Origins of Aboriginal Political Consciousness and the Aboriginal Embassy, 1907–1972' in Gary Foley, Andrew Schaap, Edwina Howell (eds), *The Aboriginal Tent Embassy* (Routledge, 2014) 42, 49; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

¹⁵³ National Archives of Australia, *The 1967 referendum — Fact Sheet 150* <<http://www.naa.gov.au/collection/fact-sheets/fs150.aspx>> archived at <<https://perma.cc/T3AZ-JLDQ>>.

negotiations preceding independence, Nauruans were given the opportunity to leave behind their homeland and settle in Australia. This meant the complete assimilation of Nauruans. Hammer De Roburt, however, vehemently rejected this option as it would have resulted in the disintegration of Nauruan society, its sense of community and identity.¹⁵⁴

What we might also see are the different struggles for self-determination and resistance by both the Aborigines and Nauruans. The Aboriginal battle for land rights and recognition paralleled and overlapped with the Nauruan struggle. What might emerge then, is a richer and more complex idea of how questions of race, identity, nationhood and sovereignty were played out in these different, overlapping dramas. Gary Foley argues that Indigenous Australian campaigns for self-determination had an international dimension almost from the outset, with the first Aboriginal political organisation, the Australian Aborigines Progressive Association, being influenced by Marcus Garvey's ideas of black nationalism, self-determination and economic independence.¹⁵⁵ These struggles were related to broader development, the civil rights movements,¹⁵⁶ the battle against apartheid, the liberation struggles taking place in Algeria, Vietnam and other places around the world. This might add a dimension to both more conventional and critical histories of Australia and its engagement with the world.

VII AUSTRALIA AND SUB-IMPERIALISM

Australian historians have used the term 'sub-imperialism' to describe one dimension of Australia's own imperial ambitions in relationship to Empire.¹⁵⁷ We might see Australian history in terms of Australia's efforts to define its own place within the British Empire on one hand, while constructing itself as something like an Imperial power in the Asia-Pacific region on the other. These are the dual dimensions of Empire that Australia must continuously negotiate. Some sense of these particular hydraulics in operation are suggested by Australia's first major appearance on the world stage at Versailles in 1919, defining Hughes's campaign to annex Papua and Nauru that was bitterly opposed by Wilson. The conflict reached a crisis when Wilson, arguing his case by claiming to speak for the all the countries represented at the Paris Peace Conference (except for Australia and New Zealand) asserted, I speak for '1200 million people'. Hughes responded — he was hard of hearing and the question had to be repeated — 'I represent sixty thousand dead'.¹⁵⁸ Hughes was referring to the 60,000 who had fallen in the war, a war that Hughes had supported with absolute conviction despite the referendums he lost in Australia. Sixty thousand

¹⁵⁴ See Hammer DeRoburt's statement to such effect: *Nauru Case (Memorial)*, app 1, 255 [19]–[20].

¹⁵⁵ See Foley, above n 51, 610.

¹⁵⁶ Foley, above n 51, 612. Gary Foley has also traced the evolution of the campaign from demands for equality and rights to claims of self-determination: Gary Foley, 'Whiteness and Blackness in the Koori Struggle for Self-Determination: Strategic Considerations in the Struggle for Social Justice for Indigenous People' [2000] (19–20) *Just Policy: A Journal of Australian Social Policy* 74.

¹⁵⁷ See, eg, Luke Trainor, *British Imperialism and Australian Nationalism: Manipulation, Conflict and Compromise in the Late Nineteenth Century* (Cambridge University Press, 1994) 38. See also Storr, 'Imperium in Imperio', above n 111.

¹⁵⁸ See Weeramantry, above n 5, 48.

Australians had died in the Middle East and the Western Front, at least some of them the victims of large-scale folly and Imperial indifference. Nauru was to be some small compensation for all the hurt and loss resulting from fealty to the British Empire. Equally importantly, even while implicitly acknowledging its subordinate position in the scheme of the British Empire, Hughes was seeking to enhance and express Australia's independence and autonomy, its claim to belong to the 'civilized nations' of the world. Australia could enhance its new status by ruling other people and establishing itself internationally as an Imperial power that would deal with the League of Nations as such. Japan's claim to be a Mandate Power may be understood in similar terms.¹⁵⁹ The United Kingdom managed at least these demands with superb finesse. While Hughes vociferously made the case for annexing Nauru, Britain appeared far more neutral and understated while diplomatically advancing Australia's claim. Eventually, Britain, presenting itself as mediating further between the rival claims of Australia and New Zealand, would receive 42 per cent of the phosphates (New Zealand received 16 per cent).¹⁶⁰ The United Kingdom had adroitly ensured that none of its former colonies could bring action against it in the ICJ,¹⁶¹ and so it was only Australia that appeared as a defendant when Nauru finally brought its case. It was not until I saw *Breaker Morant* many years after the *Nauru Case* was heard that I felt I understood an important dimension of the politics and history that led to it.¹⁶² Australia itself, after all, was a subject of the British Empire. It is illuminating that relations between Australia and the British Empire were most prominently tested by a sporting event, the battle for the Ashes and the infamous Bodyline series of 1932–33 when Douglas Jardine, the English captain, devised this new strategy to contain Australia and its most famous sporting hero, Don Bradman. Jardine, born in British India, seemed intent on winning at all costs and putting the Australians in their place.¹⁶³

This dual relationship with Empire, Australia's role within the British Empire as well as its increasing autonomy within that Empire, raised issues that were central both to the creation of the Australia–New Zealand Society of International Law ('the Australia–NZ Society') and its major interests. This was inevitable: it was only once Australia had emerged as a somewhat autonomous actor, in Versailles and later most prominently at the Imperial Conferences, that Australia's own sovereign status in external relations became an issue of

¹⁵⁹ Hughes was a powerful opponent of Japan's efforts to affirm the principle of racial equality at Versailles. For the argument that rule over colonies was a manifestation of civilisation and nationhood, see, eg, Mohammad Shahabuddin, 'Nationalism, Imperialism and Bandung: Nineteenth-Century Japan as Prelude' in Luis Eslava, Michael Fakhri and Vasuki Nesiiah (eds), *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (Cambridge University Press, 2017) 95, 101, 103–7.

¹⁶⁰ This was in accordance with the formula of phosphate allocation: *Nauru Island Agreement Act* art 7.

¹⁶¹ *Declaration of the United Kingdom of Great Britain and Northern Ireland Recognizing as Compulsory the Jurisdiction of the International Court of Justice, in Conformity with Paragraph 2, Article 36, of the Statute of the International Court of Justice*, United Kingdom–United Nations, signed 2 June 1955, 110 UNTS 122, art 2.

¹⁶² *Breaker Morant*, above n 117.

¹⁶³ See Duncan Hamilton, 'An Ashes Feud that Lasted for Life', *The Guardian* (online), 5 July 2009, <<https://www.theguardian.com/sport/2009/jul/05/harold-larwood-bodyline-ashes-england-australia>> archived at <<https://perma.cc/3LH8-EECA>>.

debate.¹⁶⁴ The *Balfour Declaration* — the other *Balfour Declaration* — of 1926, declared that the dominion powers were ‘equal’ with the Empire raised complex and unresolved issues of sovereignty.¹⁶⁵ The Australia–New Zealand Society of International Law was created in 1933, at a meeting at the University of Sydney. Among those present were Sir John Peden, Evatt and Professor Charteris — then the Challis Professor of International Law at Sydney. The first annual meeting was held also at the University of Sydney, from 17–21 August 1933. Sir Owen Dixon chaired the opening session. Australia’s status was a central concern. The colonial origins of the Australia–NZ Society are pointed out in the first paper to be printed in the ‘Australian and New Zealand Society of International Law: Proceedings’, where Sir Harrison Moore asserted:

Not many years ago the study of international law in Australia was commonly considered superfluous. Now, not merely the responsibilities assumed in international relations by each of the Dominions, but the peculiar nature of the British Empire itself, impose upon us, in common with the rest of the Empire, a special task, and form a special reason for the institution of a Society of International Law.¹⁶⁶

The question of what Australia’s new status permitted it to do in the international arena was most pointedly raised in the context of Australia’s administration of the Mandates. Thus, Evatt, in another paper in the same Proceedings, wrote on ‘The British Dominions as Mandatories’.¹⁶⁷ Evatt offered his own analysis of the ongoing problem — explored in length in Quincy Wright’s classic work on the *Mandates under the League of Nations*¹⁶⁸ — where was sovereignty over the Mandate Territories to be located? But this was only one aspect of the complication, for a further question emerged of Australia’s own sovereign status and its capacity to engage in international affairs. Evatt’s analysis of Australia’s power to administer its Mandate Territories thus involved a prior discussion of ‘The Nature of Dominion Status’ and the implications of the *Balfour Declaration*’s assertion that the Dominions and Empire are ‘equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs’.¹⁶⁹ And yet, Evatt argued, inequality between the Empire and Dominions was the real case. However,

¹⁶⁴ The subject of British Dominions itself calls for fresh scholarly evaluation and historical scrutiny. On the issue of dominions and Australia’s changing status as a Dominion Power, see eg, Robert MacGregor Dawson, *The Development of Dominion Status* (Frank Cass & Co Ltd, 2nd ed, 1965).

¹⁶⁵ Inter-Imperial Relations Committee, ‘Imperial Conference 1926’ (Report No E(IR/26), 1926) 2.

¹⁶⁶ In the case of the US too, it was the acquisition by the US of overseas territories such as the Philippines, following the Spanish-American War of 1898, that was an important factor in the creation of the American Society of International Law: W Harrison Moore, ‘Separate Action by the British Dominions in Foreign Affairs’ in the Australian and New Zealand Society of International Law, *Proceedings of the Australian and New Zealand Society of International Law* (Melbourne University Press, 1935) vol 1, 1.

¹⁶⁷ H V Evatt ‘The British Dominions as Mandatories’ in Australian and New Zealand Society of International Law, *Proceedings of the Australian and New Zealand Society of International Law* (Melbourne University Press, 1935) vol 1, 27, 33.

¹⁶⁸ Quincy Wright, *Mandates under the League of Nations* (University of Chicago Press, 1930). For a recent magisterial study of the mandate system, see Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press, 2015).

¹⁶⁹ H V Evatt, ‘The Nature of Dominion Status’ in Evatt, above n 167, 33.

If, therefore, actual international equality with Great Britain cannot be asserted of the self-governing Dominions, the evidence afforded by the inter-Imperial transactions which culminated in the *Statute of Westminster* does at least establish beyond contradiction the position that, prima facie, each Dominion may, in relation to all non-British States at least, assume obligations and acquire rights. In any given case, the nature and quality of such obligations and rights may have to be examined, and it is possible that the prima facie principle of full international capacity should not, or cannot, be applied.¹⁷⁰

Many intricate issues arise but, for my purposes, once again, we see that the relationships of Empire have to be considered in their complex conjunctions with each other. Difficult and novel questions emerged regarding both Australia's sovereign powers as a dominion, and Australia's sovereign powers over its Mandate Territories — and the two issues, generated by two different relationships with sovereignty and Empire, were closely interrelated in both conceptual and practical terms. It was by exercising its new-found powers over its mandate territories that Australia could test, manifest, and perform its sovereign powers and its emergence as an international actor notwithstanding its status as a loyal member of the British Empire. This changed status, of course, had been more dramatically signalled earlier: Australia, after all, had signed the *Treaty of Versailles*, and in so doing 'became an original member of the new family of nations constituted by the *Covenant*'.¹⁷¹ This act in itself generated myriad legal questions, but the political factors that led to this were clear to Evatt — they consisted of Hughes' tenacity and the fact that Australia had suffered 'enormous loss of life and wealth during the Great War'.¹⁷² This tragedy was rewarded by control over Nauru and a new status in the international system. Quite apart from Nauru and Papua New Guinea then, what this examination of Australian Empire points to is the self-determination of Australia itself, as its engagement with those territories marked different phases of its own evolution from colony to 'dominion' to a sovereign state which has still not relinquished its ties with Britain and Empire.¹⁷³

VIII TOWARDS THE PRESENT

The issues I have sketched here — and no more than sketched — and the questions I have raised might then be of what could be termed 'historical interest'. However, the predicament the peoples of Nauru and elsewhere confront in the aftermath of Empire is only too real. There is a powerful inevitability about the ongoing tragedy confronting the people of Nauru which is connected to its colonial past, and it would take considerable and insightful scholarship to trace the new ways in which the effects of imperialism unfold and the failures of the promise of self-determination.

¹⁷⁰ Ibid 38.

¹⁷¹ Ibid 46.

¹⁷² Ibid.

¹⁷³ Of the 'dominions', it was argued that: '[t]heir status defied exact analysis by both international and constitutional lawyers, but it was clear that they were no longer to be regarded simply as colonies of Great Britain', and that 'Colonialism was being transformed into something new and strange': F R Scott, 'The End of Dominion Status' (1944) 38 *American Journal of International Law* 34, 34.

Further, a study of the *Nauru Case*, together with the Australian administration of Papua New Guinea, might provide a detailed sense, in a very distinct and concrete way, of Australia's Empire in its actual operations; this in turn might suggest a perspective by which we might consider and illuminate, historically, Australia's ongoing relationships and policies in the Asia-Pacific, as well as its approach to Aboriginal and Torres Islander self-determination. The record has been unfortunate, as suggested by the most recent rejection of the Uluru Statement of the Heart ('Uluru Statement'), which affirmed the sovereignty of the Aboriginal and Torres Strait Islanders and called for a treaty with Australia.¹⁷⁴ Further, Australia, after all, continues to engage with the lands and peoples in the region, this in the mode of ensuring security, advancing development and providing aid and advice on state building. One glimpse of Australian foreign policy is offered by what might be termed Australia's 'Asia-Pacific Trilogy' — the cases Australia argued before the ICJ, apart from Nauru, involving its neighbours in the Indo-Pacific East Timor¹⁷⁵ in the *East Timor (Portugal v Australia)* case ('*East Timor One*') and then, what might be termed '*East Timor Two*' in the *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* case.¹⁷⁶ As in the *Nauru Case*, *East Timor One* and *East Timor Two* have to do with Australia's pursuit of resources, the oil and gas and minerals of the Timor Gap. Australian troops and Timorese fought together against great odds in the war against Japan; the resulting camaraderie and affection, however, did not prevent Australia from being one of the few nations of the world to recognise the illegal occupation of Timor by Indonesia by entering into the *Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia* ('*Timor Gap Treaty*') with Indonesia.¹⁷⁷ The *Timor Gap Treaty* apportioned the rich resources of the Timor Sea between Indonesia and Australia. These included resources that, under international law, belonged to the people of East Timor — much as the phosphates belonged to the people of Nauru. Both Nauru and Timor, in different ways, raised the issue of self-determination and more specifically, the issue of a people's right to sovereignty over their natural resources.

¹⁷⁴ First Nations National Constitutional Convention, 'Uluru Statement from the Heart' (Statement, 26 May 2017) ('*Uluru Statement*') <https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF> archived at <<https://perma.cc/CF2S-5XRK>>. For a powerful account of the history of the initiative and the consequences of its failure, see Megan Davis, 'The Long Road to Uluru' (2018) 60 *Griffith Review* 7. Notably, mining companies, Rio Tinto and BHP have just recently supported the Uluru Statement. See Darren Gray, Fergus Hunter and Hamish Hastie, "'Watershed": BHP, Rio Urge Constitutional Recognition of Indigenous Australians', *The Age* (online), 31 January 2019 <<https://www.theage.com.au/business/companies/watershed-bhp-rio-urge-constitutional-recognition-of-indigenous-australians-20190131-p50us6.html>> archived at <<https://perma.cc/G5FB-6JAP>>.

¹⁷⁵ *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep, 90.

¹⁷⁶ *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Provisional Measures)* [2014] ICJ Rep 147.

¹⁷⁷ Katsumi Ishizuka, 'Australia's Policy towards East Timor' (2004) 93 *Round Table* 374, 271–85; Australian War Memorial, *Fighting in Timor, 1942* <<https://www.awm.gov.au/articles/atwar/timor>> archived at <<https://perma.cc/D4K6-4UMF>>; *Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, Australia–Indonesia, signed 11 December 1989, 1654 UNTS 105 (entered into force 9 February 1991).

Aspects of Australian foreign policy resemble in some ways the structure of thinking and the strategies that first emerged in Australia's earlier history of interaction with the Asia-Pacific. Australia's single-minded pursuit of the resources of the area was evident in its ruthless negotiations with Timor-Leste,¹⁷⁸ a country which it simultaneously claimed to be generously assisting with humanitarian aid, expert personnel and lawyers to establish a functioning system after the trauma felt by Timor-Leste as it fought for independence from Indonesia. Australia has certainly been generous in its spending on Timor-Leste, which is the largest development partner and recipient of Australian aid. In 2016–17 alone, Australia is projected to provide something like \$94 million in aid to Timor.¹⁷⁹ Nevertheless, the question might be raised, as in the *Nauru Case* earlier,¹⁸⁰ whether it might have been fairer to allow the Timorese the opportunity to assert their rights under international law to the resources in the Timor Gap, by agreeing to a maritime boundary delimitation according to principles of international law set out by an appropriate tribunal, rather than grant them 'humanitarian aid'. It is surely telling that Australia and Timor-Leste signed the *Timor Sea Treaty* in 2002, which was very disadvantageous to the Timorese, on the very day that Timor-Leste became independent — political independence and economic subordination occurring simultaneously, the acquisition of sovereignty being coeval with its transfer in a manner that recalls imperial treaty practices of the 19th century.¹⁸¹

Later, Australia allegedly engaged in espionage — in the guise of providing development aid — and raided the offices of Timor-Leste's lawyers and seized documents that were crucial to the preparation of Timor-Leste's case against Australia.¹⁸² Further, Australia's lawyers at the ICJ argued that Australia would deal with the secret documents responsibly and not consult them.¹⁸³ Given the events that had led to the dispute, the assumptions that animated such a suggestion are hard to overlook. As in the case of Nauru, however, ordinary Australians, dismayed by the policies of their government, have been active in fighting for the rights of Timor-Leste, and their protests have contributed to Australia relenting on some of its positions.¹⁸⁴

More recently, Timor-Leste took action against Australia under the *United Nations Convention on the Law of the Sea* by instituting a Conciliation Proceeding.¹⁸⁵ Australia challenged the competence of the Conciliation

¹⁷⁸ For a detailed account of one phase of negotiations, see Paul Cleary, *Shakedown: Australia's Grab for Timor Oil* (Allen and Unwin, 2007) 81.

¹⁷⁹ Department of Foreign Affairs and Trade, *Development Assistance in Timor-Leste: Overview of Australia's Aid Program of Timor-Leste* <<http://dfat.gov.au/geo/timor-leste/development-assistance/Pages/development-assistance-in-timor-leste.aspx>> archived at <<https://perma.cc/22UT-GQKK>>.

¹⁸⁰ *Nauru Case (Preliminary Objections)* [1992] ICJ Rep 240.

¹⁸¹ *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, signed 20 May 2002, 2258 UNTS 3 (entered into force 2 April 2003).

¹⁸² *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Provisional Measures)* [2015] ICJ Rep 556, 556–7.

¹⁸³ *Ibid* 557.

¹⁸⁴ *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, signed 12 January 2006, 2483 UNTS 359 (entered into force 23 February 2007).

¹⁸⁵ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 396 (entered into force 16 November 1994).

Commission, which found against Australia.¹⁸⁶ Australia, which has an impressive record of participation in international courts and tribunals, complied with the decision, as it had stated it would in the course of the proceedings. Following this, the two countries signed a treaty establishing their maritime boundaries in the Timor Sea.¹⁸⁷

Professor Edward Said, in attempting to study how imperialism is fostered, focuses on what might be termed an imperial mindset, a ‘structure ... of thought and feeling’ (he draws on the work of Raymond Williams), and it is this perhaps, as much as economic and political structures, which persists through the decades.¹⁸⁸ It is surely more satisfying to play the role of a benevolent power bestowing all the virtues of civilisation on a benighted, deprived and war ravaged people than a state which must recognise the rights of another state and deal with it on terms of equality and mutual respect. And like so many past cases, this set of policies is motivated by a complex combination of self-interest and altruism. History continuously appears in strange and ironic ways, and it is surely unnerving that Australia so closely reproduces its own European beginnings as a penal colony by transforming Nauru into a version of that institution, although in this case, the people involved are desperate to enter Australia rather than condemned to do so. In legal terms, too, parallels do suggest themselves. Nauru has been described as a ‘legal black hole’;¹⁸⁹ but then, again, New South Wales was another version of this when it was first founded, at least according to Jeremy Bentham, who described it as a ‘nursery of martial law’.¹⁹⁰ That condition enabled the infliction of violence on both convicts and Aborigines. It is customary now to reflect on the cruelty of the laws which condemned desperate and starving people in 18th and 19th century England to death and transportation. How then should we think of the desperate people who have risked their lives to seek refuge in Australia? Port Arthur, the notorious penal colony for those deemed the worst convicts — although it transpires that many housed there were never put on trial — was constructed with humane intentions based on the enlightened and scientific thinking of Jeremy Bentham, inventor of the panopticon. Despite this animating sentiment many of the inmates were driven

¹⁸⁶ *Conciliation between Timor-Leste and Australia (Timor-Leste v Australia) (Competence)* (Permanent Court of Arbitration, Case No 2016–10, 19 September 2016).

¹⁸⁷ Anthony Fensom, ‘A \$50 Billion “Breakthrough” for Timor-Leste?’, *The Diplomat* (online), 04 September 2017 <<https://thediplomat.com/2017/09/a-50-billion-breakthrough-for-timor-leste/>> archived at <<https://perma.cc/SV8P-T7HB>>; Ben Doherty, ‘Australia and Timor-Leste to Negotiate Permanent Maritime Boundary’, *The Guardian* (online), 9 Jan 2017 <<https://www.theguardian.com/world/2017/jan/09/australia-and-timor-leste-to-negotiate-permanent-maritime-boundary>> archived at <<https://perma.cc/BNC5-3Q8R>>; Department of Foreign Affairs and Trade, *Australia’s Maritime Arrangements with Timor-Leste* <<https://dfat.gov.au/geo/timor-leste/Pages/australias-maritime-arrangements-with-timor-leste.aspx>> archived at <<https://perma.cc/F7XT-CBRR>>; Helen Davidson, ‘Australia and Timor-Leste sign Historic Maritime Border Treaty’, *The Guardian* (online), 7 March 2018 <<https://www.theguardian.com/world/2018/mar/07/australia-and-timor-leste-sign-historic-maritime-border-treaty>> archived at <<https://perma.cc/33AL-HUDT>>. On Australia’s participation in dispute resolution processes, see Bill Campbell, ‘International Dispute Resolution: Australian Perspectives and Approaches’ (2017) 35 *Australian Yearbook of International Law* 1.

¹⁸⁸ Edward Said, *Culture and Imperialism* (Vintage Books, 1994) 14.

¹⁸⁹ See Williams, above n 71.

¹⁹⁰ Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge University Press, 2010) 192.

mad. What new carceral innovations and legal technologies do Manus Island and Nauru embody and how will they be remembered — or even reproduced as a model?¹⁹¹

A study of the *Nauru Case* in these wider contexts then, might make us more self-aware of the complex and multifarious operations of race, the role of empire and the categories they created in the ongoing operations of the sovereign state. It might be useful to try and understand the complex role of race and empire in the making of modern Australia — and in the ongoing struggles faced by the peoples of the Pacific and the Indigenous peoples. It may also help us understand why it is that Nauru had little chance of success and why it is that colonial structures of disempowerment may continue in new forms. Further, the Nauru detainee camp may be seen as the locus of several intersecting versions of empire, of Australian sub-imperialism, of British empire and also of settler colonialism. The Indigenous Aborigine is absent from the scenario of the detainee camp, and yet, utterly haunts it, for it is only by suppressing the figure of the Indigenous Aborigine that the Australia so intent on excluding aliens can attempt to conceal the ineffable truth that it is itself alien to the Indigenous Aborigine. If the Aborigine is recognised as the Indigenous and as sovereign, then settlers, migrants and asylum seekers are all variations on the alien, even if differently positioned with respect to violence inflicted and suffered. Australia prevents this, invoking the spectres of threat and emergency to imprison Aborigines within and detain asylum seekers without, each practice asserting and entrenching its own sovereignty in different and expansive forms. I have suggested that the concept of self-determination might offer a way of examining the intersections of empire in the making of Australia. However, a study of incarceration — of convicts, Aborigines, asylum seekers — may provide another means of illuminating this complex of relationships.

I have tried to use the protean concept of self-determination to link the histories of Australia, Nauru, Papua New Guinea and, more distantly, Timor-Leste. The relationship between natural resources and sovereignty has been central to the project of self-determination, as expressed in the efforts to ensure that the peoples who had a right to self-determination also enjoyed the right to permanent sovereignty over natural resources. The interconnected histories I can only sketch here may suggest a complex set of changing dynamics relating to empire, political economy, mining corporations, natural resources, sovereignty and law. These dynamics require more exploration, but what is evident is the intimate connection between natural resources and sovereignty, a theme played out in different ways in Australia, Nauru, Papua New Guinea and Timor-Leste. These dynamics are changing again, as new rivalries for the region intensify with the emergence of China, a sovereign state that powerfully imagines itself as an empire and formulates corresponding imperatives. Australia demonstrated its commitment to its traditional partners, Britain and US, by partnering with them in questionable wars in Afghanistan and Iraq. However, the old securities offered in return for such loyalty can no longer be counted on.

¹⁹¹ See Emma Larking, *Refugees and the Myth of Human Rights: Life Outside the Pale of the Law* (Ashgate, 2014).

IX TOWARDS A CONCLUSION: ‘THE OLD DEAD TREE OR THE YOUNG TREE GREEN’¹⁹²

I cannot share his calm, who watch his lake,
 being unloved by all my eyes delight in,
 and made uneasy, for an old murderer’s sake.¹⁹³

‘You wake up in the morning and you are the beneficiary of a genocide’.¹⁹⁴

Through my exploration of Australian Empire, I have tried to limn a methodological problem. How should these contrapuntal histories of interacting forms of imperialism with different registers and scales, be written; what are the concepts and issues that could give an account of Australian Empire coherence and what purposes would such an account serve? What sort of history offers us a way of understanding the multiple modes in which imperialism operates, the complex ways in which power works and how relationships of domination and resistance play themselves out? Clearly however, the unique character of Australia’s relationship with imperialism can only be understood if different and yet connected forms of imperialism and the identities and subordinations that result are considered together as opposed to separately, neatly divided into different chapters and volumes. This is only a sketch of an approach; far more detail is required to provide any firm findings. But it is hoped that it may suffice to suggest that an exploration of Australian Empire, its manifestations and consequences, is a useful and illuminating project and that many questions remain as to how it is to be written.

The larger question that arises is how a history of Australian Empire might relate to more conventional histories of the country. European civilization did not arrive in Australia until the last quarter of the eighteenth century. It arrived in the form of a penal colony. Australia’s unique achievement is that began in this way became one of the most stable and prosperous and successful countries in the world. Australia accepts more migrants, relative to its population, than any other

¹⁹² Manning Clark, *A History of Australia: From 1888 to 1935* (Melbourne University Press, 1999) vols 5, 6.

¹⁹³ Judith Wright, ‘At Cooloolah’ in Judith Wright, *The Two Fires* (Angus and Robertson, 1955) 30, 30.

¹⁹⁴ Peter Carey, ‘Peter Carey: “You Wake Up in the Morning and You Are the Beneficiary of a Genocide”’, *The Guardian* (online), 18 November 2017 <<https://www.theguardian.com/books/2017/nov/18/peter-carey-you-wake-up-in-the-morning-and-you-are-the-beneficiary-of-a-genocide>> archived at <<https://perma.cc/38KS-L54H>>.

rich country.¹⁹⁵ It is surely telling that the country in which the ‘White Australia’ policy once prevailed has become home to thousands of migrants and refugees, who have built successful and happy lives for themselves and who, in recent times, have originated principally in Asia. In these different ways, the people of Australia have forged a new country and new history. Given its earlier, unpropitious history as a brutal penal colony, the story of Australia is a heroic one in which the state has been transformed from a jailor to an entity that serves the people. There are, however, other histories that must be considered, most prominently the history suggested by Judith Wright and Peter Carey, the history of the Aboriginal and Torres Straits Islanders and all they have suffered, endured and lost. And there is the related history of Australian Empire, Australia’s engagement with its former Mandate and Trust Territories. The relationship between Australia and Empire is marked by anxieties and ambivalences as Australia has sought to form its own identity and personality, separating itself from Empire while also creating and extending its own distinctive policies both within and outside the country.

Deborah Cass, whose work was crucial to the Nauru Commission of Inquiry,¹⁹⁶ posed the telling question of whether the principle of self-determination, the legal foundation of the *Nauru Case*, could ‘translate into the forms of power redistribution being experimented with in relation to indigenous peoples in Canada, New Zealand and to a lesser extent Australia’.¹⁹⁷ Since that time, the *United Nations Declaration on the Rights of Indigenous People* has reinforced the principle that indigenous peoples have a right to self-determination.¹⁹⁸ Self-determination can take many different forms, including autonomy, federalism and related arrangements. Scholars and activists such as Larissa Behrendt,¹⁹⁹ Megan Davis,²⁰⁰ Gary Foley²⁰¹ and Dylan Lino²⁰² have outlined the different forms such self-determination may take. Self-determination is what the Uluru Statement asserts and seeks: ‘a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination’.²⁰³ The Uluru Statement concludes by extending an invitation to ‘walk with us in a movement of the Australian people for a better future’.²⁰⁴ The response to this invitation is perhaps the most urgent issue confronting Australia’s ongoing project of self-determination. The issue arises then of how these imperial histories connect with each other and how they have

¹⁹⁵ Centre for Global Development, *Commitment to Development Index 2018* (2018) <https://www.cgdev.org/commitment-development-index-2018#CDI_MIG> archived at <<https://perma.cc/NT79-LST6>>. On the complex relationship between migration and indigeneity in Canada, see Amar Bhatia, ‘We Are All Here to Stay? Indigeneity, Migration, and “Decolonizing” the Treaty Right to Be Here’ (2013) *Windsor Yearbook of Access to Justice* 40.

¹⁹⁶ *Report of the Nauru Commission of Inquiry*, above n 24.

¹⁹⁷ Cass, above n 22, 39.

¹⁹⁸ See *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th mtg, Agenda Item 68, UN Doc A/61/L.67 (12 September 2007).

¹⁹⁹ See generally Behrendt, above n 2.

²⁰⁰ See generally Davis, above n 175.

²⁰¹ See generally Foley, above n 156.

²⁰² See generally Lino, above n 2.

²⁰³ *Uluru Statement*, above n 174.

²⁰⁴ *Ibid.*

shaped Australia. It is a similar question to the one that Aziz Rana has expounded on brilliantly in his work on the US, dealing with what he terms ‘settler empire’, its forms, operations and ramifications.²⁰⁵ Given all these histories, what will the history of the future be? Self-determination is not only a legal doctrine after all; it may be viewed as the actions of a people, the ongoing work of constructing an identity and community and country. The debate as to whether Australia should become a republic persists, ebbing and flowing. While this article has been concerned about the complex histories — in many ways, tragedies — of self-determination in various contexts, the questions remain of what might be gleaned from these histories and how the people of Australia will determine its future.

²⁰⁵ Aziz Rana, *The Two Faces of American Freedom* (Harvard University Press, 2010).