Self-Determination and Beyond: Reflections on the Aftermath of the Nauru Case

Antony Anghie[1]

Introduction

I first met Deborah sometime in 1987, on the 49th or 50th floor of what was then known as Nauru House. Located in Collins Street, Nauru House was one of the tallest buildings in Melbourne at that time, a prominent symbol of the almost legendary affluence of the people of Nauru. Deborah was a Research Officer to Barry Connell, Counsel Assisting the Nauru Commission of Inquiry.[2] The broad task of the Commission of Inquiry was to explore the history of the phosphate mining that had taken place on the island during the time it was administered by Australia, first under the Mandate System of the League of Nations, and then subsequently the Trusteeship System of the United Nations. The mining had devastated the island, and the commission was charged with the task of inquiring into two major issues. First, the feasibility of rehabilitating the island, and, second, the legal question of the responsibility of the three partner governments: Australia, the UK and New Zealand, who had been granted the Mandate and Trusteeship over Nauru, for the environmental damage suffered by the island during the relevant period.

1 My thanks to Kim Rubenstein and the other participants at the symposium 'Traversing Divides' held in memory of Deborah's work, at The Australian National University, Canberra, August 2015. My thanks also to Liz Thomas for her superb research assistance.

2 CG Weeramantry, *Commission of Inquiry into the Rehabilitation of the Worked-Out Phosphate Lands in Nauru* (Report, 1988) <http://asiapacific.anu.edu.au/pambu/catalogue/index.php/commission-of-inquiry-into-rehabilitation-of-worked-out-phosphate-lands-in-nauru;isaar> ('*Commission of Inquiry*').

Deborah had completed the massive task of scouring the archives in various places including London, Geneva, New York, New Zealand, Melbourne and Fiji, to gather and organise all the documents that were essential for the work of the commission. Deborah also had to initiate several Freedom of Information Actions in an effort to get access to documents that the Australian Government refused to provide, despite the fact that these were surely the property of Nauru. Australia had declined to participate in the commission. My own work consisted of serving as a research assistant to CG Weeramantry, the chair of the commission, who was responsible for writing up that part of the report which dealt with the history and complex legal issues relating to the phosphate mining.[3] The scientific part of the report which examined the feasibility of rehabilitation was completed by another commissioner, an engineer, Mr RH Challen. The final report ran to something like 10 volumes of text and documents. The commission felt under some pressure to provide a comprehensive and detailed report precisely because none of the partner governments involved had appeared before the commission.

We relied completely on the several filing cabinets full of documents that Deborah had so carefully compiled and catalogued – I should say, in a manner that demonstrated a clear and precise awareness of the legal issues that had to be addressed. It is a testament to the thoroughness and precision of Deborah's work that the case that was later argued in the International Court of Justice was based on the foundations that she had laid;[4] I am still unaware of any documents that were later added to Nauru's case. Deborah had provided all that was needed. It was not always easy working for the government of Nauru. It is a myth to believe that those who have somehow been at the receiving end of colonialism, however benevolently administered, would be ennobled by the experience. Despite all this, Deborah remain undeterred, driven on by her powerful sense of injustice to do all the work that was needed to give the people of Nauru a chance to articulate their grievance.

The theme of self-determination was central to Nauru's claims. Article 22 of the League of Nations, which created the Mandate System of the League, stipulated that the mandate power was to ensure the 'well being and development' of the native peoples unable to look after their own

3 Ibid.

4 *Certain Phosphate Lands in Nauru* (*Nauru v Australia*) (*Preliminary Objections*) [1992] ICJ Rep 240 ('*Certain Phosphate Lands*').

interests.[5] The System in this way purported to prevent the colonial exploitation that had been such a prominent feature of international relations up to that time. In legal terms, the Nauru mandate was granted by the League of Nations to Australia, New Zealand and the UK; however, Australia administered Nauru on behalf of all the partner governments, a result of an internal arrangement among them.[6] It was unclear at this stage what the League envisaged as the ultimate status of Nauru and other territories placed under the Mandate System. The theme of self-determination, expressed somewhat uncertainly, tentatively and controversially in the time of the drafting of the League, had assumed a far more detailed character by the time Nauru was placed under the Trusteeship System of the United Nations. Under the Charter, Nauru was recognised as possessing the right to self-determination. Consequently, Nauru claimed that Australia had failed to meet its obligations to preserve the interests of the people of Nauru, by failing to facilitate their transition to a functioning and sustainable sovereign statehood, and thereby not protecting their right to self-determination.[7] Most immediately, the very physical territory of Nauru had been devastated by the mining and the partner governments were responsible for the rehabilitation of the lands.

Self-determination was a topic that Deborah Cass explored later in a far more wide-ranging and theoretically ambitious work, one of her first: 'Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories', which was published in 1992. Surveying all the claims to self-determination made in the late 1980s and early 1990s: the break-up of the Balkans, the war in Iraq, claims being made in Palestine, Moldava and Ukraine, Deborah Cass argued that what she termed the 'conventional' approach to self-determination – which stipulated that colonised peoples could exercise this right only once and within pre-existing boundaries – was outmoded, and that the right of self-determination should be reconceptualised to permit minorities and indigenous peoples to exercise it. As she puts it:

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5 *The Covenant of the League of Nations*, League of Nations Members, opened for signature 28 June 1919 (entered into force 10 January 1920) art 22 ('*Covenant*').

6 League of Nations [including Australia, New Zealand and the UK], *Mandate for Nauru* (Miscellaneous No. 6, His Majesty's Stationery Office, London, 1921) <https://dl.wdl.org/468/service/468.pdf>.

7 See, eg, Mary Nazzal, 'Nauru: An Environment Destroyed and International Law' (Paper, lawanddevelopment.org, April 2005) <http://www.lawanddevelopment.org/docs/nauru.pdf>; M Rafiqul Islam, 'The Dispute between Nauru and Australia over Rehabilitation: A Test Case for Economic Self-Determination' (1992) 8 *Queensland University Technology Law Journal* 147, doi.org/10.5204/qutlr.v8i0.364.

> The challenge for international law is therefore not to exclude the ever-increasing list of claimants because they do not match precisely with an outmoded theory, but to find methods for assessing and evaluating the validity of claims according to realistic, functional and humanitarian measures.[8]

Self-determination is a topic that has haunted international law ever since the concept was first articulated, in different forms, by Lenin and Wilson. A massive amount of literature has focused on the subject. Deborah Cass's article remains a valuable contribution to this literature not only because the problems she discusses remain with us – who should be able to claim this right, and what is its content – but because of the incisive manner in which she sets out the problem and the many different analytic tools she employs to explore the problem. Such tools include classic positivist textualist analysis, leavened by a more critical jurisprudential approach which suggests how a new paradigm must be developed to accommodate developments in state practice and expectations. It is a striking feature of Deborah's brilliance that she made contributions to so many areas of law: international, domestic, constitutional, theoretical. She did not, as far as I know, return to the theme of self-determination. She proceeded instead to author one of the first analyses of 'New Approaches to International Law',[9] before then writing her pioneering book on constitutionalism and the World Trade Organization.[10] And yet, the Nauru experience had not completely disappeared from her thinking. She believed that the topic of trusteeship in international law required further exploration and was considering writing on this topic for her Doctor of Juridical Science (SJD) at Harvard. Her intuition, again, proved to be correct, as trusteeship, broadly conceived, is now being studied in far greater detail by numerous scholars whose works illuminate how this broad idea has engaged the discipline.

My purpose in this essay is not only to review Deborah Cass's important work for the Nauru Commission and her prescient thinking on self-determination, but to consider, in a reflective rather than analytic way, almost 25 years after the International Court of Justice handed down its

8 Deborah Z Cass, 'Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories' (1992) 18 *Syracuse Journal of International Law and Commerce* 31.

9 Deborah Z Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law' (1996) 65 *Nordic Journal of International Law* 341, doi.org/10.1163/15718109620294924.

10 Deborah Z Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press, 2005).

decision on 'Certain Phosphate Lands of Nauru',[11] the aftermath of self-determination, and the subsequent history of Nauru and its relationship with Australia. I try then to suggest some of the more immediate legacies and possible reverberations of the Nauru case and the ways in which the Nauru experience might be considered within the broader context of both international law and Australia's foreign relations and engagement with international law. For these purposes, I sketch the outlines of a concept that has featured only occasionally and unevenly in Australian history: 'Australian Empire', and I consider Nauru as an example of that empire in operation.

The Aftermath of Self-Determination

Nauru is now, as a result of bipartisan policy of Liberal and Labor governments, a detention facility for people seeking asylum in Australia. Considerable controversy has followed. *The Guardian* reported on leaked documents which revealed that considerable violence was taking place in Nauru.[12] Detainees were being sexually and physically abused by guards. Many had attempted suicide. The Australian Minister of Immigration, Peter Dutton, accused detainees of sewing up their own lips and setting themselves on fire in an outrageous and flagrantly manipulative attempt to enter Australia.[13] However, thousands of Australians protested against their government's policies, and called for the closing of the camps and the transfer of all detainees to Australia.[14]

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11 *Certain Phosphate Lands* (n 4). See also Antony Anghie, 'The Heart of My Home: Colonialism, Environmental Damage and the Nauru Case' (1993) 34(2) *Harvard International Law Journal* 445.

12 Paul Farrell, Nick Evershed and Helen Davidson, '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>.

13 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>.

14 Isabella Kwai, 'Australia Revokes Medical Evacuations for Offshore Detainees', *The New York Times* (online, 4 December 2019) <https://www.nytimes.com/2019/12/04/world/australia/medevac-refugees-repeal.html>; on the Australian public's reaction to off-shore detention see further 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>.

Whereas previously Nauru had supplied Australia with the phosphate it had so strenuously sought for its agricultural needs, it now serves a different function within the scheme of Australian foreign relations. In his book, based on the Nauru Report, Christopher Weeramantry wrote, 'Nauru presents in a microcosm an unusual variety of the great historical currents that have shaped the course of human affairs'.[15] He refers to the settlement of the Pacific, the emergence of a distinctive culture and way of life in Nauru, and the gradual expansion of the European presence in the remotest parts of the Pacific in search of land and minerals. 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 have profound consequences for people living thousands of miles away who have very little idea of the people and factors deciding their fate. For instance, Nauru was placed in the German sphere of influence,[16] 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. This agreement was reached during the aftermath of Berlin Conference of 1885, which had focused on European empires in Africa and that led to the Berlin Act of 1885, which regulated commerce in the Congo.[17] 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 wellbeing 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 to environmental damage, but refugee and asylum law and human rights. It is taken as exemplary of how environmental devastation – now caused by climate change – may endanger the existence of states,[18] and create 'environmental refugees'. 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

15 Christopher Weeramantry, *Nauru: Environmental Damage Under International Trusteeship* (Oxford University Press, 1994) 1.

16 The Commonwealth, *Nauru: History* (Web Page, 2019) <http://thecommonwealth.org/our-member-countries/nauru/history>.

17 See especially Katerina Martina Teaiwa, *Consuming Ocean Island: Stories of People and Phosphate from Banaba* (Indiana University Press, 2014).

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

raised complex issues about the legacies of colonialism.[19] Further, the Nauru case is rich for reconsideration in the context of new developments in the history and theory of international law promise, which scrutinise the relationship, for instance, between colonialism, political economy and the environment.[20]

The Nauru case raises enduring questions about the meaning and content of self-determination. At the time art 22 of the League of Nations was drafted, self-determination was still a vague principle: its legal status was uncertain and its political ramifications worrying and unclear. The former Ottoman territories in the Middle East designated countries such as Iraq and Syria as mandate territories, which were classified as 'A' mandates that were developed to the point 'where their existence as independent nations can be provisionally recognized'.[21] Nauru, however, was characterised as a 'C' mandate that was to be administered 'under the laws of the Mandatory as integral portions of its territory'.[22] Crucially, such administration was to be 'subject to the safeguards above mentioned in the interests of the indigenous population'.[23] Clearly then, Nauru was to be administered in accordance with basic principles of trusteeship which ensured that all the

19 Stephen Allen, *The Chagos Islanders and International Law* (Oxford University Press, 2015); David Vine, *Island of Shame: The Secret History of the US Military Base on Diego Garcia* (Princeton University Press, 2009), doi.org/10.1515/9781400838509.

20 Stephen Humphreys and Yoriko Otomo, 'Theorizing International Environmental Law' in Anne Orford and Florian Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016), doi.org/10.1515/9781400838509. 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'. 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' (doi.org/10.1017/cbo9781107239357.002) and Karin Mickelson, 'International Law as a War Against Nature? Reflections on the Ambivalence of International Environmental Law' (doi.org/10.1017/CBO9781107239357.003) both in Barbara Stark (ed), *International Law and Its Discontents: Confronting Crises* (Cambridge University Press, 2015); Usha Natarajan and Kishan Khoday, 'Locating Nature: Making and Unmaking International Law' (2014) 27(3) *Leiden Journal of International Law* 573, doi.org/10.1017/s0922156514000211; Usha Natarajan and Kishan Khoday, 'Fairness and International Environmental Law from Below: Social Movements and Legal Transformation in India' (2012) 25(2) *Leiden Journal of International Law* 415, doi.org/10.1017/s0922156512000118. For particular studies of Nauru and the legacies of the phosphate mining see Katerina Teaiwa, 'Ruining Pacific Islands: Australia's Phosphate Imperialism' (2015) 46(3) *Australian Historical Studies* 374, doi.org/10.1080/1031461x.2015.1082609; Cait Storr, 'Islands and the South: Framing the Relationship between International Law and Environmental Crisis' (2016) 27(2) *European Journal of International Law* 519, doi.org/10.1093/ejil/chw026.

21 *Treaty of Peace Between the Allied and Associated Powers and Turkey,* opened for signature 10 August 1920, art 94 <https://wwi.lib.byu.edu/index.php/Section_I,_Articles_1_-_260>.

22 *Covenant* (n 5) art 22.

23 Ibid.

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 League of Nations Charter prohibited the destruction of the physical territory of Nauru.

The Mandate System was replaced by the Trusteeship System of the United Nations. The obligations undertaken by the Australia and the partner governments under that system were far more specific and detailed than those included in art 22. Article 76(b) of the United Nations Charter stipulated the purpose of the Trusteeship System:

> 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.[24]

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. It was clear however, from the beginning of the Australian Administration in 1919, that Australia wanted to mine out the island and then resettle the remaining Nauruans in Australia. The management of the island was effectively left in the hands of the British Phosphate Commissioners (BPC), 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 mining operation.[25] The commissioners and the mining operation they were charged with managing governed the island, as many outsiders observed.[26] The Australian officials who were concerned about the impact of phosphate mining on the territory and people were thus legally disabled from controlling a system of governance essentially based on the exploitation of the phosphates.

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

25 *The Nauru Island Agreement Act (No 8) 1919* (Cth) art 13, '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 …'.

26 See Weeramantry, *Commission of Inquiry* (n 2) 128. Mr Rolz Bennett of Guatemala stated that 'every aspect of life on Nauru depended on a single activity, the exploitation of the phosphate deposits': *Trusteeship Council, 18th Session: Verbatim Record of the 741st Meeting Held at Headquarters, New York, on Thursday, 9 August 1956*, UN Doc T/PV.741 (9 August 1956) 153 <https://digitallibrary.un.org/record/3844199?ln=en> ('*Trusteeship Council, 18th session*').

The Nauru Case was settled in 1993 by Australia's payment (the other partner government later contributed) of something like A$107 million for the rehabilitation of the phosphate lands damaged by the mining.[27] Since then, Nauru has lurched from crisis to crisis as it struggles to survive: it suffers major financial problems and most its major assets have been sold, and 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.[28] It extended recognition to entities seeking statehood and was compensated for doing so, and defended Australia's infamous 'Pacific Solution', which provides Nauru with the millions of dollars it desperately needs from the Australian Government.[29] Previously Australia's policies were effectively destroying the sovereignty of Nauru – not out of any particular malice towards its people, whom it viewed generally with affectionate but devastating condescension – but because it was intent on exploiting all the phosphates available. 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'.[30]

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 implacable Australian policies concerning Nauru, and the unrelenting determination of Australia to

27 US Department of State, 'Nauru (04/08)' (Background Note), archived at <https://2009-2017.state.gov/outofdate/bgn/nauru/111187.htm>: 'Australia settled the case out of court in 1993, agreeing to pay a lump sum settlement of A$107 million (U.S.$85.6 million) and an annual stipend of the equivalent of A$2.5 million in 1993 dollars toward environmental rehabilitation'.

28 'Nauru: Paradise Well and Truly Lost', *The Economist* (online, 20 December 2001) <https://www.economist.com/christmas-specials/2001/12/20/paradise-well-and-truly-lost>.

29 Ariane Rummery, 'Australia's "Pacific Solution" Draws to a Close', *United Nations High Commissioner for Refugees* (Web Page, 11 February 2008) <https://www.unhcr.org/en-au/news/latest/2008/2/47b04d074/australias-pacific-solution-draws-close.html>.

30 See 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>.

exploit a completely unequal relationship. It is telling for instance, that Australia prevented the Nauruans access to expert advice when it came to the extraordinarily complex and crucial negotiations with the BPC and government prior to independence.[31] Australia on the other hand, was able to draw on the brilliance of eminent lawyers to justify its position. It was only through the courage and determination of the Nauruan leader, the heroic Hammer DeRoburt, and the supervision of the Trusteeship Council in continuously questioning Australia's policies in Nauru, that the island survived.[32]

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 supposedly available to them. 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. Further, intent on protecting the phosphate industry, the Australian Government made little effort to educate the Nauruans and prepare them for self-government, despite the talent the Nauruans demonstrated. Dedicated Australian officials sought to make good on Australia's obligations under the mandate, but these initiatives were defeated by the imperatives of the mining operation. As far back as 1928, the first Australian administrator of Nauru had planned to educate Nauruans to manage their own affairs and had instituted a training program for Nauruans in Geelong. 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. 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'.[33]

31 See generally Teaiwa, 'Ruining Pacific Islands' (n 20), speaking to the inequality of the Australia–Nauru relationship especially in relation to phosphate.

32 'Hammer DeRoburt: Nauruan Politician', *Encyclopaedia Britannica* (online, last updated 21 September 2019) <https://www.britannica.com/biography/Hammer-DeRoburt>.

33 Weeramantry, *Nauru: Environmental Damage* (n 15) 113.

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 have completely devastated 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'. PINWA, after much effort, met with the Minister of External Territories to express their concerns, but were disappointed in the government's response. Many years later, HE 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'.[34] 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 despised and dying race'.[35] The Trusteeship Council too, continuously questioned Australia and its failure to promote self-government. Australia had responded that no Nauruans were capable of assuming real responsibilities.[36] Thus, 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 even 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. Australia, in its efforts to protect the mining of phosphates, failed in all these areas.

34 Ibid 390.
35 Ibid 113.
36 Ibid 141, citing *Trusteeship Council, 18th session* UN Doc T/PV.741 (n 26) 151.

The people of Nauru, almost from the beginning of their relationship with Australia, have been treated with a level of 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.[37]

Nauru continues, of course, to be the subject of Australian belittlement and derision. Most infamously Alexander Downer described Nauru as being the worst place he had ever visited.[38] Given Australia's responsibility for the situation of Nauru, and indeed, the actions of Downer's predecessors as Australia's Minister for Foreign Affairs, the denunciation is ironic and tragic while reflecting an unfortunate ignorance of Australia's role in creating the dereliction that the Minister now condemns. Phosphate was crucial for Australian agriculture, and Nauru had supplied thousands of tons of the fertiliser to Australian farmers at cost price.[39] Apart from the environmental damage it caused, Australia had benefited enormously from the whole relationship: the Commission of Inquiry provided some plausible figures suggesting the extent of the massive sums involved.[40] 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 Griffith and HE 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.

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37 Weeramantry, *Nauru: Environmental Damage* (n 15) 290.

38 See 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/>.

39 'Nauru – Overview of Economy', *Nations Encyclopedia* (Web Page, 2019) <http://www.nationsencyclopedia.com/economies/Asia-and-the-Pacific/Nauru-OVERVIEW-OF-ECONOMY.html#ixzz4N7Wqx948>: 'Phosphate has been exported mainly to Australia and New Zealand, where it improved the poor soils in those countries'.

40 *Certain Phosphate Lands* (n 4) [233].

Papua New Guinea: Mining and the Postcolonial state

We might consider the Nauru case not just in terms of its legacy for the people of Nauru, but as exemplifying a set of practices and policies that Australia chose to adopt more widely in the Pacific.

In her important article, Katerina Teaiwa analyses Nauru in the context of what she terms 'Australia's Phosphate Imperialism', an imperialism which extended to other Pacific islands, such as Banaba, which were equally devastated.[41] Here I focus on another territory that was under Australian Mandate and later Trusteeship administration: Papua New Guinea (PNG). The situation in the two territories was somewhat different. Whereas in the case of Nauru, the phosphates were mined by the BPC as explicit representatives of the partner governments, the resources of PNG that were discovered in the 1960s were handed over to private entities. In the case of the massive Bougainville mine, these included the Australian mining company Rio Tinto.[42] In the 1960s, it was hardly acceptable, under trusteeship, for the partner governments discharging that trusteeship to follow the procedures that were more redolent of the nineteenth century and establish 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.[43]

A cursory glance at some of the Trusteeship Council proceedings regarding the mining concessions in PNG raise various questions. The 'development discourse', which had begun at the time of the League of Nations itself, had reached a further stage and the Special Representative for Australia noted that, '[l]ike all developing countries, the Territory needed an established policy on outside investment to ensure that the interests of the people were safeguarded'.[44] The World Bank had visited PNG and written an influential report on how development was to be achieved, and mining became crucial for this project. Various local bodies had been consulted about the need for such investment, and the House of Assembly

41 See Teaiwa, 'Ruining Pacific Islands' (n 20).

42 See, eg, Australian Department of Foreign Affairs, *Documents on Australian Foreign Policy: Australia and Papua New Guinea 1966–1969*, ed Stuart Dora (Commonwealth of Australia, 2006) (*'Australia and Papua New Guinea*'), detailing the interactions of Rio Tinto in Papua New Guinea during the 1960s.

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

44 *Report of the Trusteeship Council*, UN TCOR, 24th sess, UN Doc A/7604 (2 June – 6 August 1969) [170] (*'Report of the Trusteeship Council*').

had 'adopted a formal declaration on development capital, providing for various guarantees for investors: that declaration had been reaffirmed on 3 September 1968'.[45] 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. Furthermore, plans were made 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 UK and France. The Soviet representative, however, demurred and stated:

> [T]he 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 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'.[46]

The Russian 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 conflict states that '[b]y the standards of the time, Bougainville Copper Limited (BCL), whose principal investor was Conzinc Riotinto Australia (CRA), had a comparatively advanced sense of corporate social responsibility'.[47] This policy was based on enlightened self-interest: BCL provided scholarships to indigenous students, funded agricultural extensions and paid for all the infrastructure needed to operate the mine, such as roads, electricity, water, telecommunications, ports, airstrips and housing.[48] The Australian Administration of PNG exercised its right to acquire 20 per cent of the equity of the mine, and many shares were purchased by indigenous individuals. The mining companies paid very high taxes on their profits, and these increased even further after independence when

45 Ibid.
46 Ibid [246].
47 See John Braithwaite et al, *Reconciliation and Architectures of Commitment: Sequencing Peace in Bougainville* (ANU E Press, 2010) 12, doi.org/10.22459/RAC.09.2010.
48 Ibid.

the new government of PNG entered into negotiations.[49] The Australian Government believed that the exploitation of the mine was central to the development of PNG, in doubling 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.[50]

However generous the mining companies were according to the standards of the time, the Russian warning in this sense became a reality. The mine was central to achieving not merely political sovereignty, but 'economic self-reliance', and thus the mine became one of the central institutions of the political life of PNG.

The conflict in Bougainville has been the subject of study for many institutions, and enormous effort and resources have been devoted to peace building and conflict resolution in the island.[51] It is unclear as to how the history and origins of the conflict have been understood, or even whether these things matter. Perhaps the most important issue is to address the immediate demand of the parties involved: put simply, to stop the violence.

What is absolutely clear to me, however, is that Australian officials would have been aware that mining, without adequate regulations, could cause massive environmental damage which would have catastrophic consequences for the welfare of the indigenous population, the native peoples 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, and the scarred landscape of

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49 Braithwaite et al, *Reconciliation and Architectures* (n 47) 12.

50 See *Australia and Papua New Guinea* (n 42) xxxix, this is a statement by Newman to the House of Assembly, Port Moresby Memorandum of 16 June 1969, 'White Paper on Bougainville'. This 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 CRA's activities by the locals in Bougainville, and as early as 1969 there were dangers of Bougainville seceding.

51 See, eg, Anthony Regan, 'Causes and Course of the Bougainville Conflict' (1998) 33(3) *The Journal of Pacific History* 269; Volker Boege, *Bougainville and the Discovery of Slowness: An Unhurried Approach to State-Building in the Pacific* (Australian Centre for Peace and Conflict Studies, 2006); Benjamin Reilly, 'State Functioning and State Failure in the South Pacific' (2004) 58(4) *Australian Journal of International Affairs* 479, doi.org/10.1080/1035771042000304742.

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, while at the same time formalising the Bougainville concession agreements to two major Australian mining companies.[52] There was, however, at least one significant difference between the two situations. In the case of PNG, the community that suffered most as a result of the mining, the people of Bougainville, were not the community that had been able to engage directly and decisively with the Australian Administration, even if local communities were paid royalties. The government of PNG and its antecedent had no particular concern for the wellbeing of the people of Bougainville, who it seems had always seen themselves and been viewed as a different community. The situation is a familiar one in postcolonial states. The Nigerian government was indifferent to the wellbeing and concerns of the Ogoni people – namely that their lands were being destroyed by oil drilling – as this activity benefited both the Nigerian state and the different ethnic group that were dominant within it.[53] Secessionist wars have been fuelled by the volatile combination of ethnic differences, which have been 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 Congo in order to protect the interests of its mining companies.[54] 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. 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 BHP, one of the concessionaires of Bougainville, was famously known as 'The Big Australian'.[55]

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52 See, eg, Russell McGregor, 'Wards, Words and Citizens: AP Elkin and Paul Hasluck on Assimilation' (1999) 69(4) *Oceania* 243, doi.org/10.1002/j.1834-4461.1999.tb00372.x, detailing the interactions of Paul Hasluck and the Aboriginal community in the 1960s.

53 For further information on the Ogoni people in Nigeria, see, eg, Steven Cayford, 'The Ogoni Uprising: Oil, Human Rights, and a Democratic Alternative in Nigeria' (1996) *Africa Today* 183.

54 'Congo in Crisis: The Rise and Fall of Katangan Secession', *Association for Diplomatic Studies and Training* (Web Page, 8 September 2015) <http://adst.org/2015/09/congo-in-crisis-the-rise-and-fall-of-katangan-secession/>.

55 Even the *Sydney Morning Herald* occasionally still refers to BHP as the 'Big Australian', see, eg, Clin 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>.

Furthermore, the manner in which the governments attempted to protect the companies against the threat of self-determination is a complex and compelling theme. The independence of PNG would not necessarily have helped local communities. Here, ironically and tragically, the postcolonial state of independent PNG continued in some respects to reproduce the role of the colonial state, because it was 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 postcolonial state, invariably obsessed by the imperatives of 'development', was no better, and perhaps much worse, than the colonial state. It is important to note that, right from the outset, local communities in Bougainville protested against the mining.[56] Scholars of nationalism have elaborated on this crucial problem confronting multiethnic states where one ethnic group took control over the formidable apparatus of the state.

Extensive litigation has followed over the years. Residents of Bougainville unsuccessfully sued Rio Tinto in the US under the *Alien Tort Claims Act*, alleging it had committed crimes against humanity, war crimes and racial discrimination.[57]

Conclusion

Self-determination was the revolutionary doctrine that was the foundation of the anti-colonial movement. Initially articulated by former US President Woodrow Wilson, and intended by him to apply only to what he regarded as the suppressed nations of Europe, self-determination became a central feature of the United Nations era. It is mentioned in the UN Charter, and is the subject of several foundational General Assembly Resolutions. Nauru and PNG, however, suggest some of the unfortunate legacies of self-determination, and raise crucial questions about the limitations of self-determination. In the case of Nauru, self-determination

56 Anthony J Regan and Helga-Maria Griffin (eds), *Bougainville Before the Conflict* (ANU E Press, 2005) 131–2, doi.org/10.22459/BBC.08.2015.

57 See *Sarei v Rio Tinto plc*, 671 F 3d 736 (9th Cir, 2011), cert. granted, judgment vacated, 133 1995, 185 L Ed 2d 863 (2013); 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>. The *Sarei* decision followed the US Supreme Court decision in *Kiobel v Royal Dutch Petroleum Co*, 569 US 108 (2013) which decisively limited the application of the Alien Tort Claims Act in in the US.

ultimately took the form of returning a territory scarred by mining to its people: a people who had been denied a meaningful education or any significant engagement in running their own affairs. No steps had been taken, further, to develop an economy based on anything other than mining. At independence, Nauru was one of the richest nations in the world per capita. However, in the absence of any sort of preparation for self-government, noting again here that the Trusteeship System envisaged and required such training, the combination of wealth and inexperience in the management of political and international affairs has proven to be disastrous. No rehabilitation of phosphate lands had commenced as yet. Nauru has been prone to making extremely expensive financial mistakes, and is now suffering an ongoing crisis. Indeed, new forms of dependency between Australia and Nauru have emerged. The payment it receives from Australia by serving as a detention centre is now crucial to its economy.[58] What this means, however, is that Nauru has become complicit in the many human rights violations that have taken place in those centres. It is surely tragic that Nauru, itself a victim in many respects of colonial abuse, has now itself allied with its former colonial power to inflict such violations on asylum seekers, people who have presented no threat to Nauru itself. The hard-won sovereignty of Nauru has now been deployed in the interests of Australia to enable it to further a highly questionable policy, one that has been severely criticised by many human rights organisations and the United Nations itself.[59]

In PNG, where Australia made concerted efforts as the administering power to further education and facilitate self-governance, self-determination confronted a different set of difficulties. Developing countries had recognised that political self-determination would be gravely limited if it was not accompanied by economic self-determination. As such, developing states, seeking to make decolonisation an effective reality, combined their demands for political self-determination with a campaign for economic self-determination that involved asserting claims of 'permanent sovereignty over natural resources'. Re-establishing control over their natural resources thus became a central concern for the new states, as for many, their nationalised resource industries were owned by

58 'How Nauru Threw It All Away', *ABC News* (online, 11 March 2014) <https://www.abc.net.au/radionational/programs/rearvision/how-nauru-threw-it-all-away/5312714>.

59 Ravina Shamdasani, 'Press Briefing Notes on Nauru, Yemen and Democratic Republic of the Congo', *United Nations Human Rights Office of the High Commissioner* (Press Briefing Notes, 12 August 2016) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20368&LangID=E>.

corporations affiliated with the former colonial power. In the case of PNG, the Bougainville mine was viewed as crucial for the economic future, the sovereignty, of PNG. The nascent government of PNG, the Australian Administration and the experts of the World Bank were all unanimous that the mine would ensure the prosperity and development that was essential for the new state of PNG. The protests of the native peoples of Bougainville were disregarded or placated. Here, tragically, the mine that was the key to PNG's wellbeing has instead become a threat to its very existence. Conflict has haunted the mining operation, and the people of Bougainville themselves are asserting their right of self-determination in precisely the manner feared by all the newly independent states, who were always concerned that their ethnically divided state could fall apart. In both Nauru and PNG, their abundant natural resources have proven to undermine rather than further self-determination, due to the potential for gross exploitation. The logic of their exploitation, different in each case, led to political fracture and disempowerment.

The ambiguities of self-determination revealed by these cases support arguments that the doctrine is incoherent and indeed, injurious. And yet, for many communities, self-determination offers a means, perhaps the only means, of achieving some degree of autonomy and empowerment. Thus it is hardly surprising, after Aboriginal and Torres Strait Islanders have long campaigned for self-determination, that this idea lies at the heart of the Uluru Statement.[60] This is a development that Deborah herself pointed to more than 25 years ago. In her article she raised the issue of self-determination, not only in relation to distant Pacific islands, but to Australia itself, asking the question of whether self-determination could translate into 'forms of power redistribution being experimented with in relation to indigenous peoples in Canada, New Zealand and to a lesser extent Australia'.[61] Deborah was sensitive to injustice wherever she perceived it; her life was animated by her sense of fairness. We miss her incisive, uncompromising and compassionate voice.

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60 See Referendum Council, 'Uluru Statement from the Heart' <https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF>; see further Natassia Chrysanthos, 'Journey from the Heart: What is the Uluru Statement from the Heart?', *Sydney Morning Herald* (online, 27 May 2019) <https://www.smh.com.au/national/what-is-the-uluru-statement-from-the-heart-20190523-p51qlj.html> for an overview of the significance of the Statement and the Indigenous voice envisioned by the document, biographies of crucial advocates and leaders involved and an explanation of the creation stories forming the artwork around the Statement.

61 Cass, 'Re-Thinking Self-Determination' (n 8) 39.

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